Property Division at Divorce or Death for Married Couples Migrating Between Common Law and Community Property States

by Kenneth W. Kingma
*St. Louis, Missouri**

Editor's Synopsis: This article identifies and explores the property disposition issues that can arise upon dissolution of marriage or death of a spouse when a married couple has resided in more than one state. As explained in the article, particularly difficult problems may exist when the couple has migrated from a common law state to a community property state or vice versa. Accompanying the article are Appendix A and Appendix B which illustrate how property acquired in a common law jurisdiction will be disposed of in each of the community property states upon divorce or death of a spouse.

Introduction

In today's mobile society an individual may live and work in many states over the span of a career. The individual may initially live in one state and acquire property there as a single person, then move to another state, get married, and acquire property there, and subsequently move with his or her family to one or more other states and acquire property in each of those states. If death or divorce occurs, an estate planner may be called upon to assist in determining the following:

- The property rights of each spouse with respect to property acquired in each state;
- Whether any spousal agreements exist that may affect property rights; and
- Whether the law of the state where a dissolution or probate proceeding is pending will modify property rights as a result of death or divorce.

This determination will be made more difficult when married couples have migrated between common law and community property states because of the differences between the common law property system and the community property system.[1] An estate planner, in that event, will have to delve into both property systems, the differences of which can seem like two worlds colliding. But even though some trepidation may set in when the planner engages both systems, the planner will soon determine that each system deals in some fashion with the other system in connection with the division of property upon divorce or death of spouses who acquired property while domiciled in one system prior to migrating to the other system.

When the estate planner engages both property systems, the planner will also discover that one property system may, in connection with dissolution of marriage or probate proceedings, alter the ownership rights of property acquired under the other property system. In that event, the planner may question whether there is an unconstitutional taking of property or a violation of some other constitutional right.

This article addresses the approaches taken by common law and community property states in dealing with property brought into those states by migrating spouses. This article also addresses the issue whether state modification of property rights of migrating spouses upon divorce or death results in an unconstitutional taking of property.

Property Systems in the United States

Two property systems in the United States deal with marital property (or property acquired by either spouse during coverture[2])—the common law property

[1] For instance, the estate planner may have to consider the following for clients owning community property: (i) legal principles employed to determine source of assets; (ii) the affect of title on asset classification; and (iii) presumptions and rules when source of assets cannot be traced. Jerry A. Kasner and Alvin J. Golden, *An Overview of Community Property Law* C-5 (ACTEC Annual Meeting, March 2-7, 1999).

[2] Frank L. Spring, *In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage*, 9 N.M. L. REV. 113, 113 (Winter 1978-79). The term "coverture" is defined as the condition of being a married woman. Black's Law Dictionary 373 (7th ed. 2003). Under former law, the condition of a woman under coverture was that she could sue only through the personality of her husband. *Id.*

system and the community property system.[3] Under the common law property system originating in the common law of England,[4] the ownership of property acquired during marriage is determined through evidence of title and possession.[5] When a marriage terminates at divorce or death in a common law jurisdiction, the spouses' joint economic contribution to marriage is recognized by statutorily-imposed "sharing provisions."[6] Those sharing provisions are applicable to property acquired during marriage that may be owned jointly or individually.[7]

On the other hand, the community property system, which was brought to America by the Spanish and French[8] and is recognized in a minority of jurisdictions,[9] initially provided an automatic right of co-ownership between spouses in any property acquired through the labor and industry of either spouse during marriage.[10] Upon termination of a marriage in a community property system at divorce or death, the joint economic contribution to marriage is recognized through this right of co-ownership.[11]

Estate Planning Upon Migration

When married couples plan to migrate from a common law jurisdiction to a community property jurisdiction or vice versa, or they plan to migrate between common law jurisdictions[12] or community property jurisdictions,[13] they should engage in estate planning at the time of migration. Planning is impor-

[3] Merrie Chappell, *A Uniform Resolution to the Problem a Migrating Spouse Encounters at Divorce and Death*, 28 IDAHO L. REV. 993, 993 (1992).

[4] Chappell, *supra* n. 3, at 993.

[5] Under the common law system of marital property, spouses separately own the property each acquires, unless they agree otherwise. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS AND ESTATES, 369-70 (4th ed. 1990).

[6] Examples of statutorily-imposed sharing provisions upon divorce are equitable distribution and alimony statutes. Examples of such provisions upon death are elective or forced share statutes. Chappell, *supra* note 3, at 993.

[7] See the discussion below regarding equitable distribution in common law states under the all-property method or dual classification method of dividing property. *See* text accompanying nn. 39 through 53, *infra*.

[8] 4 THOMAS A. JACOBS, ARIZONA PRACTICE—COMMUNITY PROPERTY LAW § 1.1 (3rd ed. 2004). Community property brought to America by the Spanish and French originated with the Germanic tribes. *Id.* "So while the development of community property has been equated with the emancipation of women, historically it originated among what have been considered more primitive cultures where the wife actively shared the daily perils and struggles as well the gains from such struggles." *Id.*

[9] There are eight traditional community property jurisdictions in the United States (Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas and Washington), two of which (California and Texas) are among the three most populous states in the country. Wisconsin adopted the Uniform Marital Property Act effective January 1, 1986, which essentially created a community property system. Alaska has an "opt-in" community property system (designed primarily to achieve a new basis at death) that may or may not be treated as a community property for federal tax purposes. *Accord*, Alvin J. Golden, *Planning for Retirement Benefits: Troublesome Issues—Community Property*, 43 Heckerling Institute On Estate Planning (Special Session IV-A 2009); JACOBS, *supra* n. 8, at § 1.2; DAVID WESTFALL & GEORGE MAIR, ESTATE PLANNING LAW AND TAXATION §§ 4.01 and 4.06 (2009) (stating that the elective feature of the Alaska act makes it doubtful that the act will have the effect of creating community property for federal tax purposes); and BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 1.3 (3rd ed. 2005) (noting that Louisiana derived its law from the French while the remaining seven traditional community property states were former Mexican colonies that derived their law from Spain).

[10] WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 19 (2d ed. 1971). *See also* JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING § 3.23 (2d ed. 2000) ("Community property states all treat a husband and wife as partners who are presumed to own equal one-half interest in property acquired during marriage.") and JACOBS, *supra* n. 8, at §§ 1.4, 2.4 and 2.5 (acknowledging the double ownership theory as the predominant theory of community property ownership in the United States). Approximately 40 years ago, a husband generally had greater managerial powers over community property than his wife, but sweeping legislative changes made in the 1970s gave each spouse essentially the same powers to manage and control community property. PRICE, *supra*, at § 3.23.

[11] Spring, *supra* note 2, at 115. According to TURNER, *supra* n. 9, at § 2.5:

> "It is extremely important to understand that community property is more than a system for dividing property upon divorce; it is also a system for dividing property upon death and a system for determining ownership of property during the marriage. This fact has immense significance, for these three goals of community property law sometimes conflict."

For instance, by adopting an inception of title rule, third party creditors are able to determine at any time whether an asset is community property and each spouse's ownership interest in that property. However, a spouse's important post-inception contributions to the property are sometimes undervalued by that system, due to the presumption that spouses contribute equally to the community. *See* the text accompanying n. 51, *infra*.

[12] Some common law jurisdictions have tenancy by the entirety property and some do not, so planning is important here.

[13] In Idaho, Louisiana, Texas and Wisconsin the income from separate property is community property, while in the other community property jurisdictions income from separate property is separate property, so planning is important when spouses migrate between community property jurisdictions. PRICE, *supra* n. 10, at § 3.28.3; JACOBS, *supra* n. 8, at § 3.5.

tant in that instance because property rights and tax consequences are affected by the characterization of property as separate, community or marital property.

Step-Up/Step-Down in Basis Planning

It is typical for married couples who migrate to or between community property jurisdictions to change or confirm the character of property by agreement, conveyance, or partition, especially when they know the initial character of that property.[14] If they do not know the character of property they own, they can simply enter into an agreement to specify their respective interests in such property.[15] Interspousal agreements, though, have tax consequences as well as ethical issues when an estate planner represents both spouses.[16]

For example, if a married couple migrates from a common law state to a community property state and brings with them property that is titled jointly between them as tenants in common, joint tenants, or tenants by the entirety, they might be willing to forego certain benefits associated with each type of ownership by treating such property as community property in order to obtain a step-up in basis for the entire community property at the first spouse's death. Conversely, if any property acquired or converted into community property declines in value, the couple may wish to avoid a step-down in basis for the entire property upon the death of the first spouse by entering into an agreement in which they agree to convert or transmute such property into undivided interests of separate property (*e.g.,* tenancy in common or a true joint tenancy), to the extent local law permits such separate property.[17] Alternatively, they may agree to treat all of such property as the separate property of one spouse. This action could also be taken if the couple intends to migrate from a community property state to a common law state.[18]

Furthermore, if a married couple migrates from a common law state to a community property state, or from one community property state to another, and at least one spouse brings separate property into the new state of domicile, the estate planner should advise the couple as to whether the income of the separate property will be treated as separate property or community property following the move. For example, in Idaho, Louisiana, Texas and Wisconsin, the income of separate property will be community property unless the spouses agree in writing that part or all of such income will also be the separate property of the owner spouse.[19]

When the income of separate property is treated as community property, a question exists as to whether the non-owner spouse has a retained income interest that will cause the value of such property to be included in his or her gross estate under section 2036 of the Internal Revenue Code of 1986. That question was resolved under Texas law, where the non-owner spouse's interest in that income was determined to be a mere expectancy that did not rise to the level of a retained right under section 2036.[20]

Revocable Trust Planning

Married couples often use revocable trusts for estate planning and probate avoidance purposes. In common law states, each spouse may have a revocable trust, but, as the federal estate tax applicable exclusion amount has increased over the years, spous-

[14] PRICE, *supra* note 10, at § 3.24, § 3.29 (discussing California, Nevada, Washington, Wisconsin and Texas) and § 3.29A (Supp. 2006) (discussing non-pro rata division agreements in California and Washington). *See also* Thomas M. Featherstone, Jr. and Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 321-22 (1997) (discussing, among other states, Arizona and New Mexico).

[15] PRICE, *supra* note 10, at § 3.24.

[16] *Id.*

[17] *Id.*

[18] If the couple does not convert community property into separate property, they should determine with their estate planner whether community property will be treated as such in the common law state to which they will be moving. For example, fourteen common law states have adopted the Uniform Disposition of Community Property Rights at Death Act and thereby recognize community property upon the death of a spouse. *See* text accompanying nn. 89-95, *infra*. Case law in some of the other common law states generally provides that movable community property brought to a common law state will be treated as community property upon the death of a spouse, and that spousal rights in community property funds used to purchase real property in a common law state will continue in the property purchased and will be protected, if necessary, at the death of a spouse by a court-imposed trust. *See* Rev. Rul. 72-443, 1972-2 C.B. 531, and the treatises and cases cited there. *See also* Price, *supra* n. 10, at §3.36.

