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Community Property in Common Law States? Is There Such a Thing?

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A. Introduction and General Principles.

There are two conceptually different property law systems in the United States governing the rights of persons who are married: community property and so-called "common law" jurisdictions (jurisdictions which are based on separate property law concepts). There are nine community property jurisdictions in the United States: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.[1] Three more states have adopted legislation to permit residents and non-residents to opt into community property law regimes to varying degrees: Alaska, South Dakota, and Tennessee.[2] The Commonwealth of Puerto Rico is a community property jurisdiction.

For the most part practitioners who went to law school and who remained in common law jurisdictions after graduation learned that there is something called "community property," but quickly dismissed it as something alien and inapplicable to their practice. Unless one practices (or intends to practice) in a community property jurisdiction, why should one bother to learn a system of property law which is simply not relevant? Because of the legal principles that underly multijurisdictional choice of law rules, the chief reason why practitioners who engage in estate planning should be aware of how community property law concepts may affect their practices lies in the mobility of the United States population.[3]

Whether unfortunate or not, it is simply not correct to state that community property law concepts can be safely ignored by practitioners in common law

[1] Wisconsin became a community property law state effective on January 1, 1986, when it adopted the Uniform Marital Property Act.
[2] *See* Chapman, *Elective Community Property: An Election the Parties Can Agree On*, 2017 Summer Meeting, American College of Trust & Estate Counsel.
[3] The U.S. Census Bureau estimated that nearly 7.6 million Americans moved from one state to another in 2018. The largest intake states with 200,000 or more persons moving from other states in 2018 were (in order) Florida, Texas, California, North Carolina, Georgia, Virginia, Arizona, Washington, New York, Pennsylvania, Colorado, Tennessee, and Illinois.

jurisdictions, even those who are careful not to stray beyond their own boundaries. There are well-established conflicts of law principles, some caselaw, and uniform legislation which provide a basis to conclude that community property law concepts can be recognized and enforced in common law jurisdictions.[4]

B. A Case in Point.

A husband and wife were married in Cuba in 1936. Both were Cuban citizens and residents. It was the husband's second marriage. He had three children from a prior marriage. He had no assets when he and his new wife were married (that is, he had no separate assets to bring into the marriage). In 1951, after 15 years of marriage, the husband moved to Florida to become the plant manager of a sugar refinery near Lake Okeechobee. He would return to Cuba for weekends and other occasional visits, but after his move to Florida in 1951 he earned almost all of his income and assets in Florida. About a year after he moved to Florida, the husband bought stock in the Florida company which owned and operated the sugar refinery. Six years later, he bought more stock in the Florida company. Despite his predominant physical presence in Florida, and his occasional visits back to Cuba, the husband remained domiciled in Cuba until 1960, when the couple moved to Florida after the Cuban revolution.

Sometime after the couple moved to Florida, the husband received a promissory note and a contract for payment of additional money in exchange for his shares in the Florida company. Although the stock had been acquired by the husband while he was still a Cuban domiciliary, the promissory note and contract were received after he became a Florida domiciliary.

After leaving Cuba, the couple lived in Florida continuously until the husband's death in 1963. He died intestate, survived by his wife and his three children from his prior marriage. Under Florida intestacy law then in effect, a surviving spouse inherited the same share as a child, and thus she would have inherited one-fourth of her husband's estate. If the widow elected to take dower, her share of her husband's estate would increase to one-third.

The widow argued that she owned a one-half community property interest in the promissory note and contract for payments with respect to her husband's stock. She would still be entitled to her rights as a surviving spouse in her husband's one-half community property interest in the promissory note and contractual rights. The

[4] *See* Golden, *Musings on the Migrant Client and Community Property*, 2017 Summer Meeting, American College of Trust & Estate Counsel.

husband's three children argued that the promissory note and contract could not be community property, and that the widow's rights in her husband's estate were limited to those under the law of intestacy.

The children argued first that because their father was domiciled in Florida at the time of his death, Florida law governed the ownership and succession of their father's promissory note and contractual right to payments, which had been acquired by him while domiciled in Florida. The probate court agreed with the children, ruling that the note and contractual rights were not community property, and that Florida intestacy governed the entire interest in the note and contract. The widow appealed that decision.[5]

In its analysis, the appellate court first noted that Cuba was a community property jurisdiction at all times while the couple was domiciled in Cuba. Under Cuban community property law, all property acquired by purchase or for value paid during the marriage, or by the salary or work of either spouse, belongs to the marital community estate. Furthermore, under Cuban law, all property of the marriage is considered to be community property unless it is proven that property belongs exclusively to one of the spouses.

The children argued that the husband's interest in the stock of the Florida corporation could not be community property because it was acquired while he was in Florida, from his earnings in Florida. The widow argued that the stock had been acquired from funds originating in Cuba.

The children argued further that the stock had been sold by their father after he became domiciled in Florida, and therefore that the promissory note and contractual rights were property interests that were acquired in Florida and were governed by Florida law. The wife argued that there was no sale of the stock, and instead that the stock had been transferred to a trustee, and thus the nature of the interests in the stock would continue to be governed by Cuban law.

The appellate court held that it did not matter whether the purchase price of the stock had come from Cuban source funds or from funds earned by the husband in Florida, because the couple was domiciled in Cuba when the stock was acquired. According to the court, it is the almost unanimous authority in America that "interests of one spouse in movables acquired by the other during the marriage are determined by the law of the domicile of the parties when the movables are acquired." Because there was no evidence to show that the stock had been acquired from the husband's separate property, it was

[5] The case discussed here is *Quintana v. Ordono,* 195 So.2d 577 (Fla. 3rd DCA 1967), *aff'd*, *Ordono v. Quintana,* 202 So.2d 178 (Fla. 1967).

community property when it was acquired by the husband, even if it was acquired from earnings from his employment in Florida.

But what about the exchange of the stock for a promissory note and contractual rights to payments, which occurred after the husband became domiciled in Florida? This did have a legal consequence, according to the appellate court. The consequence was that the transaction, whatever it was, was controlled by Florida law. But that did not mean that the wife lost her community property interest. Under Florida law, if a portion of the consideration for the acquisition of an asset belongs to one spouse, and if title to the asset is taken in the name of the second spouse alone, the asset that is acquired is held in a resulting trust in favor of the first spouse to the extent of the consideration furnished by that spouse.

The appellate court ruled the wife did not lose her community property interest in the stock when she and her husband became domiciled in Florida, and she did not lose her community property interest in the proceeds of the stock when it was exchanged for a promissory note and contractual rights to payments while she and her husband were domiciled in Florida. The appellate court remanded the case to the probate court to enter an order in accordance with the appellate court's holdings.[6]

There are several important observations from this case for practitioners in states that are not community property jurisdictions.

First, community property can and does exist in common law jurisdictions.

Second, the facts and holding in the *Quintana* case do not involve real property ("immovable property") in a common law jurisdiction. Choice of law principles governing property rights involve differing considerations as between real property and personal property ("movable property") because of the inherent sovereignty right of each state to control the ownership and devolution of real property within its borders.

Third, personal property that is being acquired currently by someone who is physically present in a common law jurisdiction and with funds earned in that jurisdiction can be community property under the law of that common law jurisdiction.

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[6] The opinion does not indicate what the nature of the widow's interest in her husband's half of the assets was. A surviving spouse does have intestate succession rights in a deceased spouse's interest in community property, in addition to the surviving spouse's separate half interest. Those intestate rights vary among community property jurisdictions. Presumably under Florida law in effect in 1963, the widow inherited a one-fourth share of her husband's half interest in the note and contractual rights. Under general legal principles, however, it is likely that the widow would not have had dower rights in her husband's half of those assets, but there is no indication that this issue was considered.

Fourth, community property rights can exist in personal property which is acquired in a common law jurisdiction by a married couple who are domiciled in that common law jurisdiction at the time the personal property is acquired.

C. General Principles of Law.

Perhaps the strongest authoritative statement on the broader application of community law principles is set forth in the Restatement (Second) of Conflict of Laws (dating back to 1971, which is a significant date as will be seen later in this paper). The key provision is found in section 259:

> A marital property interest in a chattel, or right embodied in a document, which has been acquired by either or both of the spouses, is not affected by the mere removal of the chattel or document to a second state, whether or not this removal is accompanied by a change of domicil to the other state on the part of one or both of the spouses. The interest, however, may be affected by dealings with the chattel or document in the second state.

Lest there be any doubt about the significance of this principle, the rationale for the statement is set forth in the official comment *a* to section 259:

> Considerations of fairness and convenience require that the spouses' marital property interests in a chattel or right embodied in a document should not be affected by the mere removal of the chattel or document to another state. Likewise these interests are not affected by a change of domicil to another state by one or both of the spouses. Similarly, an interest in a right not embodied in a document that was acquired by either or both of the spouses during the marriage is not affected by a subsequent change of domicil to another state by one or both of the spouses.

The result in practical terms is laid out in comment *b*:

> When a chattel or document is taken into a second state and is there exchanged for some other movable or immovable, the spouses acquire the same interests therein as they had in the original chattel or document. Thus, when a husband takes an automobile, which is his alone, from a separate property state to a community property state and then, having sold the automobile, uses the proceeds to purchase a truck, the truck will be the husband's separate property. On the other hand, if the husband had

> originally held the automobile in community with his wife and had exchanged it for a truck in a separate property state, the wife's interests in the truck would be the same as those she had previously had in the automobile.

