Not Reported in F.Supp., 1987 WL 61936 (E.D.Wash.), 61 A.F.T.R.2d 88-523, 88-1 USTC P 9106, Unempl.Ins.Rep. (CCH) P 17,865
(Cite as: 1987 WL 61936 (E.D.Wash.))

United States District Court, E.D. Washington.
Terrie Lynne VENIE, Plaintiff,
v.
UNITED STATES of America, Defendant.
No. C-86-1012-JLQ.

Nov. 3, 1987.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

QUACKENBUSH, Chief Judge:

***1** This matter came regularly on for trial before the court on October 26, 1987. The plaintiff, Terrie Lynne Venie, appeared in person and with her attorneys, Robert E. Kovacevich and Christopher J. Coffman. The government appeared by attorneys Patricia C. Brennan and Michael Powell.

Mrs. Venie, the plaintiff herein, brought this action pursuant to 28 U.S.C. § 2410 for a declaration that by reason of an agreement between she and her husband, reached in 1976 when Mrs. Venie started work after the birth of the couple's two daughters, her income from that employment was and is her separate property, and therefore not subject to recent IRS levies for penalties separately assessed against Mr. Venie.

FINDINGS OF FACT

The plaintiff, Terrie Lynne Venie, and Glennon Venie were married in 1969 and since that time have been and are now wife and husband. Two daughters have been born as issue of that marriage. These children are now ages 15 and 12. Prior to 1976, the sole source of support of the family was provided by Mr. Venie, who was attending school on the G.I. Bill and, in addition, worked in a greenhouse.

In 1976, Mrs. Venie attended a grocery store checker's course. Thereafter, she was offered a position with Rosauer's Supermarkets as a checker. Mr. and Mrs. Venie discussed this job opportunity. There was no evidence introduced which indicated that it was financially necessary for Mrs. Venie to become employed to support the family. Mrs. Venie had been raised in what she described as a “poor” family and this was her first opportunity to become employed and have her own income. Mrs. Venie had completed high school, but had no further education.

Mrs. Venie informed her husband that she would like to go to work, but that she wanted the income to be “her own”. At this time, Mr. and Mrs. Venie orally agreed that if Mrs. Venie accepted the employment, the income would belong to her, i.e., her separate property. At this time, the parties further orally agreed that Mr. Venie's income would be his own, *i.e.*, his separate property. The parties agreed that they would total the basic bills for family necessities on a monthly basis and each party would contribute one-half thereof from their separate earnings. Under this agreement, each party would retain their earnings as their own property and would be free to spend their income as each saw fit. The parties further agreed that no personal or real property would be acquired as community property unless both parties agreed thereto, in which event each party would contribute one-half of the cost of the property from their separate earnings.

In reliance upon the agreement of the parties, Mrs. Venie accepted the employment offer and commenced work as a checker. It appears that at this time Mr. and Mrs. Venie had a joint checking account. Mr. and Mrs. Venie only used this account as a depository for their respective one-half contributions for the family necessities. Mrs. Venie retained her monthly check and each month contributed therefrom her one-half share for the family necessities. The parties did not commingle their income. The joint checking account evidently was closed around 1981.

***2** Since the oral agreement reached in 1976, the parties, and particularly Mrs. Venie, have studiously and consistently complied with the agreement. Mr. and Mrs. Venie have strictly observed the terms of the agreement for the ensuing 11 years and for 10 years prior to the attempted levy by the I.R.S. Mrs. Venie has maintained sole control and dominion over her monthly income. Each month the parties would add up the bills for family necessities and each party would pay one-half thereof. Mrs. Venie would cash her payroll check and pay her one-half of the bills in cash or through the purchase of money orders. In the early years of this agreement, Mrs. Venie deposited her payroll check in her own separate checking account and paid her one-half share of the bills for family necessities therefrom. Mrs. Venie closed that account many years ago.

Since 1976, the parties have not jointly purchased any real or personal property. In 1981, Mrs. Venie determined to buy an automobile from Wendle Ford, utilizing her separate income and separate property. Wendle Ford would not sell the car to Mrs. Venie without Mr. Venie's signature. Therefore, both parties signed the purchase order; however, all payments on the car were made by Mrs. Venie from her separate earnings and all costs of operation of the car, including insurance and maintenance, were paid by Mrs. Venie from her separate earnings.

