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IN-MIGRATION OF COUPLES FROM COMMON LAW JURISDICTIONS: PROTECTING THE WIFE¹ AT THE DISSOLUTION OF THE MARRIAGE

There exist two systems of marital property² in the United States. The majority of states follow a system of marital property based on the English common law. A minority of eight states³ base their marital property law on the Spanish concept⁴ of community property. Both systems provide for the protection of the more financially dependent spouse, usually the wife,⁵ in case the marriage is dissolved by divorce or by the death of the marital partner. So long as marital couples domiciled in common law states remain within jurisdictions basing their system of marital property distribution on the common law, the wife likely will be protected adequately at dissolution of the marriage. If the couple migrates into a community property state prior to dissolution of the marriage by divorce, the wife is particularly vulnerable to financial insecurity.⁶ At dissolution of the marriage, the wife in a common law state has different rights to marital property than does the wife in a community property state. These rights are not readily transported into a community property state because of differences in the philosophies and operation of the two marital property systems.

1. Marital property analysis begins with the identification of the spouse who acquired either the property or the funds with which the property was purchased. The acquiring spouse may be either husband or wife. Since husbands tend to acquire more property during marriage than wives, Bureau of Labor, U.S. Department of Labor, *U.S. Working Women: A Databook* 62 (1977), the term "husband" will generally be used instead of the more cumbersome "acquiring spouse" and, conversely, "wife" will be used rather than "non-acquiring spouse."

2. Marital property is defined as property acquired by either spouse during coverture, or property acquired in exchange for property acquired during coverture by either spouse.

3. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington.

4. W. DeFuniak & M. Vaughn, *Principles of Community Property*, § 4, at 8 (2d ed. 1971).

5. In the United States, husbands tend to earn more than do their wives. Women are paid less. A woman's weekly earnings average 62 percent of a man's earnings. Furthermore, the participation in the labor force of married women whose husbands are present in the home is low. Only 46 percent of these women work. *U.S. Working Woman: A Databook*, *supra* note 1.

6. The couple migrating from a community property to a common law jurisdiction may also present property distribution problems. *See, e.g.*, S. M. Johanson, *The Migrating Client: Estate Planning for the Couple from a Community Property State*, 9 U. Miami Inst. Estate Planning § § 800-804 (1975). These problems are outside the scope of this Comment.

THE COMMON LAW SYSTEM

The property rights of spouses under the early English common law were governed by the doctrine of unity of the legal personalities of the husband and wife.⁷ According to Blackstone, "the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything."⁸ In later years the Married Women's Acts restricted the husband's power to control the wife's separate property,⁹ thus modifying the effects of the doctrine of unity. Today, wives in common law states typically have legal title to whatever property they bring into the marriage and to property which they acquire during coverture. But they have minimal rights to the husband's earnings during coverture. These rights are generally in the nature of a right to support.¹⁰

At dissolution of the marriage by divorce,¹¹ some common law states¹² protect the financially dependent wife by divesting a quantity of the husband's separate property and vesting it in the wife as alimony. Such alimony awards are discretionary with the court and are justified as means of support.¹³ There is no implication that an award of alimony represents a fair distribution of property acquired by the husband during coverture. Wives who have contributed little and wives who have contributed much to the acquisition of marital wealth are presumably entitled to the same alimony award.

Most common law states provide for a judicial distribution of marital property, the object of which is to divide property acquired during coverture equitably between the spouses.¹⁴ No common law jurisdiction requires an equal division, or any other specific division of marital property. Courts in common law states sometimes combine property distribution with temporary or permanent alimony.

7. I. F. G. Baxter, *Marital Property* 3, 1973.

8. 1 Blackstone's Commentaries 442 (1890).

9. Baxter, *supra* note 7, at 17.

10. H. H. Clark, *The Law of Domestic Relations in the United States* § 6.1.

11. Differences in the common law and community property treatment of the wife's rights at the death of her husband are discussed in the section titled Problems Presented at the Death of the Husband.