D. Uniform Disposition of Community Property Rights at Death Act.

In 1971 (the same date as the Restatement (Second) of Conflict of Laws, and four years after the *Quintana* case was decided in Florida, the then National Conference of Commissioners on Uniform State Laws (now known as the Uniform Law Commission) promulgated the Uniform Disposition of Community Property Rights at Death Act (referred to as the "Uniform Act" in this paper). Although the Uniform Act has not been widely adopted, it has been adopted in sixteen states.[7] To the extent that the success of any uniform act is measured by how widely it is adopted among the states, one must take into account that of the fifty states in the United States, nine are community property jurisdictions in which the Uniform Act is not relevant.

Although long, the full formal name of the Uniform Act very precisely describes its scope and purpose. It is not a legislative attempt to emulate a system of community property rights in common law states. Instead, it is an act of limited scope, with precisely targeted and narrow objectives. This is made clear in the Reporter's Note to the Uniform Act.

> This Act has a very limited scope. If enacted by a common law state, it will only define the dispositive rights, at death, of a married person as to his interests at death in property "subject to the Act" and is limited to real property, located in the enacting state, and personal property of a person domiciled in the enacting state. The purpose of the Act is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their "community" rights. It thus follows the typical pattern of community property which permits the deceased spouse to dispose of "his half" of the community property, while confirming the title of the surviving spouse in "her half."

[7] The adopting states, in order of adoption, are Colorado, Hawaii, and Oregon (1973); Kentucky (1974); Michigan (1975); Arkansas, New York and North Carolina (1981); Virginia (1982); Alaska (1984); Colorado (second time), Connecticut, and Wyoming (1985); Montana (1989); Florida (1992); Utah (2012); and Minnesota (2013).

The Uniform Act does not impose or presuppose inter vivos characteristics of community property on real property or personal property that would be subject to the provisions of the Act upon death. For example, the Uniform Act does not impose a requirement that both spouses join in a conveyance of property titled in one spouse's name alone made during lifetime in order to alienate that property and defeat the interest that the other spouse would have upon the death of title holding spouse under the provisions of the Uniform Act.

The operative provisions of the Uniform Act are found in its first three sections. The first section applies to all personal property of a decedent domiciled in a state which has adopted the Uniform Act, regardless of the situs of the tangible property, and it applies to real property in the adopting state.

> Section 1. [Application.] This Act applies to the disposition at death of the following property acquired by a married person:
> (1) all personal property, wherever situated:
> (i) which was acquired as or became, and remained, community property under the laws of another jurisdiction; or,
> (ii) all or the proportionate part of that property acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, that community property; or
> (iii) traceable to that community property;
> (2) all or the proportionate part of any real property situated in this state which was acquired with the rents, issues or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property.

Section 2 of the Uniform Act establishes two rebuttable presumptions. The first presumption is that property which that was acquired by one spouse while domiciled in a community property jurisdiction was acquired as community property and retains its status as community property. The second presumption is a corresponding opposite presumption of the first: property acquired by a person while domiciled in a common law jurisdiction was not acquired as community property if the property in held in a form of ownership which has rights of survivorship. The Reporter's Note states that "[t]his presumption was deemed appropriate as expressing the normal expectations of the spouses and to facilitate ascertainment of title to real property located in the enacting state, as well as personal property wherever located."

Section 3 of the Uniform Act controls the disposition at death of property that is subject to the Act.

> Section 3. [Disposition upon Death.] Upon death of a married person, one-half of the property to which this Act applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this State. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this State. With respect to property to which this Act applies, the one-half of the property which is the property of the decedent is not subject to the surviving spouse's right to elect against the will [and no estate of dower or curtesy exists in the property of the decedent].

The Reporter's Note describes the remaining sections of the Uniform Act as being almost precatory, and states that they were added to clarify situations which would probably follow from the first three sections but which might raise questions otherwise.

The legal principles enunciated in the *Quintana* case and in the Uniform Act (although the *Quintana* case was not cited in the Reporter's Note) are entirely consistent, and part of a logical construct, if one accepts the basic policy principle stated at the beginning of the Reporter's Note:

> As a matter of policy, and probably as a matter of constitutional law, the move [from a community property jurisdiction to a common law jurisdiction] should not be deemed (in and of itself) to deprive the spouses of any preexisting property rights.

E. <u>Uniform Community Property Disposition at Death Act?</u>

There have been a number of discussions over the years since the Uniform Act was adopted whether it should be updated and expanded. In part those discussions were based on concerns why the Uniform Act has not been adopted more widely. At its fall 2018 meeting, the Joint Editorial Board for Uniform Trust and Estate Acts formally confirmed its recommendation to the Uniform Law Commission that the Uniform Act be revised to update its provisions both to improve and expand upon its provisions to the extent determined to be necessary, and to enhance its prospects for widespread enactment beyond the sixteen common law jurisdictions which have already enacted it. The Uniform Law Commission appointed a drafting committee to update the Uniform Act. The chair is Professor David English, and the reporter is Professor Ronald Scalise, Jr.

The drafting committee has met both in person before the onset of the current COVID-19 pandemic, and virtually during the pandemic. The committee has developed a discussion draft of a revised act. The revised act would be known as the Uniform Community Property Disposition at Death Act.

With the caveat that the drafting committee is still early in its work, a copy of the most recent draft of the proposed revised act (as of the date of submission of this paper) is appended to this paper, together with the initial issues memorandum prepared by the reporter.[8] At this point in the committee's work, it is noteworthy that the current draft preserves the doctrinal approach of the original Uniform Act, but significantly expands its scope by making it applicable to nonprobate transfers, and by adding new remedial provisions to protect spouses for actions that were taken by the other spouse during marriage which impair property rights that would otherwise be protected under the act. As noted by the reporter, the revised act would:

> . . . allow a court to adjudicate claims for certain bad faith actions by one spouse that might impair the rights of the other spouse with respect to property to which this act applies. One such example could be the unauthorized alienation of property to the prejudice of the other spouse. This section allows for a damage or equitable claim to be brought at the death of one spouse by the other or by his personal representative, provided a spouse's interest in property was prejudiced by the actions of the other spouse.

For those who are interested in following the progress of the drafting committee, the committee's work product can be found on the Uniform Law Commission's website.[9] In addition, the Commission allows interested persons to sign up as observers to the drafting committee, and thus receive notice of meetings and copies of materials, with the opportunity to attend meetings of the drafting committee.

[8] The author expresses his appreciation to Professor English for his permission to include the drafting committee's work product with this paper.

[9] https://www.uniformlaws.org/committees/community-home?CommunityKey=e64d2f7b-58f4-4960-8a35-09995e9cc75b.

M E M O R A N D U M

To: Uniform Disposition of Committee Property Rights at Death Revision Committee

From: Ronald J. Scalise Jr., Reporter

Date: October 8, 2019

Re: Issues Memorandum for First Committee Meeting

For the first meeting of the Uniform Disposition of Community Property Rights at Death Act Revision Committee (the "Committee"), the Reporter has prepared the below memorandum to guide the Committee in its discussion. It collects and summarizes various policy issues that the Committee may want to consider before drafting can begin in earnest.

I. ***Background, Benefits, and Barriers to Adoption*****.** The Uniform Disposition of Community Property Rights at Death Act (the "Act") was approved by the Uniform Law Commission in 1971. The Act establishes a system for non-community property states to address the treatment of property that was community property before the spouses moved from a community property state to the non-community property state. According to the Act, its purpose "is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their 'community' rights."[1] To date, 17 states have enacted the Act. Five states enacted the Act in the 1970s, shortly after its approval.[2] Another nine estates enacted the Act in the 1980s.[3] One state enacted it in the 1992,[4] and two states – Utah and Minnesota – enacted Act in 2012 and 2013, respectively.[5]

As an initial question, it may be worth considering why the Act has not been more successful in achieving enactment in the other non-community property states. Several possibilities suggest themselves: (1) Did the original Act have sufficient promotion such that states realized the benefits of adoption? (2) Were there substantive concerns with the content of the original Act? (3) Did states believe that the subject matter of the original Act was sufficiently addressed by their existing conflicts of law rules? (4) Did non-community property states fully understand the benefits of the Act? Answering this threshold question can ensure that the

[1] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, Pref. Note, at 3 (1971).
[2] Or. Rev. Stat. § 112.705; Hawaii Rev. Stat. § 510-21; Colo. Rev. Stat. Ann. § 15-20-101; Ky. Rev. Stat. § 391.210; Mich. Comp. L. Ann. § 557.261.
[3] N.C. Gen. Stat. § 31C-1; N.Y. Est. Powers & Trusts Law § 6-6.1; Ark. Code. Ann. § 28-12-101; Va. Code § 64.1-197; Alaska Stat. § 13.41.005; Wyo. Stat. § 2-7-720; Conn. Gen. Stat. Ann. § 45a-458; Colo. Rev. Stat. Ann. § 15-20-101; Mont. Code Ann. § 72-9-101.
[4] Fla. Stat. Ann. § 732.216.
[5] Utah Code § 75-2b-101; Minn. Stat. § 519A.01.

Committee addresses any issues that potentially may have been problematic under the original Act, and it can ensure the Committee is attentive to stumbling blocks that may have been encountered in the adoption of the original Act.