[19] PRICE, *supra* n. 10, at § 3.28.3; WESTFALL & MAIR, *supra* n. 9, at § 4.06 (agreements that make income from separate property the separate property of the owner spouse are permitted in those states by TEX. CONST. ART. XVI, § 15; TEX. FAM. CODE § 4.103; IDAHO CODE § 32-906(1); LA. CIV. CODE ANN. ART. 2339; and WIS. STAT. § 755.31.)

[20] Estate of Wyly v. Commissioner, 610 F.2d 1282 (5th Cir. 1980) (holding that the non-owner spouse's income interest does not rise to the level of a retained "right" under section 2036 because, under Texas law, the interest is a mere expectancy and is not a general community interest subject to joint management and control); Rev. Rul. 81-221, 1981-2 C.B. 178. Given that the law in Idaho, Louisiana and Wisconsin is similar to Texas law in this regard, a similar result should also be attainable in those states.

es in common law states are using joint trusts with more frequency. In community property states, joint revocable trusts are the norm and are drafted in a manner that will not destroy the character of community property held in trust. Thus, if a married couple lives in a common law state and each spouse has a revocable trust, that couple should consider a joint revocable trust upon migrating to a community property jurisdiction.

Regarding married couples living in community property states, Rev. Rul. 68-283[21] continues to set the standard for preparing joint revocable trusts. Based on that ruling, certain commentators advise that a joint revocable trust for a married couple living in a community property state should (i) usually grant the power to revoke to either spouse but require joint consent for amendments; (ii) provide that any community property transferred to it will retain its community status and that community assets withdrawn will be treated as community property; and (iii) deal with management rights to and upon the withdrawal of assets when state law permits other than joint management.[22]

If a trust is not properly prepared for spouses in a community property jurisdiction, substantial issues may arise as to whether the spouses have retained their community property rights or have somehow transmuted property into the separate property of either spouse.[23] A case on point is *Katz v. United States*,[24] where a husband and wife transferred community property to a revocable trust created by the husband. The wife consented to the original trust and a subsequent trust amendment. Despite such consent, the United States Court of Appeals for the Ninth Circuit held that such consent did not transmute such property into the separate property of the husband.[25]

Whether community property transferred to a trust changes its character for tax purposes is a question of fact unless state law provides otherwise.[26] If such character has been retained, a basis step-up is recognized for the entire property at the death of a spouse.[27] Where such character has been lost, there is no basis step-up for the entire property.[28]

Other planning

Planning for migrating couples is likely to include more than basis step-up/step-down planning or revocable trust planning, but those areas of planning illustrate the importance of planning for migrating spouses. If a married couple fails to plan when they migrate from a common law state to a community property state, or vice versa, or when they migrate between common law jurisdictions or community property jurisdictions, the law of the new state of domicile, at divorce or death, may not deal with property acquired in the former state of domicile in the manner contemplated by that couple. The balance of this article reviews how such property is characterized and divided at divorce or death.

Property Division at Divorce

Equitable Distribution History and Models

Under early American law, married women had no distinct legal identity.[29] The law viewed all property of the marriage as the sole property of the husband. The merger of a married woman's identity with the husband's identity under such law prevented the development of any law of property division upon divorce.[30]

Married women's property acts were enacted in all American jurisdictions by the mid-nineteenth century, which rejected the common law theory of merger and gave married women the right to own property.[31] Although women could lawfully hold title to property

[21] Rev. Rul. 68-283, 1966-2 C.B. 297.

[22] Kasner & Golden, *supra* n. 1, at C-59.

[23] *Id.*

[24] Katz v. United States, 382 F.2d 723 (9th Cir. 1967).

[25] A transmutation did not occur for the following reasons: (i) the rule that a change in the form of community property during marriage does not change its community character applies unless the spouses convert such property, by agreement, into separate property, and that rule applied here because there was nothing in the trust or the consents stating that either spouse was transmuting community property into the husband's separate property; (ii) the rule that property acquired during marriage is community property applies to equitable interests in a trust, including the husband's interests; (iii) the trust did not change the husband's management rights over the property transferred to the trust because he had full authority under community property law to manage and control the property before the trust was created (but the trust did expand the husband's ability during his life to give away community income from such property); and (iv) the management powers the husband had over the trust property were held by him as agent for, or manager of, the community and therefore did not amount to a general power of appointment over the wife's interest.

[26] WESTFALL & MAIR, *supra* n. 9, at § 4.06[3] n. 160.

[27] Rev. Rul. 66-283, 1966-2 C.B. 297.

[28] Murphy v. Commissioner, 342 F.2d 356 (9th Cir. 1965) (denying a basis step-up under section 1014(b)(6) of the Internal Revenue Code when such character had been lost by converting such property into joint tenancy property, where each spouse held as separate property an undivided interest in such property).

[29] TURNER, *supra* n. 9, at § 1.3.

[30] *Id.*

[31] *Id.*

after the enactment of those acts, property division in the early twentieth century in a divorce proceeding was based upon the *title theory*. Upon divorce, each spouse received only those assets to which that spouse had legal title.[32] There was no critical need for a property award upon divorce because permanent alimony was still being awarded where the husband was at fault.[33]

A notable exception to the title theory in the late nineteenth century was property division in the eight traditional community property states. In those jurisdictions, *community property* was traditionally divided *equally* between spouses while *separate property* was traditionally divided based on *legal title*.[34] Generally, in community property states, *separate property* is property owned by a spouse prior to marriage and all property acquired after marriage by gift, inheritance, devise or bequest. All other property acquired during marriage by a husband or wife is their *community property*.[35] Community property law was therefore the first *dual classification* system in the United States, where property was classified either as community property or as separate property.[36]

The American law of divorce changed significantly in the 1960s and 1970s with the equitable distribution revolution. During that period, the title theory to property division came under attack due to women acquiring property with greater frequency and to the greater number of women making significant direct financial contributions to their marriages.[37] The inadequacy of permanent alimony and the growing economic equality of men and women significantly influenced the adoption of equitable distribution upon divorce.[38]

Today, equitable distribution of property upon divorce is applied in all fifty states and the District of Columbia. Equitable distribution is based upon either the *all-property* model or the *dual classification* model, both of which are discussed below.[39] The equitable distribution system in common law jurisdictions recognizes that property division is a vested legal right and not a discretionary equitable remedy. That right vests only when a divorce complaint is filed, in which event property is divided equitably between the spouses.[40] In other words, marital property rights in common law jurisdictions for equitable distribution purposes are unvested prior to the commencement of a divorce proceeding. The common law property system does not go as far as the community property system that treats community property as having vested legal title interests during marriage.[41]

The *all-property* model of equitable distribution exists in fifteen states, fourteen of which are common law states and one of which is a traditional community property state.[42] In those states, courts may divide any asset owned by either spouse regardless of time or manner of acquisition. The precise division is left to the court's discretion, but there is an express list of factors that the court must consider. Several of those factors relate to spousal contributions to the marriage. The court, though, is required to consider property division in every divorce case.[43]

The *dual classification* model of equitable distribution exists in 27 common law states, the District of Columbia, the other seven traditional community property states, and the State of Wisconsin that adopted the Uniform Marital Property Act, for a total of 36 jurisdictions.[44] Thus, a majority of equitable distribution jurisdictions follow some form of dual classification system. Under the dual classification system, the court begins the property division process by classifying each spouse's assets as either *marital* or *separate* property. *Marital property* is then divided *equitably* between the spouses, while *separate property* is divided according to *legal title*.[45]

Under most dual classification systems, *marital property* is property acquired by one or both spouses during the marriage that is not defined as separate property.[46] Based on that definition, there are four elements to marital property:

---

[32] *Id.*

[33] *Id.*

[34] *Id.* "Since both spouses had equal interest in the marital community, the property was divided equally between them upon death or divorce. … Upon divorce, only community property was divided equally; separate property was divided according to legal title." *Id.* at p. 7. However, some community property states now divided community property equitably. *See* nn. 51 to 54, *infra*, and the text accompanying those notes. In addition, separate property can be divided in the State of Washington. *See* nn. 42 and 50, *infra*, and the text accompanying those notes.

[35] This "negative" definition of community property provides the key to answering most questions regarding the characterization of property. For example, marriage itself does not cause any previously owned property to become community property. PRICE, *supra* n. 9, at § 3.28.

[36] *Id*.

[37] TURNER, *supra* n. 9, at §§ 1.3 to 1.5.

[38] *Id.*

[39] TURNER, *supra* n. 9, at § 2.7.

[40] TURNER, *supra* n. 9, at § 2.7. Furthermore, if the marriage ends in death rather than divorce, marital property rights in those systems never vest and distribution is made under the law applicable to the decedent's estate. *Id.*

[41] *Id.*

[42] TURNER, *supra* n. 9, at § 2.8 n. 7. The community property state is Washington.

[43] TURNER, *supra* n. 9, at § 2.8.

[44] TURNER, *supra* n. 9, at § 2.9 n. 3. The Wisconsin Uniform Marital Property Act is essentially a community property system. *See* the authorities listed in n. 9, *supra*.

[45] TURNER, *supra* n. 9, at § 2.9.

[46] TURNER, *supra* n. 9, at § 5.29.

1. Property;
2. Acquired by one or both spouses;
3. During the marriage; and
4. Which is not separate property.

Each element has its own technical meaning under statutory or common law. The first three elements ("property acquired by one or both spouses during the marriage") appear in a great majority of dual classification statutes in nearly the same form, but the last element ("which is not defined as separate property") varies considerably from state to state.[47] According to one commentator:

> "Some types of separate property, such as property acquired in exchange for other separate property, are essentially universal; other types, such as property acquired by gift or inheritance, are majority rules with minority exceptions; and still others, such as income from separate property, are the subject of an almost equal split in authority among states."[48]

Consequently, there is no single commonly accepted definition of separate property in equitable distribution jurisdictions.[49]

Despite the need to classify property under the dual classification system, states favor that system over the all-property system for the following reasons:

> "The majority consensus to date seems to be that the consistency of dual classification is worth the cost, as a large majority of all recent statutes reject all-property. Moreover, there is a clear trend in states with all-property systems to adopt some of the benefits of dual classification by court decision. A number of courts, for instance, have held that while separate property can be divided, it should not be divided unless unusual circumstances are present. These decisions adopt a form of dual classification, for the court is dividing the parties' assets into different classes which are governed by different rules of division. Moreover, frequently the fact situations which justify division of separate property in these states are fact situations where the asset would not be considered separate property under a statutory dual classification system. At both the legislative and judicial level, therefore, there is a clear present trend toward adoption of the dual classification model of equitable distribution."[50]

The concept of equitable distribution has carried over to community property states. Community property states have traditionally required an equal division of community property on both divorce and death because, under the marital partnership theory, each spouse is treated as equally contributing to the community by his or her industry.[51] However, a growing majority of community property states have changed this rule

[47] *Id.*

[48] *Id.* (citations omitted). The commentator divides separate property into two classes: primary separate property and secondary separate property. The main types of primary separate property are assets acquired before marriage (*Id*. at § 5.30) and assets acquired by gift and inheritance (*Id*. at §§ 5.31 and 5.47). The commentator also confirms that "gifts are presently separate property in every dual classification equitable distribution jurisdiction," while "inheritances are presently separate property in an overwhelming majority of equitable distribution jurisdictions." Id. at §§ 5.31 and 5.47. The commentator also notes that only two dual classification states—Iowa and Wisconsin—treat property acquired before marriage as marital property, but, even in those states, courts divide such property unequally due to its status, unless such is the product of joint contributions. *Id*. at § 5.30. The Wisconsin exception is discussed in Appendix A regarding the division of property upon divorce in community property states.