12. Alabama, Georgia, North Carolina, Ohio. 4 Fam. L. Rep. (BNA) 3001 (1977).

13. The word alimony is derived from the Latin *alimonia*, meaning "sustenance." "It stems from the common law right of the wife to support by her husband, which right . . . continues to exist even after they cease to live together. *Alimony has as its sole object the support of the wife, and is not to be considered a property settlement upon a dissolution of the marriage.*" *Thompson v. Thompson* 282 Ala. 248, —, 210 So. 2d 808, 813 (1968).

14. See, e.g., Iowa Code Ann. § 598.21 (Supp. 1977) Note 117; Mich. Comp. Laws Ann. § 552.19 (1967).

Because of the court's broad discretion in determining the property division, the precedential value of any given decision is minimal.¹⁵

THE COMMUNITY PROPERTY SYSTEM

The community property system descends from ancient Spanish law.¹⁶ It recognizes that the earnings of the husband may be the immediate source of the marital couple's acquisitions, but that the wife's efforts contribute as well to those acquisitions.¹⁷ Thus, all community property states define property acquired by either spouse during marriage as community property, excepting property acquired by either spouse through gift, devise or descent.¹⁸ Each spouse has a right to an undivided one-half interest in the community property. Even if the husband is the sole income producer during coverture, the wife still has a right to one-half of the extant marital property at the time of the dissolution of the community. At divorce, the wife takes her one-half of the community property automatically.¹⁹ If the community has adequate resources the wife has financial protection.

Whereas the divorce court in a common law jurisdiction must typically make a determination as to an equitable property distribution, the court in a community property jurisdiction must simply determine whether the property is community or separate property, and then divide it accordingly.²⁰ At divorce, the separate property of the respective spouses remains their separate property unless the jurisdiction allows it to be divested as alimony for purposes of sup-

15. See, e.g., *In re Marriage of Kehrl*, 241 N.W.2d 923 (1976). Note that some common law states provide divorce courts with statutory or decisional guidelines to facilitate an equitable property distribution. Sixteen states enumerate specific criteria as guides to courts in making marital property distributions. Commonly included criteria are: (1) length of marriage; (2) age, health, station in life; (3) occupation; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities and needs of each party and opportunity of each for further acquisition of further assets and income; (8) contributions of each party in acquisition, preservation or appreciation of marital property, including services as a homemaker. Freed & Foster, Jr., *Family Law in the Fifty States: An Overview*, 3 Fam. L. Rep. (BNA) 4049 (1978).

16. DeFuniak & Vaughn, *supra* note 4.

17. J. Dukeminier & S. M. Johanson, *Family Wealth Transactions* 558 (1978).

18. *Id.*

19. See, e.g., Cal. Civ. Code § 4800 (1970); New Mexico Statute is silent on this issue, which has been determined by judicial decision. *Michelson v. Michelson*, 86 N.M. 107, 520 P.2d 263 (1974); *Fitzgerald v. Fitzgerald*, 70 N.M. 11, 369 P.2d 398 (1962); *Sands v. Sands*, 48 N.M. 458, 152 P.2d 399 (1944).

20. Some community property states have modified this rule, giving courts discretion to distribute marital property equitably between the spouses. See, e.g., Ariz. Stat. Ann. § 25-318 (Supp. 1978); Nev. Rev. Stat. § 125.150 (Advance Sheets 1975); Tex. Fam. Code Ann. tit. 1, § 3.63 (Vernon 1975).

port.²¹ Nevertheless, absent strong proof of necessity,²² courts in community property states do not typically award alimony even where permitted by statute.

Both the common law and community property systems protect the wife at the dissolution of the marriage. The community property concept is more consistent with contemporary notions of equality between the sexes. This concept recognizes *a priori* the economic contribution of the wife to the acquisition of marital wealth. The common law system starts from a different philosophical viewpoint, but in that system the court is given discretion to recognize the economic contribution of the wife and to reward her as the court sees fit. But when a couple migrates from a common law to a community property jurisdiction, the wife's rights to marital property may not move with her.

HUGHES V. HUGHES²³

Consider a hypothetical couple who marry and establish domicile in a common law state. During the early years of the marriage, the couple is able to save part of the husband's earnings. They move to a community property jurisdiction and invest the husband's earnings in local real estate. Subsequently the couple divorce. The problem arises as to how the property acquired in the common law state and invested in the community property state is to be distributed (if at all) between the spouses. Should the court apply the substantive law of the common law state where the property was acquired, or should it apply the community property law of the forum state?