In 1979, after completion of his education, Mr. Venie entered into the landscaping business as a sole proprietor. Mrs. Venie had serious reservations as to the economic reality of this venture and, therefore, Mr. and Mrs. Venie agreed that this business would be Mr. Venie's separate property and that the income and debts arising from this business would be solely Mr. Venie's, as his sole and separate property. The business was incorporated in 1981 with two other business partners. Mrs. Venie played no role in the operation of the business. At the time of the incorporation, Mrs. Venie was named as the initial Secretary-Treasurer; however, she held no stock in the corporation and all income was received solely by Mr. Venie as his sole and separate property. From this income Mr. Venie contributed on a monthly basis one-half of the cost of the family necessities through cash or the purchase of money orders. The business required the posting of performance bonds and Mrs. Venie signed documents pledging the family home as indemnification to the bonding company. This family home was purchased prior to the 1976 agreement between Mr. and Mrs. Venie that Mrs. Venie's income would be her separate property.

Mrs. Venie's concerns about the economic viability of Mr. Venie's landscaping business were apparently well founded. The business failed to pay federal withholding taxes and, as a result, the I.R.S. assessed the 100 percent penalties against Mr. Venie. It appears there is a balance owing on these taxes for the year 1979 in the amount of $1,627.63; for 1981 in the amount of $9,573.13. The I.R.S. levied on the cash value of life insurance on Mr. Venie's life from a New York Life Insurance Company policy on which the premiums were paid from Mr. Venie's separate property. This policy was treated as Mr. Venie's separate property and Mrs. Venie made no claim of ownership therein at the time of the I.R.S. levy. Mr. Venie became indebted to the bonding company on defaulted landscaping contracts and the bonding company foreclosed on the family home in partial satisfaction of Mr. Venie's indebtedness to it. In 1982, Mr. Venie filed for bankruptcy. Mrs. Venie signed some of the schedules at Mr. Venie's request; however none of the separate property assets or debts of Mrs. Venie were included in the bankruptcy, except for the Ford automobile.

***3** Thereafter, the I.R.S. assessed the 100 percent penalties against Mr. Venie individually. Collection efforts against Mr. Venie commenced in 1983 and, as stated, supra, levy was made against the cash value in Mr. Venie's life insurance policies. The I.R.S. treated the assessments against Mr. Venie as his separate obligations (See Exhibits 2 and 4). In

November 1986, the I.R.S. attempted to levy against Mr. Venie's alleged undivided one-half community interest in Mrs. Venie's wages. The Venies had previously advised the I.R.S. of the oral separate property agreement as to Mrs. Venie's wages. An attorney had prepared a written agreement which attempted to set forth the oral agreement of the parties (See Exhibit 1). This written agreement will be discussed, infra.

When the I.R.S. attempted to levy on Mrs. Venie's wages based upon Mr. Venie's alleged undivided one-half interest in Mrs. Venie's wages, Mrs. Venie instituted this action seeking a declaration that her wages are, in fact, her separate property, and not subject to levy to satisfy Mr. Venie's debt to the I.R.S.

ANALYSIS

In deciding this case, this court is guided by *United States v. Overman* [70-1 USTC ¶ 9342], 424 F.2d 1142 (9th Cir.1970). *Overman* is factually distinct from this action in that in *Overman* the I.R.S. levied upon the taxpayer's undivided one-half interest in admittedly community property in an effort to satisfy the separate tax liability of one member of the community. In the action sub judice, the issue is whether Mrs. Venie's earnings are her separate property. The government concedes that Mrs. Venie's wages are not subject to levy if, in fact the earnings are Mrs. Venie's separate property. The nature of the property interests must be determined under the law of the State of Washington. *Overman,* at 1146.

RCW 26.16.030 provides that except as specified in RCW 26.16.010 and . 020, property acquired after marriage is community property. RCW 26.16.140 provides that the earnings of a husband or wife, while living separate and apart, are the separate property of the party earning the wages. RCW 26.16.200 provides that the separate property and earnings of one spouse are not liable for the separate debts of the other spouse.

The courts of the State of Washington have further established that even though there is no applicable statutory provision, a husband and wife may orally convert what would normally be community property into the separate property of one of the spouses. "Married persons may orally agree, whether they are living together or not, that their respective earnings shall be separate property." *In re Estate of Janssen,* 56 Wn.2d 150, 152, 351 P.2d 510 (1960) (citing *Togliatti v. Robertson,* 29 Wn.2d 844, 190 P.2d 575 (1948), and numerous other Washington cases); see also 33 Wash.L.Rev. 112, 113 (1958).