The main types of secondary separate property are income from separate property, appreciation on separate property, and property acquired in exchange for other separate property. Id. at § 5.29. The split in community property jurisdictions over the treatment of income from separate property has spilled over into equitable distribution cases. *Id*. at § 5.50. Moreover, if income from separate property is classified as marital property but appreciation is not, it is important to distinguish between both. The fundamental distinction between both is the manner in which the new value is received. If the new value is a new asset entirely distinct from the prior asset, the new value is income. Alternatively, if the new value is not a new asset entirely distinct from the prior asset, the new value is appreciation. *Id*. at § 5.50. The only difference between the two is that income takes the form of a new asset, while appreciation takes the form of added value to an existing asset. To some, this is an illogical exercise in form over substance. Accordingly, the trend among states is to treat both income and appreciation the same. *Id*.

[49] TURNER, *supra* n. 9, at § 5.29.

[50] TURNER, *supra* n. 9, at § 2.10.

[51] TURNER, *supra* n. 9, at § 2.5 (quoting DE FUNIAK, *supra* n. 10, at chapters 2-3).

to permit *equitable* division upon divorce,[52] but courts in those states are still more likely to make an equal division than courts in equitable distribution states.[53]

Classification and Division Generally

If divorce occurs in a community property jurisdiction, community property is divided equally or equitably between the spouses, while separate property is generally divided based on legal title.[54] On the other hand, if divorce occurs in a common law jurisdiction, marital property is divided equitably between the spouses, while separate property is generally divided based on legal title.[55]

If a married couple migrates from a common law state to a community property state, or vice versa, and subsequently divorce, a question arises as to how property acquired under one property system should be treated under the other property system. Courts early on had to decide whether the character or classification of property changed when a married couple moved between community property and common law states. They relied upon conflict-of-laws rules in determining the character or classification of property.

With respect to *personal* property acquired during marriage or coverture, courts held that the law of the marital domicile at the time the property was acquired governs the character of such property and related property rights.[56] Moving from a common law state to a community property state, or vice versa, does not change the character or interests in that property.[57] The Supreme Court of Ohio summarized this rule in *Estate of Kessler*:[58]

> "It is generally recognized that the character of community property, even though it is personalty, does not change as to the nature of the holding, where the married couple remove themselves from a community-property state to a common-law state. The converse is also true, that is, the character of property acquired in a common-law state is not altered merely by the removal of the couple to a community-property state."

Concerning the character or classification of *real* property acquired during marriage or coverture, courts held that the law of the situs of such property controls.[59] Instead of merely applying local law, courts of the situs usually hold that the land acquires the marital property character of the funds or other assets used in acquiring it. So if land is purchased in a common law state with community funds, the spouses should hold the same interest in the land as they previously held in the funds.[60]

Classification and Division in Community Property States

As previously discussed, the character of personal property acquired in a common law state where a married couple was domiciled does not change when the couple moves to a community property state. However, when a divorce occurs, the question arises as to how such property should be divided. Community property juris-

[52] *Id*. Community property is divided equitably upon divorce in Arizona, Idaho, Nevada, Texas and Washington, while it is still divided equally in California, Louisiana and New Mexico. *Id*. While community property in California must be divided equally upon divorce, CAL. FAM. CODE § 2550 (2008), the court does not have to divide each asset equally. Rather, an item of community property can be awarded entirely to one party, but the other party must be compensated in some manner so as to effect a substantial equal division of the community property, CAL. FAM. CODE § 2601 (2008). *In re* Marriage of Tammen, 134 Cal. Rptr. 161, 162-63 (Cal. App. 1st Dist. 1976) (interpreting law now renumbered as CAL. FAM. CODE §§ 2601-28); *In re* Marriage of Cunningham, 2008 Cal. App. Unpub. LEXIS 1868 (2008).

[53] *Id*.

[54] *See* text accompanying n. 34, *supra*. Statutes in Arizona, California, Idaho, Louisiana, Nevada New Mexico and Texas do not grant authority to divest separate property upon divorce. Chappell, *supra* n. 3, at 999-1000 (and authorities cited there).

[55] *See* text accompanying n. 45, *supra*.

[56] RESTATEMENT (SECOND) CONFLICT OF LAWS § 258 (1971); 15A Am. Jur. 2d *Community Property* §§ 16-18 (2008); A.M. Swarthout, ANNOTATION, CHANGE OF DOMICILE AS AFFECTING CHARACTER OF PROPERTY PREVIOUSLY ACQUIRED AS SEPARATE OR COMMUNITY PROPERTY, 14 A.L.R. 3d 404 (2008). *See also* Estate of Crichton, 49 Misc. 2d 405, 408-09 and 412-13, 267 N.Y.S.2d 706 (1966) (providing that when spouses have separate domiciles, conflict-of-law rules provide that the law of the state of domicile of the spouse who acquired the personal property controls as to the ownership of the property).

[57] RESTATEMENT (SECOND) CONFLICT OF LAWS § 259 (1971). However, marital property interests may be affected by subsequent dealings with such property in the second state. *Id.*

[58] Estate of Kessler, 177 Ohio St. 136, 138, 203 N.E.2d 221 (1964). For additional authorities regarding spouses migrating to a common law state from a community property state, *see* the treatises and case law cited in Rev. Rul. 72-443, 1972-2 C.B. 531.

[59] RESTATEMENT (SECOND) CONFLICT OF LAWS § 234 (1971).

[60] *Id*. at cmt. a. *See* Depas v. Mayo, 11 Mo. 314 (1848) (where a husband's purchase of real estate in Missouri with community property acquired in Louisiana resulted in the husband holding the wife's community interest in trust for her benefit).

dictions use either a conflict-of-laws approach or a statutory approach to divide such property.

Conflict-of-Laws Approach.

Community property states *initially* resolved the division issue through conflict-of-laws rules. Courts there held that the law of the state in which a married couple is domiciled at the time the property was acquired determines both the *character* and *division* of separate property.[61] In the words of the Supreme Court of Washington in *In re Marriage of Landry*:[62]

> "[T]he judicial decisions…have recognized that just as the owner spouse's legal title survives the transfer of the property into a community property state, under conflict of laws principles, the nonowner spouse's equitable interests in an asset, as established under the law of the state of acquisition, also survive the transfer."[63]

Thus, under the conflict-of-laws approach in community property states:

- Property acquired by spouses while domiciled in a common law state is separate property because community property does not exist there.[64]
- A spouse's separate property from a common law state will retain its character when that property is moved to, or domicile is changed to, a community property state;[65] and
- The equitable distribution law of that common law state will be used in dividing the separate property.[66]

Dividing property using the equitable distribution law of a foreign state poses a significant administrative burden, which has been described as follows:

> "Under the traditional [conflict-of-laws] rule, however, the courts would be required to learn and apply the equitable distribution law of other states and even other countries. The process would not be a simple matter of applying one foreign jurisdiction's law to each case, but rather a complex process of dividing *each individual asset* according to the law of its own individual foreign jurisdiction. If the parties moved frequently during the marriage—for example, if one spouse was a military service member who served multiple tours of duty in foreign countries—the court could find

[61] *Chappell*, *supra* n. 3, at 1000-1003. The conflicts of law approached is used in Idaho, Nevada, New Mexico and Washington, which was adopted, respectively, by the following cases: Berle v. Berle, 97 Idaho 452, 546 P.2d 407 (1976); Braddock v. Braddock, 542 P.2d 1061, 1063 (Nev. 1975); Hughes v. Hughes, 573 P.2d 1194, 1198 (N.M. 1978); *In re* Marriage of Landry, 103 Wash. 2d 807, 811, 699 P.2d 214 (1985). Arizona and California courts also laid the ground work for the conflict of laws approach, but both states now have statutory authority protecting the non-acquiring spouse. *Chappell*, *supra* n. 3, at 1000-1003. *See, e.g.*, Rau v. Rau, 6 Ariz. App. 362, 365-66, 432 P.2d 910 (1967). The statutory authority enacted in Arizona and California is on Appendix A. *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 259 (1971).

[62] *In re* Marriage of Landry, 103 Wash. 2d 807, 811, 699 P.2d 214 (1985) (citing cases decided in New Mexico, Idaho and Arizona).

[63] Similarly, the Supreme Court of New Mexico in *Hughes v. Hughes*, 91 N.M. 339, 573 P.2d 1194 (1974), held as follows:

> "[W]e hold that the characterization of this property as separate must be made under the applicable laws of the State of Iowa and therefore the property is subject to all the wife's incidents of ownership, claims, rights and legal relations provided in any and all of the laws of the State of Iowa that affect marital property."

[64] "[C]ommunity property states have recognized the difference between property which is separate property as that term is used in a community property state and *property which is separate property merely because community property does not exist in the state in which the asset was acquired*." *In re* Marriage of Landry, 103 Wash. 2d 807, 811, 699 P.2d 214 (1985) (emphasis added). *Accord*, *In re* Miller, 31 Cal. 2d 191, 195, 187 P.2d 722 (1947) ("Prior to 1917 [when California enacted its quasi-community property statute], it had uniformly been held that where the husband acquired property during coverture in a common-law state while domiciled there and then subsequently brought it to California at the time of establishing residence here, such marital property remained the sole and separate property of the husband, irrespective of the prevailing concept of community property in this state as including all property acquired by either spouse after marriage other than that acquired by gift, bequest, devise or decent."); Addison v. Addison, 62 Cal. 2d 558, 563, 399 P.2d 897 (1965).

[65] *See* authorities listed at nn. 56, 57 and 61, *supra*.