A concrete example of the hypothetical case presented above is the recent New Mexico case of *Hughes v. Hughes*.²⁴ Col. and Mrs. James Lindberg Hughes were domiciliaries of Iowa.²⁵ In February, 1965, Col. Hughes contracted to purchase a 160-acre tract of land (the ranch) near Santa Fe.²⁶ The Hughes family moved to Santa Fe

21. See, e.g., Nev. Rev. Stat. Section 125.150 (1973); N.M. Stat. Ann. §§ 40-4-7, 40-4-12 (1978). But see Texas case law holding alimony to be contrary to public policy. *McBride v. McBride* 256 S.W.2d 250 (Tex. Civ. App. 1953); *Lodge v. Lodge* 368 S.W.2d 40 (Tex. Civ. App. 1953); *Francis v. Francis* 407 S.W.2d 295 (Tex. Civ. App. 1966), reversed on other grounds 412 S.W.2d 29.

22. N.M. Dist. Judge Thomas Donnelly quoted in *The New Mexican*, Feb. 4, 1977.

23. 91 N.M. 339, 573 P.2d 1194 (1978).

24. *Id.*

25. Col. Hughes entered the Air Force as an Iowa resident in 1949. In 1955 he and Ms. Hughes were married at Bolling AFB in Maryland. Col. Hughes was subsequently stationed at bases in a number of jurisdictions, both common law and community property. At trial the parties stipulated that Col. Hughes was an Iowa resident at all times pertinent to the litigation. Ironically, Col. and Ms. Hughes' longest stay in Iowa was a three-day visit.

26. 91 N.M. at 341; 573 P.2d at 1196.

in July, 1966. Shortly thereafter, Col. and Mrs. Hughes signed a contract to purchase an apartment complex in Santa Fe (the 115 apartments).²⁷ Down payments for both properties were made principally with funds earned by Col. Hughes during coverture.²⁸ In 1967, Col. Hughes was ordered to Vietnam. From May, 1967 until March, 1973, he was incarcerated by the North Vietnamese. During this period, Mrs. Hughes managed the marital property.²⁹ In 1974, one year after Col. Hughes' return, Mrs. Hughes sued for divorce.³⁰ What rights, if any, did she have to the marital property?

In order to determine Mrs. Hughes' rights to the marital property, the trial court first had to decide whether the property was community property or the separate property of Col. Hughes.³¹ If it were community property, then Mrs. Hughes would have rights to one-half of the property. If it were separate property, under New Mexico law, she would have no rights to it. If the court wanted to give Mrs. Hughes a share of Col. Hughes' separate property, then it would be forced to look outside New Mexico for authority to do so.

The court was presented with the argument that the marital property was community property since it was acquired during coverture and was situated in New Mexico.³² The property, however, was purchased primarily with funds acquired by Col. Hughes while he was domiciled in a common law state. If property acquired in exchange for these funds were held to be community property, then this would imply that when noncommunity property is brought into New Mexico it may be transmuted into community property by virtue of local investment. A community property characterization would have raised substantial constitutional objections.³³ The trial

27. *Id.*

28. Counsel for Ms. Hughes argued on appeal, Brief for Appellant at 22, *Hughes v. Hughes*, 91 N.M. 339, 573 P.2d 1194 (1978), that the property was, if not community property, the joint property of the divorcing couple. The fact that both the 115 apartments and the ranch were deeded to the couple in joint tenancy would support this argument. Under N.M. Stat. Ann. § 47-1-16 (1978) an instrument conveying property in joint tenancy is prima facie evidence that the property is held in joint tenancy; a preponderance of the evidence is sufficient to establish joint tenancy. The joint tenancy argument in *Hughes* was probably defeated by (a) insufficient evidence of donative intent on the part of Col. Hughes; (b) the fact that downpayments were made principally with funds traceable to Col. Hughes' separate property, *See, e.g., Wiggins v. Rush* 83 N.M. 133, 489 P.2d 641 (1971), and (c) the fact that Col. Hughes alone contracted to purchase the ranch. In New Mexico, the status of property is determined by the title at the time of acquisition rather than the final instrument of conveyance. *Hollingsworth v. Hicks*, 57 N.M. 336, 258 P.2d 724 (1953). In *Hughes* the purchase agreement rather than the warranty deed conveyed title.