Although the Committee will undoubtedly want to reconsider some of the policy decisions made in the original Act, the Act offers substantial benefits for citizens in non-community property states that have adopted the Act. Americans are more mobile today than ever before. It is estimated that in 2016 that 7.5 million people moved one state to another.[6] Undoubtedly, a significant subset of that 7.5 million involves Americans moving from one of the nine community property states to one of the forty-one non-community property states. As Americans migrate, the property previously acquired in a community property state "does not lose its character by virtue of a move to a common law state."[7] In fact, "once [property] rights are fixed, they cannot be constitutionally changed during the lifetime of the owner merely by moving the personalty across one or more state lines, regardless of whether there is or is not a change of domiciles."[8] The Prefatory Note to the Act notes that this is both a matter of policy "and probably a matter of constitutional law."[9] Under traditional conflicts principles, the result is the same: a move from a community property state to a non-community property one does not change the nature of the property.[10] The Restatement (Second) of Conflicts notes that "[a] marital property interest in a chattel, or right embodied in a document, which has been acquired by either or both of the spouses, is not affected by the mere removal of the chattel or document to a second state, whether or not this removal is accompanied by a change of domicile to the other state on the part of one or both of the spouses."[11] Nevertheless, non-community property states do often prescribe procedures for holding or treating community property once the decedent has relocated to the non-community property state. These policies vary in content and may not always suit the desires or needs of the migrating couple.

Moreover, there is some evidence to suggest that adoption of the Act by a State may produce significant tax benefits for those who move from community property states to non-community property states. It has long been the case that community property states receive favorable tax benefits upon the death of one spouse. Specifically, Section 1014(b)(6) of the Internal Revenue Code provides that upon the death of either spouse, the entire community receives a step-up in basis, not just the half attributable to the decedent spouse.[12] When spouses move from community property states to non-community property states, however, many states "force[] a couple to change ownership from community property to some form of joint ownership or to a resulting trust, [which] … almost certainly destroys the ability to take advantage of the full step up."[13] In attempt to achieve the benefits of a community property jurisdiction in a common

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[6] State-to-State Migration Flows: 2016, *available at* https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html

[7] In re Marriage of Moore & Ferrie, 18 Cal. Rptr. 2d 543 (Court of Appeal, First District, Division 2, 1993).

[8] William Q. De Funiak, *Conflict of Laws in the Community Property Field*, 7 ARIZ. L. REV. 50, 51 (1966).

[9] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, Pref. Note (1971).

[10] Sarah N. Welling, *The Uniform Disposition of Community Property at Death Act*, 65 KY. L. J. 541, 545 (1977).

[11] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 259 (1971).

[12] I.R.C. § 1014(b)(6).

[13] Jeremy T. Ware, *Section 1014(B)(6) and the Boundaries of Community Property*, 5 NEV. L. J. 704, 718 (2005).

law state, some states have enacted community property trust laws, which among other things, endeavor to provide a full step up in basis for couples upon the death of one spouse.[14]

Commentators have suggested that states that have adopted the Act may benefit from community property tax benefits. Specifically, some argue that "section 1014(b)(6) should determine the basis of the surviving spouse's one-half interest in property covered by the Uniform Act."[15] Others have noted that "[i]n common law states that have adopted the Uniform Act the full step up for couples moving to those states may be preserved."[16] In fact, a Field Service Advisory (FSA) from the IRS has indicated that the full step up is available for the relevant parties in states that adopted the Act.[17] Specifically, an FSA from 1993 addressed a situation of a couple who had sold their community property home in California and used the proceeds to buy a replacement residence in Oregon. When the husband died, the FSA indicated that "the wife's basis in the property would be …the fair market value of the property at her husband's date of death."[18] In explaining its conclusion, the FSA noted that because Oregon had adopted the Act, the proceeds of the sale in California are "presumed to remain community property for purposes" of the relevant Oregon law.[19] Consequently, the "property in Oregon acquired by the husband and wife with the proceeds from the sale of the California property will retain the character of community property, even though, in Oregon, the husband and wife held the converted property in a joint tenancy with right of survivorship."[20]

In short, the movement of Americans from community property to non-community property jurisdictions is a significant issue that would behoove non-community property states to address. The Act provides a relatively simple solution that should be appealing to states not only because of the clarity it provides in an otherwise murky area of law but also because of the potential favorable tax benefits for its citizens.

II. [Section 1] ***Applicable Property.*** In brief, Section 1 of the Act provides that all personal property acquired by either spouse while domiciled in a community property state is subject to the Act as well as all real property in the enacting state that was acquired with proceeds of community property.

Characterization as Community Property. Under Section 1, the central question becomes what property – real or personal – was "acquired as or became, and remained, community property under the laws of another jurisdiction."[21] This formulation clearly covers the situation in which a community asset is moved from a community property state to another state that does not recognize community property. As Professor Boxx has noted, however, "what constitutes community property varies significantly from state to state."[22] The variation is only exacerbated

[14] Alaska Stat. § 34.77.100; S. Dak. Cod. Laws 55-17-1; Tenn. Code § 35-17-101.
[15] Jonathan G. Blattmachr, Howard M. Zaritsky, & Mark L. Ascher, *Tax Planning with Consensual Community Property: Alaska's New Community Property Law*, 33 REAL PROP. PROB. & TR. J. 615, 628 (1999).
[16] Ware, *supra* note 13, at 713.
[17] IRS Field Service Advisory, 1993 WL 1609164 (Nov. 24, 1993).
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 1.
[22] Letter from Karen E. Boxx to Joint Editorial Board for Uniform Trust and Estate Acts 1 (September 6, 2012).

when one considers an asset that is acquired with both community and separate property. In some jurisdictions, a "pro rata" approach is employed, which provides for a combination of community and separate ownership based in proportion to the payments contributed by either the community or the spouses separately.[23] The Act accommodates this approach by not requiring an "all or nothing" classification of community property. Rather, the Act is applicable when "all or the proportionate part" of property would be community property. The Act further notes the complexity that is often associated with apportioning or allocating interests in property as part separate and part community, but indicates that "the matters simply [should] be left to court decision as to what portion would, under applicable choice of law rules, be treated as community property."[24]

Not all jurisdictions, however, employ the above "pro rata" approach. In some community property states, an "inception of title" theory is used, such that the characterization of the property is dependent upon the characterization of the right at the time of acquisition. For example, a house acquired in a credit sale before marriage would remain separate property under this theory even if the vast majority of the payments were made after marriage and with community funds. The community maintains a claim for reimbursement for the amount of funds expended for the separate property of the acquiring spouse. Should the Act protect the spouse's claim for reimbursement?

Tracing. Subsections (1)(1)(iii) and (1)(2) of the Act apply to property that is "traceable to community property." Stated simply, "tracing" is the concept that property may change form without changing character.[25] Thus, property given in exchange has the same character as property received. Tracing, however, becomes more complex when community and separate property are comingled. Other parts of Section 1 of the Act make clear that the Act applies not only to community property but also to "the proportionate part of … property acquired … in exchange for … community property." It is assumed that the provision on tracing for personal property in Subsection (1)(1)(iii) applies in the context of commingled property where only a part of the asset is traceable to community property, although the language does not explicitly state. If it does, should some standard or burden of persuasion be adopted in demonstrating that comingled property is traceable to community property. In community property jurisdictions, all property is ordinarily presumed to be community and parties are faced with the task proving that separate property was used to acquire community property. In this context, however, the situation is reversed insofar as it is the community property that is traceable to other property. As drafted, the Act does not impose upon any party the obligation to demonstrate the traceability of the community property, although Sections 4 and 5 of the Act (discussed below) do seem to impose some duty to investigate upon the personal representative once "written demand" is made. Some commentators have noted that if property is indistinguishably commingled, courts could (1) "characterize all property as community property" since all community property maintain that presumption; (2) "proceed on an inferred intent theory," treating the current form of the property

[23] For a general discussion of the characterization of property acquired over time, see WILLIAM A. REPPY, CYNTHIA A. SAMUEL, AND SALLY BROWN RICHARDSON, COMMUNITY PROPERTY IN THE UNITED STATES 91-92 (2015).
[24] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 1 cmt.
[25] REPPY, SAMUEL, AND RICHARDSON, *supra* note 14, at 161 (quoting W.BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 134 (1964)).

as evidence of the parties' intent with respect to its character; or (3) attempt to segregate the interest of the parties at the time they entered the state from the subsequent accretions.[26]

"Rents, Issues, or Income of … community property." Professor Featherston observes that Section 1 of the Act applies not only to property that was classified as community property under the laws of another jurisdiction but also to "the rents, issues, or income of" that property. He questions whether this phrase is redundant, as community property jurisdictions already classify as community property the "rents, issues, and income of" community property. The inclusion of this phrase in Subsection (1)(2) does appear redundant as it applies to "real property … acquired with rents, issues or income of …community property … or property traceable to that community property." By definition, rents, issues, or income of community property are already community property. As used in Subsection (1)(1)(ii), however, the phrase appears to mean something different because it pertains to "property acquired with the rents, issues, or income of …" personal property "wherever situated … which was acquired as … community property under the laws of another jurisdiction." In other words, in Subsection (1)(1)(ii), the phrase "rents, issues or income" appears to include the rents, issues, and income that are generated from personal property (which was previously classified as community) after a couple has moved to a non-community property state. Without the inclusion of this phrase in Subsection (1)(1)(ii), a court might not treat the "rents, issues or income" of such personal property as community property.

Undivided Interests in Each Asset. Professor Featherston has observed that the Act could be clarified to more appropriately address the application of community property concepts by courts in jurisdictions that are not accustomed to dealing with community property matters. Specifically, he notes that the Act by its terms applies to "all personal property" and to "all or the proportionate part of any real property" acquired with community funds. He correctly observes that in community property jurisdictions, the spouses own equal undivided shares in each asset of the community rather than equal shares in the aggregate value of the community assets. He suggests this could be clarified by noting that the Act applies to "each item of personal property" and "each item or a proportionate part of each item of real property" acquired with community funds.