[66] *See* authorities listed at n. 61, *supra*.

itself applying the law of many different states and even countries in the course of a single property division case. The administrative burden posed by this process can fairly be called daunting."[67]

Statutory Approach

While some community property states have decided to handle migrating spouse issues by applying conflicts-of-law principles, other community property states have decided to enact equitable distribution statutes to expressly deal with that issue. Appendix A to this article shows two categories of statutes enacted by certain community property jurisdictions for the purpose of equitably dividing property acquired by spouses in a common law state before migrating to a community property state.

Under the column there entitled Equitable Division Approach, two states have enacted statutes that grant a court authority to divide all, or nearly all, of the property acquired by the spouses. For instance, Washington, an all-property state, enacted a statute allowing the court to divide all community and separate property on a just and equitable basis. On the other hand, Wisconsin, a dual classification state, enacted a statute authorizing the court to divide equally all property acquired by the spouses before and after marriage except for three specific categories of separate property.[68] If, however, a hardship on either party or children of the marriage would result, then those categories of separate property will be divided in a fair and equitable manner.[69]

The last column on Appendix A lists the community property states that have enacted so-called quasi-community property statutes. Quasi-community property is generally defined as property acquired while a married couple was domiciled in a common law state that would have been characterized as community property if the married couple had been domiciled in a community property state. An excerpt of each state's quasi-community property statute is set forth on Appendix A.

Community property states that have enacted statutes listed on Appendix A are now able to classify and divide all property under the law of the forum. Classifying and dividing all property under the law of the forum is the majority practice within the United States for the following reasons:

- It eliminates the administrative burden of classifying and dividing individual assets;[70]
- Application of foreign law to individual assets could lead to unjust results because property division systems should not be viewed in isolation and often have complex trade-offs between property division and other issues.[71]
- The adoption of quasi-community property statutes in a majority of community property states reveals that they concur with the assessment that classification and division of property under the law of the forum is good policy.[72]

Classification and Division in Common Law States

Common law states have not followed the path of community property states in enacting special statutes that deal with property acquired by divorcing spouses while domiciled in a community property state. To the contrary, case law in common law states has addressed the issue.[73] A majority of the cases in common law states classify and divide all property under the law of the forum, while a minority of the cases classify property using foreign law but divide such property based on the law of the forum.[74]

[67] TURNER, *supra* n. 9, at § 3.13.

[68] The three categories of property treated as separate property are (i) gifts from a non-party, (ii) property received by reason of the death of a non-party, such as proceeds from life insurance, deferred employee benefit plans, or individual retirement accounts, and property received by right survivorship, by a trust distribution, by bequest or inheritance, or by a payable on death or a transfer or death arrangement, and (iii) funds acquired in a manner provided in clauses (i) or (ii). WIS. STAT. § 767.61(2)(a) (2008).

[69] WIS. STAT. § 767.61(2)(b) (2008).

[70] *See* text accompanying n. 67, *supra*.

[71] TURNER, *supra* n. 9, at § 3.13.

[72] *Id.*

[73] *Id*.

[74] *Id*. For cases holding that the law of the forum controls all equitable distribution issues, *see* TURNER, *supra* n. 9, at § 3.13 n. 7; for more cases reaching the same result by applying the "most significant relationship" test of RESTATEMENT (SECOND) CONFLICT OF LAWS § 258 (1971), *see Id.* at § 3.13 n. 8; and for authorities referencing the "sheer number of cases, far too many for convenient citation" that divide out-of-state property under the law of the forum without expressly discussing any choice of law issue, *see Id.* at § 3.13. For the minority of cases using the law of the forum only for dividing assets upon divorce but not for classifying those assets, *see Id*. at § 3.13 n. 8.

One factor facilitating the use of the law of the forum is the breadth of a state's equitable distribution statute. For instance, in *Zeolla v. Zeolla*,[75] the Supreme Judicial Court of Maine reviewed a statute providing that in a divorce proceeding "the court shall set apart to each spouse the spouse's property and shall divide the marital property in proportions the court considers just after considering all relevant factors…." That statute, according to the Supreme Judicial Court, authorized the division of all property under Maine law, regardless of its location. It imposed no restriction on distributing out-of-state property, but directed the distribution of each "spouse's property" and the "marital property." By applying to all property including out-of-state property, the statute sought to dispose of all issues related to the parties' property upon the entry of a divorce decree. In refusing to apply Massachusetts law to divide property located in that state, the Supreme Judicial Court stated:

> "Preventing a court from using Maine law to distribute all the marital property would be anathema to the policy of granting the divorce court such large equitable powers. In our increasingly transient society, a court could be limited by the property distribution laws of every state a migratory marriage touched.
>
> "Both the plain language and the policy behind … [the applicable statute] dictate that the court shall use the broad discretion it is granted under that section to equitably divide all of the marital and nonmarital property, wherever that property is located."[76]

Property Division at Death

Generally

The same issue confronting migrating married couples regarding the division of property upon divorce also applies at death. Unlike common law states, which have statutory "sharing provisions" at death such as elective or forced share provisions,[77] community property jurisdictions have traditionally provided for a surviving spouse only by giving that spouse an equal share of the community property upon the death of the other spouse. Under community property law, property acquired by a deceased spouse in a common law jurisdiction while domiciled there has traditionally been treated as the deceased spouse's separate property. Consequently, the deceased spouse could traditionally dispose of that property at will and thereby disinherit the surviving spouse. The surviving spouse in that event was left to the generosity of the deceased spouse.

Certain community property states have dealt with this issue by adopting quasi-community property statutes that apply at a spouse's death. Appendix B describes the various types of quasi-community property statutes enacted for this purpose. For reasons discussed below, only a quasi-community property statute applicable at death will protect the interests of a surviving spouse with respect to the separate property of the deceased spouse that was acquired in another jurisdiction during marriage.[78] Appendix B also lists those community property states that have not enacted any quasi-community property statute for disposing of property at death but rely instead upon their conflict-of-laws rules that foster potential disinheritance of the surviving spouse with respect to the deceased spouse's separate property from common law states.

Classification and Division in Community Property States

Under previously discussed conflict-of-laws rules in community property states, the law of the state where a married couple is domiciled at the time property is acquired determines the character of that property.[79] That character is retained when property is brought into a community property state.[80] Those rules also provide that the law of the state where a married couple is domiciled at the time property is acquired also determines the division of that property upon *divorce*.[81] However, with respect to the division of property at *death*, conflict-of-laws rules provide that the law of a married couple's domicile will govern instead.[82] Thus, conflict-of-laws rules applicable at death have been summarized as follows:

---

[75] Zeolla v. Zeolla, 2006 Me. 118, 908 A.2d 629 (2006).

[76] *Zeolla*, 908 A.2d 629 at 631.

[77] *See* text accompanying n. 6, *supra*.

[78] *Chappell*, *supra* n. 3, at 1007.

[79] *See*, *supra* nn. 61-65 and the text accompanying those notes.

[80] *Id.*

[81] *See*, *supra* nn. 61-63 and the text accompanying those notes.

[82] RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 260 and 263 (1971).

> "First, the laws of the couple's domicile at the time of property acquisition determine the property ownership. Second, moving the property to another state or changing domicile does not change a person's legal interest in that property. Third, the laws of the state of domicile at the time of death govern the disposition of property."[83]

Appendix B lists four community property states that follow those conflict-of-laws rules. However, the courts in those states have not extended the succession law of any common law state to separate property acquired by a spouse in a common law state while domiciled there. For example, the Court of Appeals of Arizona in *Rau v. Rau*[84] applied the equitable distribution law of a common law state to the separate property of a spouse acquired in that state but refused to apply the succession law of that common law state to such property because "[t]he statutory regulation of rights of succession has been regarded as something apart from the determination of property rights between living persons."[85] Moreover, in *Estate of Hanau*,[86] the Supreme Court of Texas concurred with the *Rau* decision and refused to extend to probate actions the Texas quasi-community property statute that was applicable to divorce actions. It stated that no case up to that point had extended to probate actions the equitable distribution of separate property acquired in a common law jurisdiction and noted that such relief had been extended to probate actions by statutes enacted only in California and Idaho.[87] Accordingly, "no case law or trend" supported judicial extension of that relief to probate actions.[88]

The *Rau* and *Hanau* decisions are likely to have a continuing chilling affect on any attempt to extend judicially to probate actions the succession law of a common law state to property acquired by a deceased spouse while domiciled in that state. Hence, one should refer to Appendix B not only to determine which community property states have quasi-community property statutes effective upon death but also to compare Appendix B with Appendix A to determine which community property states equitably divide separate property acquired in a common law jurisdiction upon divorce but have no statutory provision for dividing such property upon death. If a community property state does not have a quasi-community property statute that disposes of such property at death, then a married couple who is migrating to that state should be advised to pay attention to the potential for disinheritance upon the death of a spouse who acquired such property.

Classification and Division in Common Law States

Because the law of the state of domicile governs the disposition of property at death, common law states also need special succession statutes if they want to classify community property as such at death and direct the distribution of that property at death. In 1971, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Disposition of Community Property Rights at Death Act ("Uniform Act")[89] that common law states could enact to deal with property acquired by a deceased spouse while domiciled in a community property state. What the Uniform Act is to a common law state, a quasi-community property statute is to a community property state.

The purpose and history of the Uniform Act is set forth in a Prefatory Note, which states in part as follows:

> "Frequently spouses, who have been domiciled in a jurisdiction which has a type of community property regime, move to a jurisdiction which has no such system of marital rights. As a matter of policy, and probably as a matter of constitutional law, the move should not be deemed (in and of itself) to deprive the spouses of any preexisting property rights. A common law state may, of course, prescribe the *dispositive* rights of its domiciliaries both as to personal

[83] Hrant Norsigian, *Community Property and the Problem of Migration*, 66 WASH. U. L.Q. 773, 778 (1988).

[84] Rau v. Rau, 6 Ariz. App. 362, 366, 432 P.2d 910 (1967). *See* nn. 102 and 167-169, *infra*, and the text accompanying those notes, which provide that property rights of living persons are fundamental rights while rights of succession and of testamentary disposition are purely a creature of statute and may be enlarged, limited or abolished by the legislature.

[85] According to Mark Patton, *Quasi-Community Property in Arizona: Why Just at Divorce and Not Death?* 47 ARIZ. L. REV. 167, 179-80 (2005), the conflict-of-laws approach adopted in Rau v. Rau, 6 Ariz. App. 362, 432 P.2d 910 (1967), may prevent Arizona courts from disposing of a deceased spouse's property at death that was acquired while domiciled in a common law jurisdiction because Arizona lacks a statute that applies at death to such property.

[86] Estate of Hanau, 730 S.W.2d 663, 665-66 (Tex. 1987).

[87] *Id*.

[88] *Id*.

[89] UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT (1971), 8A U.L.A. 213 (2003).

property and real property located in the state. California's development of its 'quasi-community property' laws illustrates the distinction.