29. 91 N.M. at 341, 573 P.2d at 1196.

30. *Id.*

31. *Id.* at 348, 573 P.2d at 1203.

32. Complaint at 2.

33. A community property characterization would probably not withstand constitutional objections regarding due process. *See* note 46, *infra*.

court rejected such a characterization and the supreme court agreed. In its opinion, the supreme court relied on New Mexico precedent, *Koprian v. Mennecke*,³⁴ stating that the status of property as community property or separate property is determined in accordance with the laws of the jurisdiction where it was acquired. Having been acquired as separate property in a common law state, the property retained that characterization when invested in New Mexico. In so deciding, the supreme court was applying the "source rule" which, absent a quasi-community property statute, is the universally accepted conflict of laws principle applicable to the fact pattern.³⁵

Once the trial court rejected the community property characterization, it followed that the marital property was Col. Hughes' separate property. The court then determined Mrs. Hughes' rights to this property according to New Mexico law, under which she could take nothing.³⁶ Mrs. Hughes appealed.

On appeal the supreme court adopted the trial court's characterization of the property as separate property, but refused to determine the parties' rights to the property according to New Mexico law.³⁷ Instead, the court chose to apply the law of Iowa, the state of domicile at the time the property was acquired. Examining Iowa law, the court found that the wife had "inchoate equitable rights" to her husband's separate property where she has made contributions to preserving and bettering the property.³⁸ The court determined that Mrs. Hughes had made a substantial contribution to the acquisition of the property and was entitled to the benefit of the equitable share Iowa law provides. It directed the trial court to re-examine the property rights of the parties in light of the applicable substantive law of Iowa.

It its opinion, the supreme court stated that the trial court on rehearing should "look to the whole law of Iowa bearing on marital property."³⁹ That meant that the trial court must define the parties'

34. 53 N.M. 176, 204 P.2d 440 (1949).

35. This statement assumes that a common law form of concurrent ownership, such as joint tenancy or tenancy in common, is not asserted. N.M. Stat. Ann. § 40-3-8(d) (1978) provides that spouses may hold property concurrently. As to arguments concerning concurrent ownership in the *Hughes* case, see, *supra* note 27.

36. New Mexico law provides one way, apparently not considered by the court, in which Mrs. Hughes could have taken a substantial portion of the marital property. N.M. Stat. Ann. § 40-4-7(B)(1) (1978) provides for the divestment of a spouse's separate property in favor of the other spouse "as alimony." The trial court could have determined that the disputed property was Col. Hughes' separate property, then divested a portion of it for Mrs. Hughes' support. Thus the difficult conflict of laws questions posed by the *Hughes* case would not have arisen.

37. 91 N.M. at 346, 573 P.2d at 1201.

38. 91 N.M. at 342, 573 P.2d at 1199.

39. *Id.* at 346, 573 P.2d at 1201.

rights to the property in a manner consistent with a common law state's notions as to the rights of the wife to the husband's separate property.

Thus, the supreme court's instruction to the trial court enabled Mrs. Hughes to take an interest in the marital property commensurate with her contribution to its acquisition. In so doing, the court honored the state's policy that the wife shall have equal rights and equal dignity and shall be an equal benefactor in the marital gain.⁴⁰ Ironically, the *Hughes* court's decision required the trial court to reject New Mexico's substantive law and to apply the law of a foreign state which had no interest in the outcome of the dispute and with which the parties involved had scant contact.⁴¹ This solution is procedurally complex. A statutory solution, if made available, could simplify property distribution while achieving a similarly equitable result.

The application of Iowa substantive law resulted in Mrs. Hughes receiving a twenty percent interest in the disputed property at retrial.⁴² She was also awarded substantial alimony as well as her one-half share in the couple's community property. Arguably, the trial court on rehearing gave Mrs. Hughes her fair share of the marital property as mandated by the supreme court.