III. [Section 1] *To Whom Does the Act Apply?* Because the original Act was approved in 1971, it was drafted at a time long before same-sex marriage. By its terms, the original Act "applies to the disposition at death of the following property acquired by a *married* person."[27] Obviously, the Act would apply today to property acquired either by same-sex or opposite-sex married couples, but some community property states also allow community property to be acquired pursuant to domestic or registered partnerships. Two community property states – California and Nevada – allow for community property to be acquired via registered domestic partnerships.[28] Washington also provides in a more limited sense that certain domestic partners

[26] Welling, *supra* note 10, at 556-57.

[27] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, Sec. 1 (emphasis added).

[28] Cal. Fam. Code § 297.5 (stating that domestic partners "have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses."); Nev. Rev. Stat. § 122A.200 (same).

may acquire community property as well.[29] As Professor Karen Boxx notes, "The Act should be revised to reflect that."[30]

IV. [Section 2] ***Rebutting the Presumptions of Community Property.*** Section 2 of the Act creates a "rebuttable presumption" of community property for "property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property."[31] The comments note that "[i]t may be shown, of course, that such property was the separate property of the spouse and the law of the state of domicile may furnish the rule."[32] As Professor Boxx has noted, the Act "does not indicate the standard of proof necessary to rebut the presumption."[33] Some community property states allow the presumption to be rebutted by a mere "preponderance of the evidence."[34] Others require clear and convincing evidence.[35] Idaho reasons proof by "reasonable certainty and particularity."[36] Should the law of the applicable community property jurisdiction provide the standard for rebutting the presumption?

It is also worth noting that the Act does not require that the parties have a "marital domicile" in a community property state for the Act to apply. Rather, if either spouse is domiciled in a community property jurisdiction, a presumption arises that property acquired during marriage by that spouse will be subject to the Act.[37]

V. [Section 3] ***Dispositions Upon Death.*** This Section is the heart of the Act and provides simply that for all property to which the Act applies, only one-half is the property of the decedent is subject to his testamentary disposition or distribution of his estate under the laws of succession.[38] The other half belongs to the surviving spouse.[39] In *Estate of Bach*, a New York court applied the corresponding provision of New York law and held that a widow whose community property interest originated under the laws of Bolivia was entitled to receive one-half of her husband's estate as community property after his death in New York.[40] Section 3 also provides that the rights of dower, curtesy, and the elective share do not apply to the half of the property that belongs to the decedent. Although some of the language needs to be updated in this section, the general rule and approach seem commendable.

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[29] Wash. Rev. Code tit. 26, § 26.60.100(3); *Id*. tit. 26, § 26.60.015. Although most domestic partnerships in Washington automatically converted into marriages, this is not the case for opposite sex couples in which one member is 62-years old or older. *Id*. tit. 26, § 26.60.100(3)

[30] Boxx, supra note 22, at 1.

[31] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 2.

[32] *Id*. cmt.

[33] Boxx, *supra* note 22, at 2.

[34] See Talbot v. Talbot, 864 So. 2d 590 (La. 2003); Marriage of Ettefagh, 59 Cal. Rptr. 3d 419 (Cal. App. 2007); Brandt v. Brandt, 427 N.W.2d 126 (Wis. Ct. App. 1988); Sanchez v. Sanchez, 748 P. 2d 21 (N.M. App. 1987).

[35] Tex. Fam. Code § 3.039(b); Sommerfield v. Sommerfield, 592 P.2d 771 (Ariz. 1979); Pryor v. Pryor, 734 P.2d 718 (Nev. 1987); Marriage of Muller, 167 P.3d 568 (Wash. App. Ct. 2007).

[36] Reed v. Reed, 44 P.3d 1100 (Idaho 2002).

[37] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 2; *see also* 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 10.21[G][4] (2008).

[38] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 3.

[39] *Id*.

[40] Estate of Bach, 145 Misc. 2d 945 (N.Y Sur. Ct. 1989).

VI. [Sections 4 and 5] ***Fiduciary Duties of Personal Representative***. Under sections 4 and 5 of the Act, applicability of the Act is premised upon a "written demand" being made by the surviving spouse or by heir, devisee, or creditor of the decedent asserting that the Act is applicable to particular property.[41] The Act further makes clear that neither "[t]he personal representative [of the decedent] nor the court in which the decedent's estate is being administered has a duty to discover or attempt to discover whether property held by the decedent is property to which this Act applies…."[42] Professor Boxx questions whether this matter should be revisited by the Committee. Although the approach of the Act is obviously designed to protect the personal representative of the decedent from both liability and burdensome obligations, Professor Boxx rightly notes that "ascertaining the decedent's property is a basic fiduciary duty of the" decedent's personal representative.[43] Under the Uniform Probate Code, "[a] personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this [code], and as expeditiously and efficiently as is consistent with the best interests of the estate."[44]

Moreover, although the personal representative is not under a duty to independently investigate the character of the property, the procedures for perfecting title differ under Sections 4 and 5. Under Section 4, if the surviving spouse seeks to perfect title in herself, the appropriate procedure is to provide written notice to the personal representative, which then triggers a duty to investigate if property held by the decedent is subject to the Act.[45] Under Section 5, however, if an heir or devisee seeks to perfect title to property held by the surviving spouse, he may independently "institute an action to perfect title to the property."[46] In addition, he may provide written notice to the personal representative, which then triggers a duty to investigate if property held by the surviving spouse is subject to the Act. As some have noted, "the Act would appear to allow for two or more separate actions, one by the personal representative, and one or more others by heirs and devisees, to be proceeding at the same time."[47] A creditor of the decedent, however, who seeks to perfect title does not have a right to institute an action on his own, but his only remedy is to provide a written demand to the personal representative of the decedent."[48] Should the policy underlying this provision be revisited?

VII. [Section 6] ***Rights of Third-Party.*** Section 6 of the Act addresses the situation in which purchasers or lenders take a security interest for value after the death of the decedent from someone with apparent title to the property.[49] Subsection (a) applies to purchasers or lenders who acquire an interest from a surviving spouse, and Subsection (b) addresses the corresponding situation in which the same parties acquire an interest from the personal representative, heir, or devisee of the decedent.[50] In both cases, the Act provides that "a purchaser for value or a lender taking a security

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[41] *Id.* at sec. 4 &5.
[42] *Id*.
[43] BOXX, *supra* note 22, at 2.
[44] UNIF. PROB. CODE. § 3-703.
[45] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 4. New York law requires that notice be provided to all parties entitled to be served with process. NY EST. POWERS & TRUST § 6-6.4.
[46] *Id*. at sec. 5.
[47] 1 SCHOENBLUM, *supra* note 37, at 10.21[G].
[48] *Id*.
[49] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 6 cmt (1971).
[50] *Id*.

interest in the property takes his interest in the property free of any rights of the" competing parties, whether they be surviving spouse, personal representative, heir, or devisee of the decedent.[51] This provision seems to be at odds with other provisions of general law insofar as "there is no requirement of good faith."[52] In other words, even a party who has knowledge of the rights of another may still acquire his interest "free of any rights" of competing parties. Section 6(c) makes clear that "[a] purchaser for value or a lender need not inquire whether a vendor or borrower acted properly."[53] In fact, the Act "fails to distinguish between bona fide purchasers and those complicit[] in efforts to deprive the decedent's estate of its property."[54] The text of the statute itself also makes no provision as to the amount of value that need be given, referencing only a "purchaser for value."[55] The comment, however, suggests otherwise in stating a preference to protect third parties where "adequate consideration is paid."[56] In the end, however, the Act protects third parties at the expense of spouses or successors of the decedent, but it does treat the proceeds of the transaction with the third party as subject to the Act, which is some acknowledgment of the rights of the spouse or successor.[57] After all, spouses in some community property jurisdictions can also unilaterally transfer community assets to the detriment of the other spouse in a way similar to the authority in Section 6.[58]

VIII. [Section 7] ***Rights of Creditors.*** Section 7 of the Act provides simply that "[t]his Act does not affect rights of creditors with respect to property to which the Act applies."[59] In other words, it purports to provide that creditors rights are unaffected by the application of the Act and thus the continued treatment of property as community property under the Act does not alter the rights of a creditor. But this provision seems contrary to Section 5 of the Act, which curtailed creditors rights insofar as they cannot proceed on their own behalf to perfect title in property but are required to file a "written demand" with the personal representative of the decedent in order to ensure protection of their rights. This section is also at odds with Section 6, which seems to expand creditor rights insofar as they are preferred to the interests of a surviving spouse or successors, even in the absence of good faith or proof of their character as a bona fide purchaser.[60] Does the Committee wish to revisit this section?

IX. [Section 8] ***Severance or Alteration of Community Property.*** Section 8 of the Act provides that "[t]his Act does not prevent married persons from severing or altering their interests in property to which this Act applies."[61] The Act itself, however, does not specify what constitutes a severance or alteration of community under Section 8. Rather, it merely notes that the various "rights, and procedures[] … vary markedly among the community property states."[62] An issue for consideration is whether the Committee would like to flesh out, in any way, this section.