"The common law states, as contrasted to California, have not developed a statutory pattern for disposition of estates consisting of *both* separate property of spouses and property which was community property (or derived from community property) in which both spouses have an interest. In these states there have been relatively few reported cases (although the number has been increasing in recent years); the decisions to date show no consistent pattern and the increasing importance of the questions posed suggests the desirability of uniform legislation to minimize potential litigation and to facilitate the planning of estates.

"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.'

"It is intended to have no effect on the rights of creditors who became such before the death of a spouse. While problems may arise prior to the death of a spouse they are believed to be of relatively less importance than the delineation of dispositive rights (and the correlative effect on planning of estates). The prescription of uniform treatment in other contexts poses some-what greater difficulties; thus this Act is designed solely to cover dispositive rights at death, as an initial step."[90]

Some additional notable features of the Uniform Act are as follows:

- Section 1—Personal property is treated as community property not only if it was acquired as community property or with the "rents, issues or income" of community property but also if it became community property by agreement between the spouses. Real property situated in the enacting state is treated as community property if it was acquired with funds traceable to community property.[91]

- Section 2—Two rebuttable presumptions are provided here. First, property acquired during marriage by one of the spouses while domiciled in a community property state is presumed to be and continue as community property. Thus, if a husband purchases stock in a community property state, moves to a common law state with his wife and subsequently sells such stock and purchases new stock in his name, the new stock retains its character as community property.[92] Second, if husband and wife move from a community property state to a common law state and acquire property in a joint tenancy, tenancy by the entireties, or some other form with a right of survivorship, it will be presumed that the property is not community property subject to the Uniform Act.[93] Thus, if husband and wife want to protect community property brought into a common law state, it is important that one spouse hold title to the property or that community property be confirmed by written agreement.

[90] *Id.*

[91] UNIFORM ACT, *supra* n. 89, Comment to Subsection (1), at 217 (acknowledging that personal property can become community property by means of a transmutation agreement). UNIFORM ACT, *supra* n. 89, Comment to Subsection (2), at 217 (noting that dispositive rights of real property acquired in a community property state will presumably be governed by the law of that state).

[92] UNIFORM ACT, *supra* n. 89, Comment to Section 2, at 219-20.

[93] *Id.*

- Section 3—Only the community property of a deceased spouse is subject to the Uniform Act. This complies with constitutional requirements discussed below.[94] The decedent's one-half portion of the community property is not subject to the surviving spouse's elective share.

- Sections 4 and 5—The personal representative has no fiduciary duty to discover whether any property held by the decedent or the surviving spouse is community property subject to the Uniform Act.

- Section 6—A purchaser for value and a lender taking a security interest need not inquire into the community property status of the property and each takes free of any rights of the surviving spouse, personal representative, or any heir or devisee of the deceased spouse.

- Section 7—The Uniform Act does not affect creditors' rights.

- Section 8—The Uniform Act does not prevent married persons from severing or altering their interests in community property subject to the Act. The Comment to this Section notes that "The rights, and procedures, with respect to severance of community property vary markedly among the community property states."[95] Thus, the estate planner may have to determine what those rights and procedures are.

Only 14 common law states have adopted the Uniform Act. Common law states that have not adopted the act will probably distribute a deceased spouse's community property under state succession statutes as if such property were not community property, unless the community property status of such property is raised in a probate proceeding.

Constitutionality of State Statutes Dividing Property Upon Divorce or Death

California

California was the first community property state to enact a quasi-community property statute in 1917.[96] That statute defined the concept for purposes of determining property rights during life and upon divorce and death.[97] Generally speaking, that statute treated the personal property of a spouse acquired while domiciled in another state as community property upon migrating to California.[98] In 1934, the Supreme Court of California in *Estate of Thornton*[99] struck down the statute as unconstitutional. The husband in *Thornton* acquired property in Montana while he and his wife were domiciled there and subsequently brought the property to California. Upon the husband's death, the surviving wife sought her community property share under the statute. The statute was declared unconstitutional because it altered the husband's vested rights in the property during his lifetime in violation of the husband's privileges and immunities and transferred the property to his wife by reason of his citizenship and domicile without due process of law.[100]

In 1935, the California legislature enacted a new statute as a part of the state's probate code providing that, upon the death of a spouse, all personal property, wherever situated and whenever acquired after marriage while domiciled outside of California, was treated as community property for succession purposes. In 1947, the California Supreme Court in *In re Miller*[101] held that the statute was constitutional on the theory that the state of domicile of a decedent at the time of death has full power to control rights of succession.[102]

In 1961, the California legislature revised its civil code by enacting a new definition of quasi-community property and by enacting a statute that applied the concept to divorce or separate maintenance proceedings.[103] In 1965, the Supreme Court of California upheld the

[94] *See* nn. 161-166, *infra*, and the text accompanying those notes, which discuss constitutional issues when a quasi-community property statute gives a deceased spouse the power of testamentary disposition over the surviving spouse's separate property acquired in a common law state. Because Section 3 of the UNIFORM ACT pertains only to the community property of a deceased spouse, Section 9 of the UNIFORM ACT, which prevents a deceased spouse from disposing of property by will if the law prevents testamentary disposition, can be omitted, as Connecticut has done.

[95] UNIFORM ACT, *supra* n. 89, Comment to Section 8, at 226.

[96] *Chappell*, *supra* n. 3, at 1003.

[97] Estate of Thornton, 1 Cal. 2d 1, 5-7, 33 P.2d 1 (1934) (Langdon, J., dissenting).

[98] Addison v. Addison, 62 Cal. 2d 558, 563-64, 399 P.2d 897 (1965).

[99] Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934).

[100] *Id*.

[101] *In re* Miller, 31 Cal. 2d 191, 196, 187 P.2d 722 (1947).

[102] Justice Langdon, in his dissent in *Thornton*, stated: "It is a rule of almost universal acceptance that the rights of testamentary disposition and of succession are wholly subject to statutory control, and may be enlarged, limited or abolished without infringing upon the constitutional guaranty of due process of law." 1 Cal. 1 at 7.

[103] Addison v. Addison, 62 Cal. 2d 558, 562, 399 P.2d 897 (1965).

constitutionality of those statutes in *Addison v. Addison*[104] for the following reasons:

- First, the statute made no attempt to alter property rights merely upon crossing the boundary into California;[105]

- Second, the concept of quasi-community property was applicable only when a divorce or separate maintenance action was commenced after the parties became domiciled in California and did not disturb any vested rights in the interim;[106]

- Third, California's inherent power to impair any property right was exercised in a manner that did not run afoul of the due process clauses of the United States and California constitutions:

  ➢ The state has an inherent police power to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals and general well being of the people.[107] There exists, in that regard, a substantial state interest in the dissolution of marriage and the distribution of marital property,[108] which the United States Supreme Court expressly recognized in *Williams v. North Carolina*[109]:

  "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal."

  ➢ That same state interest also exists in common law states, and none of their statutes providing for division of separate property upon divorce in a just and reasonable manner had been overturned up to that point.[110]

  ➢ Furthermore, a state has a very substantial interest in protecting a spouse who would otherwise be left unprotected under marital dissolution law.[111]

- Fourth, the quasi-community property statute does not abridge the privileges and immunities of the deceased spouse for the following reasons:

  ➢ The privileges and immunities protected are only those arising under the United States Constitution, not those springing from state law or other sources.[112]

  ➢ The quasi-community property statute does not impinge upon the right of a United States citizen to maintain a domicile in the state of his choosing without the loss of valuable property rights. The statute does not cause a loss of valuable property rights upon change of domicile, but is only applicable upon an action for divorce or separate maintenance.

  ➢ The contention that California, which has refused to tamper with vested marital property rights of its citizens, is barred by the privileges and immunities clause of section 2 of Article IV of the United States Constitution from tampering with vested marital property rights of citizens of other states does not apply here.[113] That clause bars discrimination against citizens of other states where there is no substantial reason for discrimination other than the mere fact that they are citizens of another state. But if the discrimination is based on independent reasons and the discrimination reasonably relates to those reasons, states should be given considerable leeway in addressing local issues and prescribing cures. Here, the surviving wife lost the protection of Illinois marital dissolution law by moving to California, so the discrimination, if any, arising from the

[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 567 (quoting Armstrong, *'Prospective' Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?* 33 CAL. L. REV. 476, 495-496 (1945)).
[108] *Id.*
[109] Williams v. North Carolina, 317 U.S. 287, 298 (1942)
[110] *Addison*, 62 Cal. 2d 558 at 567.
[111] *Id.*
[112] *Id.* at 568.
[113] *Id.*

quasi-community property statute is reasonable and not barred by the privileges and immunities clause.[114]

- Fifth, the statute was not applied retroactively because the statute neither created nor altered rights except upon divorce or separate maintenance, and the divorce judgment was granted after the effective date of the statute.[115]

As a result of the decisions discussed above, the quasi-community property concept applies in California during divorce and separate maintenance proceedings and during probate proceedings.

Constitutional Challenges When Dividing Property Upon Divorce

Equitable distribution statutes have been attacked on a number of constitutional grounds, such as due process, impairment of contract, retroactivity, and vagueness. The courts have almost uniformly rejected these attacks.[116]

Due Process

The strongest ground upon which equitable distribution statutes have been upheld is a legislature's ability to exercise its police power.[117] Under the police power, generally, a legislature can enact statutes that promote the public health, safety, morals and general welfare. "As long as the public benefit from exercising the police power outweighs any danger to private interests, an action taken under the police power is constitutional even if it impairs vested rights."[118]

As noted in the *Addison* decision above, there is longstanding authority by the United States Supreme Court regarding the use of the police power to regulate all aspects of marriage. As far back as 1888, the United States Supreme Court in *Maynard v. Hill* stated:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, *its effects upon the property rights of both, present and prospective*, and the acts which may constitute grounds for its dissolution."[119]

While marriage is a social relation subject to the state's police power, the state's police power to regulate marriage is not unlimited.[120] Nevertheless, a number of cases hold that equitable distribution statutes fall squarely within the legitimate exercise of a state's police power.[121] Some of the benefits of equitable distribution statutes recognized by state courts include the following:

- Correction of an historic wrong regarding the persistent and sexist undervaluation of indirect or intangible contributions to marriage.[122]

- Elimination of rancorous post-divorce proceedings dealing with property not severed or divided during the divorce proceeding.[123]

- Reduction of the need for alimony and the likelihood that a dependent spouse may become a public charge.[124]

Secondary reasons why equitable distribution statutes have been upheld on due process grounds are as follows:

- The application of an equitable distribution statute to property acquired prior to the enact-

[114] *Id*.

[115] *Id*.

[116] TURNER, *supra* n. 9, at § 1.6.

[117] *Id*.

[118] *Id*. at § 1.6, p. 41.

[119] Maynard v. Hill, 125 U.S. 190, 205 (1988) (emphasis added).

[120] Loving v. Virginia, 388 U.S. 1, 7 (1967).