In this case, the court finds Mrs. Venie to be a most credible witness. The court finds that in fact when Mrs. Venie accepted employment in 1976, the parties agreed that her earnings would be and would remain her separate property. While the law of the State of Washington presumes that property acquired during marriage is community property, this presumption can be overcome if the proof to the contrary is clear and convincing. *In re Marriage of Janovich,* 30 Wn.App. 169, 171, 632 P.2d 889 (1981). From the time of the agreement of the parties in 1976, Mrs. Venie maintained and disposed of her earnings as her separate property. She at no time commingled her earnings with those of her husband. She spent and maintained her earnings as she chose, after she had paid one-half of the family necessities as agreed by the parties. This process has been strictly followed from 1976 to date. Appropriate discovery procedures by counsel for the government failed to disclose a single instance of commingling or variance from the 1976 agreement from the date of the agreement to present. The co-signing of the 1981 automobile purchase by her husband was required only by reason of the policy of the auto dealer. The car was, in fact, purchased and paid for by Mrs. Venie from her separate earnings.

***4** Mr. Powell, on behalf of the government, appropriately argues the presumption as to the community nature of a spouse's earnings. Counsel for

the government further points out that the written agreement of the parties (Ex. 1), prepared in 1986, which attempted to memorialize the 1976 oral agreement, could be construed to mean that only that portion of Mrs. Venie's earnings, after the payment of one-half of the family necessities, was to be her separate property. A strict construction of one of Mrs. Venie's answers to such a question put to Mrs. Venie by counsel for the government could result in such a finding. The court does not reach this conclusion. To the extent that one might construe the 1986 written agreement and the one response of Mrs. Venie as admissions of the government's position, the court finds to the contrary. The attorney's language in the 1986 written document was somewhat ambiguous, just as the affidavit prepared by the attorney dated December 19, 1986, incorrectly stated that Mrs. Venie was the sole source of her family's support. Mrs. Venie frankly admitted this error. Mrs. Venie, throughout her testimony, was frank and honest. The testimony of Mrs. Venie was corroborated by the testimony of her husband and her brother. The court finds that the evidence was clear and convincing that not only did the parties enter into the 1976 oral agreement, but that they have consistently conformed and complied therewith from that date to this.

The trier of fact should be concerned about the legitimacy of such agreements where creditors are involved. Such agreements, even if found to exist, cannot be utilized to avoid creditors in existence at the time of the agreement. In this case, the I.R.S. penalty debt of Mr. Venie did not arise until a number of years after the separate property agreement was made and complied with. There is no evidence that the agreement was a device to defraud or avoid creditors.

The agreement reached by Mr. and Mrs. Venie is recognized by State of Washington law and is not contrary to public policy. While this court did not decide this case based upon a public policy analysis, the court observes that a separate property agreement, such as was reached by the Venies, in fact supports a legitimate public policy of keeping families together. RCW 26.16.140 provides in part that if a husband and wife live separate and apart, their respective earnings are their separate property. This court can take judicial notice of the fact that in some circumstances, a separation of husband and wife has taken place by reason of economic necessity to protect the earnings of one spouse from attachment or garnishment by a separate property creditor of the other spouse. The law of the State of Washington recognizing oral separate property agreements between a husband and wife living together supports the public policy of keeping families together, particularly where, as here, the agreement was bona fide and was not entered into in an effort to avoid or defraud creditors existing at the time the agreement was reached.

***5** The plaintiff seeks recovery of attorney fees from the government under the Equal Access to Justice Act (28 U.S.C. § 2412). While the court has found against the government, I do not find that its position was unjustified. The court finds that in view of the presumptive community nature of Mrs. Venie's income, the government's position was substantially justified. As such, the request for attorney fees must be DENIED except those previously awarded in the discovery process in the amount of $444.00.

CONCLUSIONS OF LAW

1. Pursuant to the 1976 oral agreement of Mr. and Mrs. Venie, the court finds that Mrs. Venie has established by clear and convincing evidence that her wages are her separate property and an Order to that effect should be entered.

2. The plaintiff's request for attorney fees should be DENIED, except for the sum of $444.00 previously awarded, for which judgment should be entered in favor of the plaintiff and against the defendant.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

JUDGMENT

On the basis of the Findings of Fact and Conclusions of Law, IT IS ADJUDGED:

1. Defendants are restrained from attempting to collect from plaintiff's separate property the unpaid employment taxes now owing by Glennon Venie.

2. Plaintiff is awarded judgment against the defendant in the amount of $444.00 pursuant to the court's Order of July 1, 1987.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

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