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[51] *Id*. (a) & (b).
[52] *Id*. cmt.
[53] *Id*. (c).
[54] 1 SCHOENBLUM, *supra* note 37, at 10.21[G][7].
[55] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 6 (a) & (b).
[56] *Id*.; 1 SCHOENBLUM, *supra* note 37, at 10.21[G][7].
[57] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 6 (d).
[58] 1 SCHOENBLUM, *supra* note 37, at 10.21[G][7], note 501.
[59] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 7.
[60] *See generally* 1 SCHOENBLUM, *supra* note 37, at 10.21[G][8].
[61] UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 8 (1971).
[62] *Id*. cmt.

Commentators have questioned whether the mere act of taking title to former community property as joint tenants with the right of survivorship is sufficient to create an inference that the parties agreed to sever their community interest.[63] It has been noted that some courts have found that similar arraignments created an implied severance, and "[n]othing in the Act precludes this inference."[64] Moreover, Florida law provides that "[t]he reinvestment of any property to which these sections apply in real property located in this state which is or becomes homestead property creates a conclusive presumption that the spouses have agreed to terminate the community property attribute of the property reinvested."[65] Should the revision be more directive in what does and does not constitute a severance or termination?

X. [Section 9] ***Testamentary Dispositions.*** Section 9 of the Act provides that "[t]his Act does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person." The content of this provision is not entirely clear, and no comments exist to aid in its interpretation. It is presumed that this provision means that "even if the Act recognizes a community property interest of a spouse that could ordinarily be disposed of by will, this disposition will not be allowed if the property is held in trust, joint tenancy, or similar valid testamentary substitute."[66]

XI. ***Outdated Language.*** Because the Act was approved in 1971, it contains some terms and phrases that are either outdated or inaccurate, some of which have been noted by Professors Boxx and Featherston. The Committee will need to pay particular attention to these matters during the drafting process.

[63] Welling, *supra*, note 10, at 559.
[64] *Id*.
[65] Fla. Stat. Ann. §732.225.
[66] 1 SCHOENBLUM, *supra* note 37, at 10.21[G][10].

D R A F T

FOR DISCUSSION ONLY

UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

SEPTEMBER 12, 2020 SESSION

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the drafting committee. They do not necessarily reflect the views of the Conference and its commissioners and the drafting committee and its members and reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

September 1, 2020

UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT

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UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT

Prefatory Note

The Uniform Disposition of Community Property Rights at Death Act (UDCPRDA) was approved by the Uniform Law Commission in 1971. The UDCPRDA established a system for non-community property states to address the treatment of community property acquired by spouses before they moved from a community property state to the non-community property state. According to the UDCPRDA, its purpose was "to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their 'community' rights." Unif. Disp. Comm. Prop. Rights Death Act, Pref. Note, at 3 (1971). As of 2020, 17 states have enacted the UDCPRDA. Five states enacted the UDCPRDA in the 1970s, shortly after its approval. Or. Rev. Stat. § 112.705; Hawaii Rev. Stat. § 510-21; Colo. Rev. Stat. Ann. § 15-20-101; Ky. Rev. Stat. § 391.210; Mich. Comp. L. Ann. § 557.261. Another nine estates enacted the UDCPRDA in the 1980s. N.C. Gen. Stat. § 31C-1; N.Y. Est. Powers & Trusts Law § 6-6.1; Ark. Code. Ann. § 28-12-101; Va. Code § 64.1-197; Alaska Stat. § 13.41.005; Wyo. Stat. § 2-7-720; Conn. Gen. Stat. Ann. § 45a-458; Colo. Rev. Stat. Ann. § 15-20-101; Mont. Code Ann. § 72-9-101. One state enacted it in the 1992, (Fla. Stat. Ann. § 732.21), and two states – Utah and Minnesota – enacted the UDCPRDA in 2012 and 2013, respectively. Utah Code § 75-2b-101; Minn. Stat. § 519A.01.

In its original form, the UDCPRDA offered substantial benefits for citizens in non-community property states that have adopted the act, namely the recognition and protection of property rights acquired in a community property state in which citizens were formerly domiciled. Today, this is more important than ever, as Americans are more mobile today than ever before. It is estimated that 7.5 million people moved one state to another in 2016. *State-to-State Migration Flows: 2016*, *available at* https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html. Undoubtedly, a significant subset of that 7.5 million involves Americans moving from one of the nine community property states to one of the forty-one non-community property states. As Americans migrate, the property previously acquired in a community property state "does not lose its character by virtue of a move to a common law state." *In re Marriage of Moore & Ferrie*, 18 Cal. Rptr. 2d 543 (Court of Appeal, First District, Division 2, 1993); *In re Kessler*, 203 N.E.2d 221 (Ohio 1964); *Commonwealth v. Terjen*, 90 S.E.2d 801 (Va. 1956). In fact, "once [property] rights are fixed, they cannot be constitutionally changed during the lifetime of the owner merely by moving the personalty across one or more state lines, regardless of whether there is or is not a change of domiciles." William Q. De Funiak, *Conflict of Laws in the Community Property Field*, 7 ARIZ. L. REV. 50, 51 (1966). The Prefatory Note to the UDCPRDA observes that this is both a matter of policy "and probably a matter of constitutional law." Unif. Disp. Comm. Prop. Rights Death Act, Pref. Note (1971).

Under traditional conflicts-of-law principles, the result is the same: a move from a community property state to a non-community property one does not change the nature of the property. Sarah N. Welling, *The Uniform Disposition of Community Property at Death Act*, 65 KY. L. J. 541, 545 (1977). The Restatement (Second) of Conflicts counsels that **"**[a] marital property interest in a chattel, or right embodied in a document, which has been acquired by either

or both of the spouses, is not affected by the mere removal of the chattel or document to a second state, whether or not this removal is accompanied by a change of domicile to the other state on the part of one or both of the spouses." RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 259 (1971). Nevertheless, the law in non-community property states on this matter is often unclear. The UDCRPDA provided a relatively simple solution that served to clarify an otherwise murky area of law.

Since its original promulgation in 1971, however, many changes in the law of marital property and in estate planning practice have occurred. The rise of the popularity of non-probate transfers and the recognition of same-sex marriage throughout the United State are just some of the significant changes in the law that could not have been foreseen or accounted for in the original UDCPRDA. Consequently, an update of the act is needed to accommodate these changes and others, as well as to reexamine some underlying policy choices made in the original act some fifty year ago.

This Uniform Recognition of Community Property Rights at Death Act (URCPRDA) revises and updates UDCPRDA. Like its predecessor, URCPRDA preserves the community property character of property acquired by spouses while domiciled in a community property jurisdiction, even after their move to a non-community property state. Unlike its predecessor, however, the URCPRDA broadens the applicability of the act, insofar as it preserves some rights that spouses would have had in the community property jurisdiction for certain bad faith acts or acts of mismanagement of community property by a spouse, whereas the UDCPRDA "only define[d] the dispositive rights, at death, of a married person as to his interests at death in property" subject to the act.

Section 3 sets forth the applicability of the URCPRDA and the property to which it applies, namely, only the property acquired by spouses while domiciled in a community property jurisdiction, as well as any rents, profits, issues, or traceable mutations of that property. Once spouses move to a non-community property state, their newly acquired marital property is governed by the law in that state.

Section 4 makes clear that if the spouses have partitioned their community property, the URCPRDA no longer applies to that property, as the spouses themselves have ended the community property classification of the property and mutually allocated to each other separate property interests that were previously held as community.

Section 5 assists courts and the parties in evidentiary matters of proof in applying the URCPRDA. Specifically, even if two spouses are married under a community regime in a community property state, they may still acquire separate property that is owned individually and is not part of their community regime. Community property states generally impose a presumption that all property acquired by either spouse during the existence of their community is presumed to be community, unless a spouse can demonstrate to the contrary. Section 5 adopts the same type of rebuttable presumption, such that a party asserting the applicability of this act would need to prove only that the property was acquired while domiciled in a community property jurisdiction and not that the property was acquired while domiciled in a community property jurisdiction and that the relevant property was not acquired separately. It was thought that any other rule might

make proof of application of the act too difficult, given the passage of time, the absence of records, and the fading of memories between the time when the property was originally acquired and the time of death of the decedent.

Section 6 is the heart of the act. It provides that upon the death of one spouse, half the property to which this act applies belongs to the decedent and the other half to the surviving spouse. This is the same result that would be achieved at the death of one spouse in a community property jurisdiction.

Section 7 is new and has no analogue in the UDCPRDA. It expands the applicability of this act to allow a court to adjudicate claims for certain bad faith actions by one spouse that might impair the rights of the other spouse with respect to property to which this act applies. One such example could be the unauthorized alienation of property to the prejudice of the other spouse. This section allows for a damage or equitable claim to be brought at the death of one spouse by the other or by his personal representative, provided a spouse's interest in property was prejudiced by the actions of the other spouse.

Section 8 provides limitations periods within which a party must act to preserve rights under this act.

Section 9 protects third persons who have transacted in good faith and for value. Otherwise, third persons could be subject to claims by a spouse under Section 7 if the spouse engages in some acts of bad faith management of community property while alive. Similarly, Section 8 may grant beneficiaries of the decedent or the surviving spouse of the decedent rights against third persons for unauthorized alienations. Section 9 ensures that in most instances, third persons will be protected from these claims.

UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Community Property Disposition at Death Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Domicile" means the jurisdiction in which the primary residence of an individual is located, under the law of this state other than this [act].

(2) "Jurisdiction" means the United States, a state, a foreign country, or a political subdivision of a foreign country.

(3) "Partition" means a voluntary division by spouses of property that either was community property or is treated as community property under this [act].