[121] McCree v. McCree, 464 A.2d 922 (D.C. 1983), Corder v. Corder, 546 S.W.2d 798 (Mo. Ct. App. 1977), Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974), Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988); Bacchetta v. Bacchetta, 498 Pa. 227, 445 A.2d 1194 (1982).

[122] *Rothman*, *supra*, 65 N.J. 219, at 228-229; *Corder*, *supra* 546 S.W.2d 798, at 803-05 (which provides a good summary of marital dissolution proceedings prior to the enactment of equitable distribution statutes and the benefits resulting from the equitable distribution system).

[123] Corder v. Corder, 546 S.W.2d 798, 803-05 (Mo. Ct. App. 1977).

[124] TURNER, *supra* n. 9, at § 1.6 and cases cited there in notes 6 through 8.

ment of that statute does not amount to a retroactive application of law nor a taking without compensation.[125]

- ➢ There is no such thing as a vested right in the continuation of an existing law.[126] A vested right must be something more than a mere expectation that a law will continue. Society takes on the risk that laws may change, and the state incurs no responsibility if a law change affects private interests.[127]

- ➢ Equitable distribution statutes do not apply during marriage but only upon the filing for dissolution of marriage.[128]

- ➢ An action for divorce filed after the effective date of an equitable distribution statute results in a prospective application of the statute.[129] Nevertheless, various cases have also held that an equitable distribution statute can constitutionally be applied to property acquired before the statute was passed.[130] Retroactivity has generally been applied when an equitable distribution statute codifies prior common law, is a remedial measure to correct problems, or deals with procedural rather than substantive questions.[131]

- Prior to equitable distribution statutes, courts had the power to make financial awards in divorce proceedings. A court could compel conveyance from one spouse to another upon a showing of contribution or for support in limited situations.[132]

Impairment of Contracts

Challenges to equitable distribution statutes based on impairment of contract have been as unsuccessful as challenges based upon due process.[133] Over a century ago the United States Supreme Court in *Maynard v. Hill*[134] laid to rest the argument that the marital relation and reciprocal rights arising from it do not come within the prohibition against impairing the obligation of contracts.[135] A state through its police power can impair contractual rights, and, since equitable distribution statutes fall within the permitted use of the police power, they can impair contract rights.[136] The wisdom of legislation enacted through the exercise of the police power is not open to judicial review; rather, judicial review is limited to determining whether a real and substantial affinity exists between such legislation and the public interest being served and whether it is so palpably unreasonable or unduly discriminatory as to infringe unjustifiably upon constitutional rights.[137]

Void for Vagueness

Equitable distribution statutes have also escaped challenges that they are void for vagueness.[138] Those statutes often require a court to divide marital property in such proportions as the court deems just after considering all relevant factors, while naming only some of the factors to be considered.[139] Due process requires reasonable and intelligible standards to guide the future conduct of individuals and carry out legislation.[140] Moreover, not all of the terms of a statute have to be defined.[141] A statute will be invalidated only when it is so indefinite and uncertain or is so incomplete or inconsistent that it cannot be executed.[142] The courts have reasoned that broad, objective criteria are

[125] Armstrong v. Armstrong, 322 N.C. 396, 400-02, 368 S.E.2d 595 (1988).

[126] *Id*.

[127] 16B AM. JUR. 2d Constitutional Law § 703 (2008).

[128] *Id*.

[129] *Id*. *Accord*, *Rothman*, 65 N.J. 219 at 231-32.

[130] TURNER, *supra* n. 9, at § 1.6 and cases cited in note 9.

[131] *Id*. at § 1.7. For example, the Supreme Court of New Jersey in *Rothman*, recognizing that statutes enacted under the police power may have retroactive application provided the public interest promoted sufficiently outweighs in importance the private rights impaired, 65 N.J. 219 at 225-26, held that retroactive application of the equitable distribution statute there did not offend due process because "there is a highly significant and important social interest which will be seriously impaired by interpreting the statute as having no more than prospective application," 54 N.J. 219 at 231-32.

[132] TURNER, *supra* n. 9, at § 1.6 and cases cited in note 2.

[133] TURNER, *supra* n. 9, at § 1.6.

[134] Maynard v. Hill, 125 U.S. 190, 205 (1988).

[135] Corder v. Corder, 546 S.W.2d 798, 803 (Mo. Ct. App. 1977).

[136] TURNER, *supra* n. 9, at § 1.6 and cases cited there in notes 18 and 19, including Nuttall v. Nuttall, 386 Pa. Super. 148, 562 A.2d 841 (1974).

[137] Corder v. Corder, 546 S.W.2d 798, 803 (Mo. Ct. App. 1977).

[138] TURNER, *supra* n. 9, at § 1.6.

[139] Fournier v. Fournier, 376 A.2d 100 (Me. 1977) (listing three such factors), and Marriage of Thornqvist, 79 Ill. App. 3d 791, 399 N.E.2d 176 (1979) (listing 10 such factors).

[140] *Fournier*, 376 A.2d 100, at 102-03.

[141] *Marriage of Thornqvist*, 79 Ill. App. 3d 791, at 793-94.

[142] *Id*.

needed to divide property justly because a just division in one set of facts could easily be unjust in another.[143]

Equal Protection

Kentucky and Missouri have enacted statutes exempting teacher retirement benefits as marital property for equitable distribution purposes.[144] The teacher retirement benefits in those states are provided in lieu of Social Security.[145] Those statutes were enacted to attract and retain teachers in the state and assure them adequate compensation, and to reduce society's responsibility to support retired teachers.[146] The statutes protected teachers by treating retirement benefits as nonmarital property for equitable distribution purposes upon divorce. Similarly, under federal law, Social Security benefits are not marital assets and cannot be divided upon dissolution of the Social Security beneficiary's marriage, but can be garnished for alimony and child support obligations.[147]

The Supreme Court of Kentucky in *Waggoner v. Waggoner*[148] upheld Kentucky's statute on equal protection grounds because the statute was rationally related to the legitimate objective of protecting teachers upon retirement. The Supreme Court of Missouri in *Woodson v. Woodson*[149] also upheld Missouri's statute on equal protection grounds. It recognized that the legislature could rationally classify teacher retirement as nonmarital property to attract and retain teachers and to reduce society's responsibility to support retired teachers but emphasized the former rather than the latter.[150]

If a state does not have a statute similar to those in Kentucky and Missouri or does not have an anti-assignment statute protecting state retirement benefits, then courts in 10 states will treat retirement plans that substitute for federal Social Security as being subject to division as a marital asset.[151] Currently, courts in five states do not treat such plan benefits as marital assets for equitable distribution purposes.[152]

Other Grounds

Equitable distribution statutes have withstood other challenges,[153] including the following:

- Challenges based upon state constitution requirements that an act encompass more than one topic. Some have argued that equitable distribution statutes deal with marriage and divorce and therefore violate the one topic requirement. The courts, though, have determined that those statutes deal comprehensively with the single subject of domestic relations.[154]

- Challenges based upon state constitutional provisions or state statutes that protect the right of women to acquire and transfer property in their own names before and after marriage.[155] Upon marriage, such property can be held and transferred free from the debts of a husband.[156] Prior to those provisions and statutes, the right to hold and transfer property existed only for men.[157] Those provisions and statutes put a wife on equal footing with her husband in the acquisition and transfer of property, but they do not clothe the wife with superior property rights in the event of a divorce.[158] Accordingly, those provisions or statutes do not apply to the division of marital assets upon divorce.[159]

- Challenges based on violation of an equal rights amendment because it fails to establish an equal division presumption.[160]

Constitutional Challenges When Dividing Property at Death

The same constitutional arguments that support a state's use of the police power to enact quasi-communi-

[143] *Fournier*, 376 A.2d 100, at 102-03; *Marriage of Thornqvist*, 79 Ill. App. 3d 791, at 793-94.

[144] KY. REV. STAT. ANN. § 161.700(2) (2008); MO. REV. STAT. § 169.572 (2008).

[145] The Social Security Act allows states to enter into a voluntary agreement to provide Social Security coverage for their employees. Waggoner v. Waggoner, 846 S.W.2d 704, 707-08 (Ky. 1992). Thus, a state can provide its own retirement plan in lieu of Social Security.

[146] *Id*.; Woodson v. Woodson, 92 S.W.3d 780, 784 (Mo. 2003).

[147] Forrester v. Forrester, 953 A.2d 175, 179-80 (Del. 2008) (citing 42 U.S.C. § 659).

[148] Waggoner v. Waggoner, 848 S.W.2d 704, 708 (Ky. 1992).

[149] Woodson v. Woodson, 92 S.W.3d 780, 784 (Mo. 2003).

[150] *Id*.

[151] Forrester v. Forrester, 953 A.2d 175, 181 n. 20 (Del. 2008) (Delaware joined the other nine states listed in n. 20 of that decision).

[152] The four states listed at *Forrester*, 953 A.2d 175 at 181 n. 20, plus *Waggoner*, 846 S.W.2d 704.

[153] TURNER, *supra* n. 9, at § 1.6.

[154] *Marriage of Thornqvist*, 79 Ill. App. 3d 791, at 793.

[155] TURNER, *supra* n. 9, at § 1.6 n. 25.

[156] Peters-Reimers v. Riemers, 2002 N.D. 72, 21-22, 644 N.W.2d 197 (2002), *cert. denied*, 537 U.S. 1195 (2003); Stuart v. Stuart, 280 Ark. 546, 547-48, 660 S.W.2d 162 (1983).

[157] *Peters-Reimers v. Riemers*, 2002 N.D. 72, at 22.

[158] *Stuart v. Stuart*, 280 Ark. 546, at 548.

[159] *Peters-Reimers v. Riemers*, 2002 N.D. 72, at 22.

[160] Wendt v. Wendt, 59 Conn. App. 656, 757 A.2d 1225 (2000).

ty property statutes and equitable distribution statutes regarding the dissolution of marriage by divorce apply to the enactment of quasi-community property statutes and elective share statutes regarding termination of marriage by death. In both instances, the state's interest is the same with respect to the division and distribution of marital property between spouses. If both types of statutes apply only at divorce or death, they will not affect property rights in the interim. Courts should therefore find such statutes to be constitutional.

Quasi-Community Property Statutes Effective at Death

The constitutionality of California's quasi-community property statute listed on Appendix B was determined with respect to a predecessor statute.[161] The predecessor statute generally provided that, upon the death of a spouse, one-half of all property acquired during marriage by either or both spouses while domiciled outside of California belonged to the surviving spouse, and the other half was subject to testamentary disposition of the decedent.[162] The Supreme Court of California initially upheld the constitutionality of the predecessor statute in *In re Miller*,[163] but subsequently the California Court of Appeal in *Paley v. Bank of American Nat'l Trust & Saving Assoc*.[164] held that the portion of that statute granting the decedent the power of testamentary disposition over the *surviving spouse's* separate property acquired in a common law jurisdiction was unconstitutional because it had the affect of taking the surviving spouse's property without due process of law and abridged the survivor's privileges and immunities as a United States citizen.[165] In other words, the legislature's exercise of its police power overstepped constitutional boundaries. However, the Court of Appeal noted, in dicta, that the portion of the statute allowing the surviving spouse to receive half of the decedent's quasi-community property was constitutional and severable from the unconstitutional portion.[166] The current California quasi-community property statute listed in Appendix B is limited to the quasi-community property of the decedent.