(4) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(5) "Spouse" means an individual who, under the law of a jurisdiction, is in a valid marriage or a valid domestic or registered partnership that is recognized as valid in this state.

(6) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

Comment

(1) *Domicile*. The definition of "domicile" is based upon the definition in the Restatement (Second) of Conflicts, which defines domicile as the place where a person "usually … has his home." Restatement (Second) of Conflicts § 11 cmt. (a). A person may reside in more than one place, but may have only one domicile. Restatement (Second) of Conflicts § 11(2) ("Every person has a domicil at all times and, at least for the same purpose, no person has more than one domicil at a time."). If an individual has multiple residences, that individual's domicle will be ascertained under the appropriate standards applicable in this state.

(2) *Jurisdiction*. The term "jurisdiction" is included in this act in order to ensure the applicability of this act to individuals who acquired community property in a foreign country.

(3) *Partition*. The term "partition" is defined to mean a severance or division by spouses of property that was community property or treated as community property. A partition may occur while the parties are domiciled in a community property state or after they move to a non-community property state. In the latter case, a partition can still occur irrespective of whether the property retains is community property character in the new state or is merely treated as community property for purposes of application of this act.

(4) *Person*. The definition of "person" is based upon the standard Uniform Law Commission definition.

(5) *Spouse*. The term "spouse" is defined expansively to include not only married persons, of either sex, but also partners in other arrangements, such as domestic or registered partnerships, under which community property may be acquired. *See, e.g.*, Cal. Fam Code § 297.5 (stating that domestic partners "have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses"); Nev. Rev. Stat. § 122A.200. The term also encompasses putative spouses. The putative spouse doctrine is a remedial doctrine recognized in many states that allows a person in good faith to enjoy community property and other civil effects of marriage, despite not being a party to a legally valid marriage. *See, e.g.*, Unif. Marriage & Div. Act § 209. Although few, if any, community property states recognize common law marriage, Texas does recognize "informal marriages" and thus parties to such an arrangement should also be included in the definition of a "spouse" under this act. *See, e.g.,* Tex. Fam. Code § 2.401.

(6) *State*. The definition of "state" is based upon the standard Uniform Law Commission definition.

SECTION 3. SCOPE This [act] applies to the following property of a spouse who formerly was domiciled in a jurisdiction where property could be acquired as community property, irrespective of how the property currently is titled or held:

(1) if a decedent is domiciled in this state at the time of death, all or a proportionate part of each item of personal property, wherever located, that was community property under the law of the jurisdiction where the decedent or the surviving spouse of the decedent was domiciled at the time of acquisition;

(2) whether or not a decedent is domiciled in this state at the time of death, all or a proportionate part of each item of real property located in this state that was community property

under the law of the jurisdiction where the decedent or the surviving spouse of the decedent was domiciled at the time of acquisition;

(3) income, rents, or profits, and appreciations or other increases, derived from property described in paragraph (1) and (2); and

(4) property traceable to property described in paragraph (1), (2), and (3).

Comment

This section makes the act applicable to spouses who were formerly domiciled in a community property jurisdiction. The term "jurisdiction" is used, rather than the narrower term "state," to be clear that this act would apply to a spouse who was domiciled in foreign jurisdictions where community property may be acquired. The term "formerly domiciled" is used to indicate that the act will be applicable whenever a spouse was domiciled at any time in the past in a community property jurisdiction, has acquired property there, and has moved to another jurisdiction. Thus, if A and B were married in state X (a community property state) and acquired property there, but then moved to state Y (a non-community property state) prior to moving again to state Z (also a non-community property state) where A eventually dies, state Z should apply this act to the property acquired by A and B in state X.

Under subsection (a), the act applies to all personal property that was originally classified as a community property by the state at the time in which it was acquired. The current location of the personal property is not relevant for application of this act. Thus, if A and B were married in state X (a community property state), acquired a car there, and eventually moved to state Z (a non-community property state) where A eventually dies, then the car would be subject to this act, even if the car was left in storage in state Y.

Under subsection (b), this act adopts the traditional situs rule for real estate and is made applicable to all real estate located in a state where this act has been adopted, irrespective of whether the party to whom the act applies is domiciled in the enacting state. Thus, if A and B, while domiciled in a state X (a community property state) acquire real estate with community funds in state Y (a non-community property state), but then move to state Z (also a non-community property state), where A eventually dies, then this act will apply to the real estate in state Y, assuming state Y has enacted this act. Whether or not state Z has enacted this act will be important in ascertaining how the personal property of A is distributed, but not in the disposition of the real estate, located in state Y.

Under both section (a) and (b), this act applies to "all or a proportionate part" of property that was acquired with community property. In other words, when an asset is acquired partly with community property and partly with separate property, at least some portion of the property should be characterized as community property. The issue of apportionment and commingling, however, is a complex one with many state variations applicable to different types of assets.

In some community property states, an "inception of title" theory is used, such that the characterization of the property is dependent upon the characterization of the right at the time of acquisition. For example, a house acquired in a credit sale before marriage would remain separate property under an "inception of title" theory even if the vast majority of the payments were made after marriage and with community funds. In this instance, the community would have a claim for reimbursement for the amount of funds expended for the separate property of the acquiring spouse. Section 7 of this act accommodates reimbursement claims, if such a claim would be appropriate under the law of the relevant jurisdiction. In other jurisdictions, a "pro rata" approach is employed, which provides for a combination of community and separate ownership based in proportion to the payments contributed by either the community or the spouses separately. The act accommodates this approach by not requiring an "all or nothing" classification of community property. Rather, the act is applicable when "all or the proportionate part" of property would be community property according to the law of a jurisdiction in which the spouse was formerly domiciled at the time of acquisition.

Even among states that employ a "pro rata" approach, there is considerable variation for how the apportionment is made. As the comments in the prior act stated, "[a]ttempts at defining the various types of situations which could arise and the varying approaches which could be taken, depending upon the state, suggest that the matter simply be left to court decision as to what portion would, under applicable choice of law rules, be treated as community property." The UDCRPDA follows the same approach. Thus, if A acquires $100,000 of life insurance, pays five of the monthly $1000 premiums from funds prior to marriage, pays 10 of the premiums with community property after marrying B, and pays 10 more premiums (before dying) from earnings acquired by B after A and B move to a non-community property state, then some portion of the life insurance policy should be considered community property, if the law of the community property state so treated it. This act leaves discretion to the courts as to how the apportionment is made.

Under subsection (c), income, rents, or profits derived from community property are also subject to this act, as well as appreciations or other increases in community property. This section should be read to include net income, rather than gross income, from community property, as well as things produced from community property (i.e., "appreciations and other increases"), even if not technically revenue producing. Thus, if a $500,000 house were purchased completely with community funds and increased in value to $700,000 after spouses moved to a non-community property state, then the entire house, not merely $500,000 in value, is classified as community property. Similarly, crops produced from a community property farm and foal produced from a horse that is owned as community property are also considered to be community property.

Subsection (c) also applies not only income, rents, and profits from community property produced prior to moving to a non-community property jurisdiction, but also after the move. Indeed, in the former case, such a rule would be unnecessary as all community property states already characterize income, rents, or profits derived from, as well as appreciations or other increases in, community property as community property. The rule is subsection (c), however, is necessary to be clear that even after spouses move to a non-community property state, the incomes, rents, and profits produced by community property acquired prior to the move are still community property after the move to a non-community property state. Thus, interest produced

from a community property savings account is still community property after A and B move from state X (a community property state) to state Z (a non-community property state), irrespective of the location of the account.

Under subsection (d), this act also applies to any property that is a traceable to property in subsections (a) or (b). Simply stated, property is "traceable" to community property if the property changes form without changing character. WILLIAM A. REPPY, CYNTHIA A. SAMUEL, AND SALLY BROWN RICHARDSON, COMMUNITY PROPERTY IN THE UNITED STATES 161 (2015) (quoting W. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 134 (1964)). By way of illustration, if after moving from a state X (a community property state) to state Z (a non-community property state), A and B transfer money from a community property bank account opened in state X to a bank in their new domicile, state Z, then the bank account in state Z is subject to this act because it is traceable to community property. Similarly, if A and B are married in state X (a community property state), open a bank account there funded solely with community property and buy a car with that money after moving to state Y (a non-community property state), then the car would still be subject to this act because it is traceable to community property. The same result would obtain even if A and B moved again from state Y to state Z (another non-community property state) and exchanged their prior car for a new one in state Z. The new car would still be subject to this act because it is traceable to the community property originally acquired in state X.

SECTION 4. EXCLUDED PROPERTY; EFFECT OF PARTITION OR WAIVER.

(a) This [act] does not:

(1) apply to property that has been partitioned between spouses;

(2) prevent the partition of property to which this [act] would otherwise apply; or

(3) affect an agreement waiving rights granted by this [act].

(b) A unilateral act by a spouse of holding property in a form, including a revocable trust, that allows for its payment or transfer on death to a third person is not a partition of the property or an agreement waiving rights granted under this [act]. Holding property to which this [act] applies in a form, including a revocable trust, that allows for its payment or transfer on death to the surviving spouse of the decedent is presumed to be a partition of the property or an agreement waiving rights granted under this [act]. The presumption may be rebutted by clear and convincing evidence.

Comment

If parties have partitioned previously-acquired community property after moving to a non-community property state, this act would not apply to any such property owned by the decedent at death. The term "partition" is defined in Section 2 of this act as "a voluntary severance or division by spouses of property that either was community property or was treated as community property."

The mere taking of title to property that was previously acquired as community property in the form of a transfer-on-death deed, does not operate as a partition or waiver. For example, if after moving from a community property state to a non-community property state, A retitles a community property bank account owned with B into a bank account in A's name exclusively with a pay-on-death designation to C, the retitling of former community property in the exclusive name of "A, pay-on-death, C" does not constitute a partition, unless it can be shown that B agreed voluntarily to sever B's interest in the property. For a partition to occur, both spouses must agree to the severance of their community property interests. Whether there was an agreement between the spouses to sever their community interests is a factual matter to be ascertained by the courts.

On the other hand, this act presumptively does not apply to property titled in the name of "A, pay on death, B," even if it can be shown that the property was community property. The designation of a spouse as a beneficiary of the property on the death of the other spouse creates a strong presumption that the spouses agreed to retitle the property and voluntarily sever their community interests.

SECTION 5. REBUTTABLE PRESUMPTION. Property acquired by a spouse when domiciled in a jurisdiction where property could then be acquired by the spouse as community property is presumed to be community property. The presumption may be rebutted by a preponderance of the evidence.

Comment

This section adopts a blanket presumption in favor of treating all property acquired by a spouse while domiciled in a community property jurisdiction as community property, provided, of course, that the laws of the community property state allowed community property to "then be acquired by that person." In other words, the presumption applies only to those persons who could acquire community property under the laws of the relevant jurisdiction. Consequently, the presumption does not apply to unmarried individuals or to those who have opted out of the community regime even if they acquire property while domiciled in a community property jurisdiction, as those individuals could not then acquire community property in that jurisdiction.

Although stated in various ways, the blanket presumption of this section is common in community property jurisdictions. *See, e.g.*, N.M. Stat. Ann. § 40-3-12(A) ("Property acquired

during marriage by either husband or wife, or both, is presumed to be community property."); Wisc. Stat. § 766.31(2) ("All property of spouse is presumed to be marital property."); Tex. Fam. Code § 3.003(a) ("Property possessed by either spouse during or on dissolution of marriage is presumed to be community property"); La. Civ. Code art. 2340 ("Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove they are separate property."); Cal. Fam. Code § 760; Unif. Marital Prop. Act. § 4(a) ("All property of spouses is marital property except that which is classified otherwise by this Act.").

Despite the above presumption, a party may prove that the relevant property was separate, even though acquired during the existence of a community regime, such as by demonstrating that the property was acquired by inheritance. Although different community property states provide different standards for rebutting the relevant presumption of community property, this act adopts a preponderance standard for rebutting the presumption, as have a number of community property states. *See, e.g., Marriage of Ettefagh*, 59 Cal. Rptr. 3rd 419 (Cal. App. 2007); *Talbot v. Talbot*, 864 So. 2d 590 (La. 2003); *Brandt v. Brandt*, 427 N.W. 2d 126 (Wisc. App. 1988); *Sanchez v. Sanchez*, 748 P.2d 21 (N.M. App. 1987); *But see* Tex. Fam. Code § 3.03(b) ("The degree of proof necessary to establish that property is separate property is clear and convincing evidence."); *Reed v. Reed*, 44 P.3d 1100 (Idaho 2002) (requiring "reasonable certainty and particularity" to rebut the presumption).

Unlike the prior version of this act, this act does not impose a presumption against the applicability of this act for property acquired in a non-community property state and held in a form that creates rights of survivorship. Taking title to property in various forms is often a unilateral act that should not by itself serve as a presumption of partition of interests in a community asset. After all, a spouse may move to non-community property state and open a bank account with a pay-on-death designation to a friend or a sibling. Such an account should not be presumed to be excluded from this applicability of this act, as the relevant account may have been funded with community property acquired prior to the move. The ultimate treatment of the relevant account will depend upon whether it can be proved that the money in the account was traceable to community property.

SECTION 6. DISPOSITION OF PROPERTY RIGHTS UPON DEATH.

(a) Except as otherwise provided in subsection (b), one-half of the property to which this [act] applies belongs to the surviving spouse of the decedent and is not subject to disposition by the decedent at death.

(b) If, at death, the decedent purports to dispose of property belonging to the surviving spouse to a third person and disposes of other property to the surviving spouse, the court may require the surviving spouse to elect between retaining the disposition to the surviving spouse or

asserting rights under this [act].

(c) One-half of the property to which this [act] applies belongs to the decedent and is subject to disposition by the decedent at death. The property that belongs to the decedent is not subject to elective-share rights of the surviving spouse. This section does not limit the rights of a surviving spouse to a [homestead, exempt property, or family] allowance.

Legislative Note: *A state should substitute the state's surviving spouse appropriate statutory allowances in the bracketed language in subsection (c).*

Comment

Under subsection (a), at the death of one spouse, one-half the property to which this act applies belongs to the surviving spouse. This is universal approach of community property states. As a result, the decedent cannot dispose of the property belonging to the surviving spouse by will or intestate succession. An attempt to do so would be ineffective.

If, however, the decedent disposes of property subject to this act by non-probate transfer in favor of the third person, Section 7, rather than this section, would apply. In other words, this act, like community property states, provides that reimbursement or equitable claims may be available to a surviving spouse when a decedent improperly alienates the interest of a spouse by means of a non-probate transfer. *See, e.g., T.L. James & Co. v. Montgomery*, 332 So. 2d 834 (La. 1975). If, however, the decedent disposes of property subject to this act by non-probate transfer in favor of the surviving spouse, a partition of that property is presumed under Section 4 of this act.

If the decedent disposes of the decedent's share of property under this act but transfers other property to the surviving spouse, a court may require the surviving spouse to make an equitable election to retain the disposition from the decedent or assert rights under this act.

Under subsection (b), at the death of one spouse, one-half the property to which this act applies belongs to the decedent. Again, this is universal approach of community property states. As a result, the decedent can dispose of that property by any probate or non-probate mechanism. Elective share rights that are common in non-community property states do not apply in community property states, at least not with respect to community property in those states. Consequently, a surviving spouse does not have elective share rights against the decedent's share of the property under this act. Subsection (b), however, does not limit a surviving spouse's claim for other statutory allowances, such as homestead allowances, allowances for exempt property, and family allowances. See, e.g., UPC §§ 2-402, 2-403, and 2-404.

In addition, this section provides that one-half of the property covered by this act is included in the decedent's intestate estate. Assuming a decedent dies intestate, this act will likely result in half the property subject to this act belonging to the surviving spouse, whereas the

intestate law of most states awards to the surviving spouse a lump sum plus at least one half of the remainder of the property to which this act does not apply.

By way of illustration of this section, assume A and B were formerly domiciled in state X (a community property jurisdiction) where all their property was community property, and have subsequently moved to a state Y (a non-community property state). Upon moving to state Y, A and B acquired a home in state Z (also a non-community property jurisdiction), titled solely in B's name but with funds from the proceeds of the sale of the home in state X. A and B also acquired stock while domiciled in state X, but held it in safety deposit boxes located in states U and V (two other non-community property states). A and B also retained a summer house in state X, which they acquired while domiciled there and which was titled solely in B's name. A and B also acquired real property in state Z for investment purposes and held title as tenants by the entireties. Finally, B acquired bonds held in B's name issued by the company that employed B and acquired with earnings from B's job.

At B's death, the home in state Z and the stock located in states U and V would be property subject this act, and consequently, B would have the right under this section to dispose of half. The home retained in state X would be community property under the law of state X, but this act applies only to real property located in the adopting state. Because the investment property located in state Z was held as tenants by the entireties, it is strongly presumed that A and B partitioned that property and thus made this act inapplicable to that asset. Finally, the bonds held in B's name would not be subject to this act because they were acquired with property earned and acquired in state Z, a non-community property state.

SECTION 7. OTHER LEGAL AND EQUITABLE REMEDIES AVAILABLE AT DEATH. With respect to property to which this [act] applies, at the death of the decedent, the personal representative of the decedent or the surviving spouse may bring an action for legal or equitable relief if the action:

(1) arises out of an:

(A) act of the surviving spouse or decedent during the marriage; or

(B) act of the decedent which takes effect at the death of the decedent; and

(2) could have been brought under the law of the jurisdiction where the decedent or the surviving spouse was domiciled at the time of the act under paragraph (1).

Comment

This section confirms that comparable legal and equitable remedies that would be available to protect a spouse in a community property jurisdiction remain available at death in a non-community property state under this act. Two remedies often provided by community property jurisdictions are claims for reimbursement and monetary claims against a spouse for marital waste, fraud, or bad faith management.

Claims for reimbursement are commonly available when community property has been used to satisfy a separate obligation or when separate property has been used to improve community property or vice versa, *see, e.g*., La. Civ. Code art. 2364, 2366, and 2367; Cal. Fam. Code § 2640. Different community property states calculate the amount of reimbursement differently. *See, e.g., Hiatt v. Hiatt*, 487 P.2d 1121 (Idaho 1971) (awarding reimbursement based upon the enhanced value of the property even if it exceeds the amount spent); *Portillo v. Shappie*, 636 P.2d 878 (N.M. 1981) (assessing reimbursement based upon the enhanced value of the improved property even if it exceeds the amount of money expended); La. Civ. Code art. 2366 (providing for reimbursement based upon the amount expended); *Marriage of Sedlock*, 849 P.2d 1243 (Wash. App. 1993) (awarding reimbursement based upon the amount spent); Estate of *Kobyliski v. Hellstern*, 503 N.W.2d 369 (Wis. App. 1993) (assessing reimbursement based upon the greater of the amount spent or the value added). This section grants courts flexibility in assessing the amount of the reimbursement.