Elective Share Statutes

Constitutional challenges have also been levied against elective share statutes enacted by common law states. At issue is the state's exercise of its police power in enacting succession statutes applicable to a decedent.

When reviewing the exercise of a state's police power, courts in both common law and community property jurisdictions have historically recognized that property rights are inalienable rights grounded in natural law, while disposition of property at death is purely a creature of statute and was not a right recognized at common law.167 Consequently, the constitutional protections normally provided to property have not been afforded to testamentary disposition of property.168 The right to inherit is therefore an expectancy rather than a vested right.169

After recognizing that property rights are fundamental but testamentary rights emanate from the legislature, courts apply a "reasonable relationship" or "rational basis" standard in reviewing whether a statute impermissibly infringes upon property or testamentary rights.[170] A statute is valid if it bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary or oppressive.[171] Stated differently, if there is any reasonable relationship between a statute and the furtherance of a valid government objective, the statute must be upheld.[172]

---

[161] Former Cal. Prob. Code § 201.5 as set forth in *Paley v. Bank of American Nat'l Trust & Saving Assoc.*, 159 Cal. App. 2d 500, 324 P.2d 35 (1958).

[162] *Id*.

[163] *In re* Miller, 31 Cal. 2d 191, 187 P.2d 722 (1947). *See* text accompanying n. 101, *supra*.

[164] Paley v. Bank of American Nat'l Trust & Saving Assoc., 159 Cal. App. 2d 500, 324 P.2d 35 (1958).

[165] *Paley*, 159 Cal. App. 2d 500 at 512-13.

[166] Specifically, the California Court of Appeal stated that "[S]ection 201.5 appears to be severable. The purpose of the legislative enactment was to provide a rule of *succession* and it was designated to operate on the property of the *decedent*. If it be *limited* to this, as a *succession statute*, then it would be complete in itself and capable of being executed in accord with the legislative intent and the dominant purpose of the Legislature. That being so, the constitutional part is clearly severable from the unconstitutional." *Paley*, 159 Cal. App. 2d 500 at 510 (emphasis added).

[167] Estate of Magee, 988 So.2d 1, 3 (Fla. Ct. App. 2007) (common law state); Estate of Perkins, 21 Cal. 2d 561, 569, 134 P.2d 231 (1943) (community property law).

[168] *Magee*, 988 So.2d 1 at 3.

[169] *Perkins*, 21 Cal. 2d 561 at 569 ("Since the right of inheritance is not an inherent or natural right but one which exists only by statutory authority, the law of succession is entirely within the control of the Legislature.… The designation of heirs and the proportions which they shall receive are subject to the legislative will…, and until the death of the ancestor, the right of inheritance is not a vested one but a mere expectancy."

[170] *Estate of Magee*, 988 So.2d 1 at 5.

[171] *Id*. citing Haire v. Florida Dept. of Agriculture & Consumer Services, 870 So.2d 774, 783 (Fla. 2004).

[172] *Id*. *Accord*, Hamilton v. Hamilton, 317 Ark. 572, 576, 879 S.W.2d 416 (1994) ("Indeed, statutory classifications which have a rational basis and are reasonably related to the purpose of the statute are permissible.").

In *Hamilton v. Hamilton*,[173] the Supreme Court of Arkansas applied the "reasonable relationship" or "rational basis" standard of review in connection with statutes dividing property upon divorce and death. There, a divorce proceeding was pending when the husband died. The surviving wife elected her statutory share. The deceased husband's daughters from a prior marriage challenged the wife's right to take her elective share.[174] They contended that the surviving spouse stood to gain much more by taking her elective share than she would under divorce laws because, as the deceased husband's second wife, her contribution to property in his estate was minimal. They further contended that the elective share statute should be struck down because of the disparate treatment of spouses under elective share statutes and equitable distribution statutes. They asserted that spouses should be treated the same regardless of the cause that terminated marriage. The Supreme Court of Arkansas responded as follows:

> "The policy consideration behind the statutory division of property as part and parcel of a divorce is not the same as the policy consideration giving rise to the elective share statute. The former policy deals with the dissolution of the marriage contract and the division of property. The latter is designed to prevent injustices when a marriage endures until the death of the husband or the wife. We easily discern a rational basis behind the General Assembly's distinct handling of the two classes of spouses. Furthermore, any effort to amend the treatment afforded to the two groups is more appropriately addressed to the General Assembly. In sum, we decline to strike down [the elective share statute[175]] as violative of the Equal Protection Clause, either facially or as applied. *See In the Matter of Patrick*, 303 S.C. 559, 402 S.E.2d 664 (S.C. 1991) (providing for surviving spouses is a legitimate legislative purpose and salvages the elective share statute from an equal protection attack)."[176]

Furthermore, in *Estate of Magee*, the Florida Court of Appeal also applied the "reasonable relationship" or "rational basis" standard in a case challenging the Florida elective share statute. After recognizing that testamentary rights historically emanated from the legislature, the Court of Appeal noted that the Florida Supreme Court concluded in a prior case that a specific provision in the Florida constitution abandoned that position and afforded testamentary rights the same constitutional protections normally provided to other property rights. Accordingly, the Court of Appeal had to determine whether the exercise of the state's police power with respect to those rights satisfied those standards. The Court of Appeal upheld the constitutionality of the Florida elective share statute as follows:

> "[T]his state has a 'strong public policy' concerning the protection of the surviving spouse of [a] marriage in existence at the time of the decedent's death.' … The provisions of the elective share statute thus serve a legitimate legislative purpose. The statutes are rationally related to that purpose in that they seek to provide any surviving spouse who has not waived such protections a minority share in the assets of the decedent in the event that spouse did not receive as much through testamentary dispositions. This legislative scheme has strong historical roots in the common law, in existence before the enactment of our state constitution and undisturbed until now."[177]

In summary, quasi-community property statutes and elective share statutes are constitutional when they satisfy the "reasonable relationship" or "rational basis" standard of review. To date, courts have upheld those statutes because they are rationally related to the state's interest in protecting the surviving spouse of a marriage terminated by death.

[173] Hamilton v. Hamilton, 317 Ark. 572, 879 S.W.2d 416 (1994).

[174] *Id*. at 574.

[175] The opinion actually mistakenly cited the equitable distribution statute here rather than the elective share statute. The elective share statute should have been cited here because the deceased husband's children challenged the wife's right to take her elective share and because the Patrick case cited at the end of the quote above dealt with South Carolina's elective share statute.

[176] *Id*. at 577. Later in the opinion the Supreme Court of Arkansas stated: "The elective share provisions are designed to strike a balance between a testator's right to control the distribution of his or her property for life, while preserving the State's interest in protecting the surviving spouse. … As in the case of the classification discussed above, a legitimate government interest supports the diminishment in the daughters' shares caused by the widow's election. *Id*. at 578.

[177] *Estate of Magee*, 988 So.2d 1 at 5-6.

Conclusion

Married couples who plan to change their state of domicile need to consider the property and tax ramifications of their move. This is particularly true when they migrate between common law and community property states, although important property and tax issues also exist when a move is between common law states or between community property states.

Property rights of spouses acquired while domiciled in a state should not change merely by moving to a new domicile. However, a state may not recognize those rights or may modify those rights upon divorce or death. Statutes enacted to classify and divide marital property upon divorce or death satisfy an important public purpose of regulating domestic affairs and usually constitute a proper exercise of a state's police power.

APPENDIX A

DIVISION UPON DIVORCE OF SEPARATE PROPERTY[1] ACQUIRED IN A COMMON LAW JURISDICTION

COMMUNITY PROPERTY STATE	CONFLICTS-OF-LAW APPROACH	EQUITABLE DIVISION APPROACH	QUASI-COMMUNITY PROPERTY APPROACH[2]
ARIZONA			ARIZ. REV. STAT. ANN. § 25-318(A) (2008)[3]
CALIFORNIA			CAL. CIV. CODE §§ 63, 125 and 2550 (2008)[4]
IDAHO	Berle v. Berle, 97 Idaho 452, 546 P.2d. 407 (1976)[5]		
LOUISIANA			LA. CIV. CODE ANN. Art. 3526 (2008)[6]
NEVADA	Braddock v. Braddock, 542 P.2d. 1061 (Nev. 1975)[7]		
NEW MEXICO			N.M. STAT. ANN. § 40-3-8(C)(1) (1991)[8]
TEXAS			TEX. FAM. CODE ANN. § 7.002 (2007)[9]
WASHINGTON		WASH. REV. CODE § 26.09.080 (2008)[10]	
WISCONSIN		WIS. STAT. § 767.61 (2008)[11]	

[1] The term separate property here means separate property under community property law.

[2] Quasi-community property is generally defined as marital property acquired while domiciled in a common law state that would be characterized as community property if a married couple had been domiciled in a community property state. Generally speaking, the statutes referenced in this column are similar to California's quasi-community property statute.

[3] ARIZ. REV. STAT. ANN. § 25-318(A) (2008) states in part: "[f]or purposes of this section only, property acquired by either spouse outside this state shall be deemed to be community property if the property would have been community property if acquired in this state."

[4] CAL. CIV. CODE § 2550 (2008) provides that in a proceeding

for dissolution of marriage, the court shall divide the community estate of the parties equally. The term community estate is defined in CAL. CIV. CODE § 63 (2008) as including both community property and quasi-community property. CAL. CIV. CODE § 125 defines quasi-community property as "all real or personal property, wherever situated, acquired…(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this estate at the time of its acquisition…[or] (b) In exchange for [such] real or personal property…." The predecessor of CAL. CIV. CODE § 125 (2008) was upheld by *Addison v. Addison*, 399 P.2d. 897 (1955).

[5] The law of the state of marital domicile at the time property was acquired determines characterization and division of that property. In other words, an individual's separate property from a common law jurisdiction retains its same character and is then divided in accordance with that state's equitable distribution rules.