Different community property states also provide different remedies to a spouse whose community property interest has been unduly impaired by another spouse with authority to manage or alienate community property. In California, for example, a court may award a defrauded spouse a percentage interest or an amount equal to a percentage interest in any asset transferred in breach of a spouse's fiduciary duty. Cal. Fam. Code § 1101. In Texas, the doctrine of "fraud on the community" protects one spouse when the other wrongfully depletes community property through actual or constructive fraud by allowing a court to allocate other property to the defrauded spouse through any legal or equitable remedy necessary, including a money judgment or a constructive trust. See, e.g., Tex. Fam. Code § 7.009; *see also Osuna v. Quintana*, 993 S.W.2d 201 (Tex. Ct. App. Corpus Christi 1999) ("The breach of a legal or equitable duty which violates the fiduciary relationship existing between spouses is termed 'fraud on the community,' a judicially created concept based on the theory of constructive fraud."). In Louisiana, a spouse may be awarded damages when the other spouse acted fraudulently or in bad faith. See La. Civ. Code art. 2354 ("A spouse is liable for any loss or damage caused by fraud or bad faith in the management of the community property."). In addition to damages and equitable relief, some community property states statutorily grant courts authority to add the name of a spouse to a community asset titled solely in the name of the other spouse in order to protect the interest of the previously unnamed spouse. See, e.g., Cal. Fam. Code § 1101 (c); Wisc. Stat. § 766.70(3). This section provides the court with broad authority to grant damages or to craft any other appropriate equitable remedy necessary to protect a spouse.

The rights granted by this section are operable at the death of an individual and may not be asserted during the existence of the marriage. This approach is consistent with the law of various community property jurisdictions. See, e.g., La. Civ. Code art. 2358 ("A claim for

reimbursement may be asserted only after termination of the community property regime, unless otherwise provided by law."). *But see* Uniform Marital Property Act § 13 (allowing claims for breach of the duty of good faith and for an accounting to be brought by spouses during an ongoing marriage). The relief sought under this section may, however, be for actions of a spouse taken either during life or that take effect at death. For instance, a spouse may use community funds to augment a separate property asset. Moreover, a spouse during the marriage have inappropriately donated property to a third person. Similarly, at the death of the decedent, the decedent may have inappropriately transferred property belonging to the surviving spouse to a third person by non-probate transfer. Although community property states generally enforce such transfers, they correspondingly grant a claim for damages, recovery, or reimbursement to the surviving spouse. Of course, the application of this section must yield when appropriate to federal law. See, e.g., Employment Retirement Security Act, 29 U.S.C. Section 1001 et seq.; *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding that ERISA pre-empted state community property law and remedies, even though the relevant ERISA-governed retirement plan was funded with community property).

Although most instances of application of this section will involve monetary claims against by one spouse against another, this section does preserve other "equitable relief," which may involve recognition of rights against third persons to whom property has been transferred by one spouse without authorization of the other. Equitable doctrines, such as a "constructive trust," are common remedies used by courts to protect the interest of a spouse. This section, however, must be read in conjunction with Section 9 of this act, which protects good faith transferees of property from one spouse who give value. Thus, good faith transferees for value will be protected by Section 9 of this act, such that a spouse's claim for bad faith management would solely be cognizable against the other spouse. If, however, one spouse improperly donates or transfers to a third person who is not in good faith property to which this act applies, equitable relief may, in the discretion of the court, be available to the spouse whose rights are impaired. After all, improper gifts of community property by one spouse are generally voidable as against a third person in community property jurisdictions. *See, e.g., Polk v. Polk*, 39 Cal. Rptr. 824 (App. 1964); Wisc. Stat. § 766.70; La. Civ. Code art. 2353; *Mezey v. Fioramonti*, 65 P.2d 980 (Ariz. App. 2003); Uniform Marital Property Act § 6(b).

SECTION 8. RIGHTS OF SURVIVING SPOUSE, HEIRS, BENEFICIARIES, AND CREDITOR.

(a) In this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(b) A surviving spouse may send a demand in a record to a personal representative of the decedent asserting a right under this [act]. The demand must be sent not later than six months after the appointment of a personal representative. If the spouse does not send the demand, the

personal representative does not have a duty to apply this [act].

(c) An heir, beneficiary, or creditor of the decedent may send a demand in a record to a personal representative of the decedent asserting a right under this [act]. The demand must be sent not later than six months after the appointment of a personal representative.

(d) The following actions asserting a right under this [act] must be brought not later than three years after the death of the decedent:

(1) an action by a surviving spouse against an heir, beneficiary, or transferee of the decedent; and.

(2) an action by an heir, beneficiary, or creditor against the surviving spouse.

Comment

Subsection (a) of this section allows a surviving spouse to protect rights under this act and provides a statute of limitation for doing so. Namely, a surviving spouse must institute an action against the successors of the decedent within three years of the date of death of the decedent. Although not required, a surviving spouse may also file a written demand with the personal representative of the decedent. Unless the surviving spouse does so within six months of the opening of decedent's estate, the personal representative has no fiduciary duty to investigate or to attempt to ascertain whether this act applies to any property owned by the decedent.

Subsection (b) of this section allows the personal representative, an heir, or a beneficiary of the decedent to protect rights under this act and provides a statute of limitation for doing so. Namely, an action must be instituted against the surviving spouse within three years of the date of death of the decedent. Although not required, the heirs, beneficiaries or creditors of the decedent may attempt to protect their interests by filing a written demand with the personal representative of the decedent within six months of the opening of decedent's estate. Unlike in subsection (a) of this section, the personal representative of the decedent has an obligation to attempt to ascertain whether the decedent has property rights that should be protected under this act. See, e.g., Unif. Prob. Code §§ 3-703 (general duties) & 3-706 (duty to prepare an inventory).

The time periods provided in this section are generally borrowed from other areas of law. Specifically, a six-month period is not an uncommon period for a non-claim statute for creditors and the three-year period is adapted from claims challenging revocable trusts and for contesting nonprobated wills. See Unif. Trust Code § 604; Unif. Prob. Code § 3-109.

SECTION 9. PROTECTION OF THIRD PERSON.

(a) A person is not liable under this [act] to the extent the person, with respect to property to which this act applies:

(1) transacts, in good faith and for value:

(A) with a spouse; or

(B) after the death of the decedent, with a surviving spouse, personal representative, heir, or beneficiary; and

(2) does not know that the other party to the transaction is exceeding or improperly exercising the party's authority.

(b) Good faith under subsection (a) does not require a person to inquire into the extent of propriety of the exercise of authority by the other party to the transaction.

Comment

This section is based upon Section 1012 of the Uniform Trust Code. Like the Uniform Trust Code, this section does not define "good faith." It does, however, require that a third person not have actual knowledge that the other party to the transaction is acting without authority with respect to property to which this act applies. Moreover, this section makes clear that a person dealing with another party is not charged with a duty to inquire as to the extent of the property of the exercise of the purported power or authority of that party. This section, like the Uniform Trust Code, acknowledges that a definition of good faith that is consistent with a state's commercial statutes would be consistent with the purpose of this section. This section should be read in conjunction with Section 7 of this act, which provides that courts retain the ability at the death of one spouse to grant equitable relief to the other for actions that have impaired rights granted by this act.

This section protects third persons in two different situations. First, during life, both spouses may engage in a variety of transactions with third parties concerning the property to which this act applies. This section protects third persons who deal with either spouse concerning property to which this act applies, provided the third person gives value, is in good faith, and does not have knowledge that the spouse who is a party to the transaction is improperly exercising authority over property. Although third persons are ordinarily allowed to deal with a spouse who has apparent title concerning a martial asset during the existence of the marriage, no good reason could be found for protecting bad faith third parties with knowledge of the commission of fraud on the rights of the other spouse. For example, if A retitles community property belonging partly to B solely in A's name and sells it to C, C is protected from any claim

by A with respect to the property because C gave value and provided C is in good faith and does not know that A improperly transferred property belonging to B. To the extent B has a cognizable claim under Section 7 of this act, it will be solely against A, not C. On the other hand, if A donated a community asset to C, C would not be protected by this section and B's claim under Section 7 of this act could be cognizable against A or C or both.

Second, this section also applies after the death of a decedent. Section 8 of this act provides relevant time periods within which a surviving spouse may assert rights against a personal representative of the decedent, as well as heirs or transferees of the decedent. Similarly, it also provides relevant time periods within which the heirs, beneficiaries, or creditors of the decedent may assert rights against the surviving spouse or the personal representative of the decedent. This section protects third persons who transact with those relevant parties in possession of apparent title to property, provided the third person gives value, is in good faith, and is without knowledge that the other party to the transaction is improperly exercising authority. For example, if after A's death, A's surviving spouse, B, sells Blackacre, which is titled solely in B's name, to C, C will be protected from liability under this section, even if Blackacre was subject to this act because it was traceable to community property, provided, of course, C was in good faith and without knowledge that B was exceeding his authority.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c) or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

[SECTION 12. REPEAL. The [Uniform Disposition of Community Property Rights at Death Act] is repealed.]

Legislative Note: *A state should repeal its existing Uniform Disposition of Community Property Rights at Death Act, or comparable legislation, to be replaced by this act.*

Comment

This section repeals the adopting State's present Uniform Disposition of Community Property Rights at Death Act. The effective date of this Section should be the same date selected by the state in Section 12 for the application of this act.

SECTION 13. EFFECTIVE DATE. This [act] takes effect…