[6] LA. CIV. CODE ANN. Art. 3526 (2008) provides that upon divorce, the rights of spouses "with regard to immovables situated in this state and movables, wherever situated, that were acquired during the marriage by either spouse while domiciled in another state shall be determined as follows: (1) Property that is classified as community property under the law of this state shall be treated as community property under that law; and (2) Property that is not classified as community property under the law of this state shall be treated as the separate property of the acquiring spouse. However, the other spouse shall be entitled, in value only, to the same rights with regard to this property as would be granted by the law of the state in which the acquiring spouse was domiciled at the time of acquisition. Thus, clause (1) in that definition provides the same protection for the non-acquiring spouse of property acquired while domiciled in another state as quasi-community property statutes provide in other community property states. Moreover, clause (2) in this definition also protects the non-acquiring spouse with respect to property treated as separate property by applying the distribution law of the state where such property was acquired. In this sense, the non-acquiring spouse is provided with double protection.

[7] *See* n. 5, *supra*.

[8] N.M. STAT. ANN. § 40-3-8(C) (1991) provides that quasi-community property means "all real or personal property acquired, except separate property…, wherever situated,…acquired…(1) by either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition; or (2) in exchange for [such] real or personal property." Furthermore, both spouses must be domiciled in New Mexico at the time of the divorce proceeding before New Mexico's quasi-community property law applies. N.M. STAT. ANN. § 40-3-8(D) (1991). Otherwise, New Mexico will use the conflicts-of-law approach. Hughes v. Hughes, 573 P.2d 1194 (1978).

[9] TEX. FAM. CODE ANN. § 7.002(a) (2007) provides that "the court shall order a division of the following real and personal property, wherever situation, in a manner that the court deems just and right…: (1) property that was acquired by either spouse while domiciled in another state and that would have been community property if the spouse who acquired the property and been domiciled in this state at the time of the acquisition; or (2) property that was acquired by either spouse in exchange for [such] real or personal property…." A similar rule also applies to separate property. TEX. FAM. CODE ANN. § 7.002(b). (2007)

[10] WASH. REV. CODE § 26.09.080 (2008) provides that "the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including…the nature and extent of community property;…the nature and extent of the separate property;…the duration of the marriage…and the economic circumstances of each spouse…." Thus, Washington is an all-property state for equitable distribution purposes.

[11] WIS. STAT. § 767.61(3) provides that all property acquired by the parties is to be divided equally between them except property acquired by either party prior to or during marriage (i) by a gift from a third party; (ii) by reason of the death of a third party (including life insurance proceeds, payments under a deferred employment benefit plan or individual retirement account, property acquired by right of survivorship, by trust distribution, by bequest or inheritance, or by a POD or TOD arrangement); or (iii) with funds acquired under clauses (i) or (ii). Thus, Wisconsin, a dual classification state, divides property acquired both before and during marriage except as otherwise provided by statute.

APPENDIX B

DIVISION AT DEATH OF SEPARATE PROPERTY[1] ACQUIRED IN A COMMON LAW JURISDICTION

COMMUNITY PROPERTY STATES	CONFLICTS-OF-LAW APPROACH	QUASI-COMMUNITY PROPERTY APPROACH
ARIZONA	Rau v. Rau, 6 Ariz. App. 362, 432 P.2d 910 (1967)[2]	
CALIFORNIA		CAL. PROB. CODE § 101 (2008)[3]
IDAHO		IDAHO CODE 15-2-201 (2008)[4]
LOUISIANA		LA. CIV. CODE ANN. art. 3526 (2003)[5]
NEVADA	Braddock v. Braddock, 91 Nev. 735, 542 P.2d 1060 (1975)[6]	
NEW MEXICO	Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194 (1978)[7]	
TEXAS	Estate of Hanau, 730 S.W.2d. 663, 666 (1987)[8]	
WASHINGTON		WASH. REV. CODE 26.16.220 and 26.16.230 (2008)[9]
WISCONSIN		WIS. STAT. § 861.02 and 861.03 (2008)[10]

[1] The term separate property here means separate property under community property law.

[2] *Rau*, which applied the equitable distribution law of Illinois (a common law state) to the separate property of a spouse acquired in that state, refused to apply the succession law of Illinois to such property. *See also* Mark Patton, *Quasi-Community Property in Arizona: Why Just at Divorce and Not Death?* 47 ARIZ. L. REV. 167, 179-80 (2005).

[3] CAL. PROB. CODE § 101(a) (2008) provides that "[u]pon the death of a married person domiciled in this state, one-half of the decedent's quasi-community property belongs to the surviving spouse and the other half belongs to the decedent." Quasi-community property for this purpose is defined in CAL. PROB. CODE § 66(a) (2008) as "(a) All personal property wherever situated, and all real property situated in this state,…acquired by a decedent while domiciled elsewhere that would have been the community property of the decedent and the surviving spouse if the decedent and been domiciled in this state at the time of its acquisition…[and] (b) All personal property wherever situated, and all real property situated in this state,…acquired in exchange for real or personal property [in clause (a)]…." Only the quasi-community property of the deceased spouse is covered by that statute. California protects the surviving spouse from certain transfers of quasi-community property made by the decedent without substantial consideration and without consent of the surviving spouse, particularly transfers with retained interests or powers. In that event, the surviving spouse may require the transferee to restore to the decedent's estate one-half of the property transferred or its proceeds or value. CAL. PROB. CODE § 102 (2008). Comments to that statute state that a transfer is not intended to be set aside if the transferee gave a consideration equal to one-half or more of the value of the property received.

[4] IDAHO CODE ANN. § 15-2-210(a) (2008) states that "[u]pon the death of a married person domiciled in this state, one-half (1/2) of the quasi-community property shall belong to the surviving spouse and the other one-half (1/2) of such property shall be subject to the testamentary disposition of the decedent and, if not devised by the decedent, goes to the surviving spouse. The definition of quasi-community property in IDAHO CODE ANN. § 15-2-201(b) (2008) is similar to California's definition, except that the term (i) excludes leaseholds in real property; but (ii) includes real property located in another state owned by a domiciliary of Idaho if the laws of the other state permit descent and distribution of such property to be governed by the laws of Idaho. Idaho protects the surviving spouse from certain transfers made by the decedent with-

out adequate consideration and without consent of the surviving spouse, including transfers with retained interests or powers and transfers made within two years of death in excess of the federal annual gift tax exclusion. IDAHO CODE ANN. § 15-2-202 (2008).

[5] LA. CIV. CODE ANN. art. 3526 (2003) is discussed in Appendix A because it applies upon termination of marriage by divorce or death.

[6] It is unclear how *Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975), a divorce proceeding that characterized and divided separate property acquired in a common law state (Ohio), interacts with NEV. REV. STAT. §§ 123.130, 123.220, 123.250 (2008) at the death of a spouse. For example, NEV. REV. STAT. §§ 123.130, 123.220 (2008) generally provide that all property (other than gifts, bequests and devises) acquired after marriage by either spouse is community property unless otherwise provided by agreement, court order or statute. NEV. REV. STAT. § 123.250, in turn, generally provides that, upon the death of either spouse, each is entitled to one-half of the community property. Under the broad definition of community property here, property described in *Braddock* (*e.g.*, separate property acquired in a common law state) that is owned by either spouse could be treated as community property upon the death of a spouse because it was acquired during marriage other than by gift, bequest or devise. One could contend that Nevada used its "police power" pertaining to the regulation and distribution of marital property at divorce and death, which is discussed elsewhere in this article, to treat property described in *Braddock* as being community property at the death of either spouse. Two issues exist with respect to that contention. The first issue is whether the these statutes were intended to reclassify property acquired outside Nevada. In this regard, the 4 to 3 decision in *Estate of Perkins*, 21 Cal. 2d 561, 134 P.2d 231 (1943) is instructive. There, the majority construed certain succession statutes for the benefit of non-spouse heirs as including property acquired outside California. The forceful dissent written by Justice Traynor argued against such reclassification because there was a lack of legislative intent to do so, which was shown, in part, by California's quasi-community property statute that was applicable upon death. The second issue is whether those Nevada statutes can, upon the death of the first spouse, constitutionally encompass the surviving spouse's property that was acquired outside of Nevada at a time when both spouses were domiciled in a common law state. The answer is no according to *Paley v. Bank of American Nat'l Trust & Saving Assoc.*, 159 Cal. App. 2d 500, 324 P.2d 35 (1958).

[7] Hughes, a divorce proceeding that applied the equitable distribution law of Iowa (a common law state) to the separate property of a spouse acquired in that state, does not apply to probate proceedings. Nevertheless, according to Merrie Chappell, *A Uniform Resolution to the Problem a Migrating Spouse Encounters at Divorce and Death*, 28 IDAHO L. REV. 993, 1009 (1992), New Mexico has omitted spouse and omitted children legislation (N.M. STAT. §§ 45-2-301 and 45-2-302 (2008)) that provides (i) for a spouse when marriage occurred after the decedent's will was executed; and (ii) for children when born or adopted after the decedent's will was executed, but the legislation only pertains to the deceased spouse's one-half interest in community property.

[8] In *Estate of Hanau*, 730 S.W. 2d 663, 665-66 (Tex. 1987), the Texas Supreme Court refused to apply the Texas quasi-community property statute applicable upon divorce to a probate action.

[9] WASH. REV. CODE § 26.16.230 (2008) provides that "[u]pon the death of any person domiciled in this state, one-half of any quasi-community property shall belong to the surviving spouse…and the other one-half of such property shall be subject to disposition at death by the decedent…." Quasi-community property is defined in WASH. REV. CODE § 26.16.220 (2008) as being "all personal property wherever situated and all real property…that is not community property and that was…acquired (a) By the decedent while domiciled elsewhere and that would have been the community property of the decedent and of the decedent's surviving spouse…. had the decedent been domiciled in this state at the time of its acquisition; or (b) In derivation or in exchange for [such] real or personal property…." Real property for this purpose is defined by WASH. REV. CODE § 26.16.220(2) (2008) as real property situated in Washington, real property situated in another state if the law of that state provides that the law of the decedent's domicile at death shall govern the rights of the decedent's surviving spouse to a share of such property, and leasehold interests in such real property. Similar to California and Idaho, Washington protects the non-acquiring spouse from transfers made by the acquiring spouse in excess of the acquiring spouse's one-half interest. If the acquiring spouse transfers quasi-community property within three years of death without adequate consideration and consent from the other spouse and retains an interest or power over such property, then the surviving spouse may require the transferee to restore one-half of property or its proceeds or value pursuant to WASH. REV. CODE 26.16.240 (2008).

[10] WIS. STAT. § 861.02(1) (2008), which is based on the Uniform Marital Property Act, gives the surviving spouse a right to elect up 50 percent of the augmented deferred marital property estate upon the death of the other spouse. Per WIS. STAT. § 861.02(2)(b) (2008), the augmented deferred marital property estate is "the total value of the deferred marital property of the spouses, irrespective of where the property was acquired, where the property was located at the time of a relevant transfer, or where the property is currently located, including real property located in another jurisdiction." It includes probate and nonprobate transfers, gifts by the decedent within two years of death, and deferred marital property of the surviving spouse. *Id.*