THE EFFECTS OF THE HUGHES DECISION

The effects of *Hughes*, if not remedied, will likely be detrimental to litigants in similar cases. The best result in a property dispute at divorce is an out of court settlement. For the progeny of *Hughes*, settlement will be especially difficult because counsel for each litigant will be obliged to predict what a New Mexico trial court would decide when confronted with a property distribution problem based on foreign law. After *Hughes*, the current law of marital property distribution in the state of Iowa has been clarified,⁴³ but the

40. *Id.* at 343, 573 P.2d at 1198.

41. The Restatement (Second) of Conflict of Laws § 6 (1971) lists seven contacts factors which a court may apply in a choice of law situation. Those factors pertinent to the *Hughes* case would have directed the court to apply New Mexico law because the state of Iowa has no cognizable interest in either the parties or the New Mexico property involved in the suit.

42. Decision of the Court, at 5 and 6.

43. Or has it been? The *Hughes* opinion directed the trial court on remand to make a property distribution consistent with "applicable Iowa case law," 91 N.M. at 347, 573 P.2d at 1202. The court cited to several Iowa cases, notably *Schantz v. Schantz*, 163 N.W.2d 398 (Iowa, 1968), from which case the court quoted ten guidelines for awarding alimony and making a distribution of property on divorce. Counsel for Col. Hughes, Joseph J. Mullins, observed that the guidelines listed had been partially overturned by the repeal of Iowa's fault divorce statute, Iowa Code Ann. § 598.16 (West Supp. 1978), repealed by Acts 1970

comparable laws of the remaining forty-one common law jurisdictions are yet to be interpreted by New Mexico courts. New Mexico attorneys must, therefore, research the current statutory and decisional law of the appropriate foreign state or states. The cost of this research will be passed on to the clients. Even after the attorneys grasp the pertinent law, settlement will be unlikely since the probable decision of a New Mexico trial court will be difficult to ascertain prior to argument on the issues.

Litigation of such cases will doubtless consume the court's time and energy and the taxpayer will ultimately assume the burden. If either litigant chooses to appeal, the costs will further multiply. The *Hughes* property distribution consumed four years of litigation. Some of the delays in *Hughes* were due to circumstances unique to the case,⁴⁴ but the uncertain legal foundation of future *Hughes* decisions will no doubt result in numerous appeals.

Perhaps the greatest liability involved in protracted domestic relations litigation is the personal detriment suffered by the litigants and their family. Months or years of litigation can destroy any remaining good will between the litigants and divide family members into hostile camps.⁴⁵

Nevertheless, the *Hughes* decision is probably justifiable as the best solution available to the supreme court under the circumstances. Even so, in those instances where the divorcing couple migrate in from a state which does not allow for a judicial distribution of marital property other than for alimony, the *Hughes* remedy will not be available to the wife. Regardless of her contribution to the acquisition of her husband's separate property, the best she can hope for is an award of alimony. Her "inchoate equitable rights" to the marital property would not exist. A better solution to the *Hughes* problem would (a) assure recognition of the wife's contribution to the acquisition of marital wealth, (b) give the in-migrating wife the same rights to marital property as those enjoyed by New Mexico

(63 G.A.) ch. 1266, § 1. Indeed, the Supreme Court of Iowa in *In re Harrington's Marriage*, 199 N.W.2d 351, 354 (Iowa 1972) specifically struck down those *Shantz* guidelines tending "to place fault for the marital breakdown on either spouse." Through its error on this point, the *Hughes* court itself provides us with an example of the uncertainty that will characterize the application of foreign case law in future New Mexico cases. Note also that the Supreme Court in *Hughes* observed that in cases "fairly analogous" to *Hughes*, the wife received from "one-third to two-thirds of the property involved." 91 N.M. at 347, 573 P.2d at 1202. The trial court on rehearing awarded Mrs. Hughes only twenty percent, plus alimony. Mrs. Hughes' right to her share of the community property doubtless influenced the court to reduce her share of Col. Hughes' separate property. This result makes the value of Iowa precedent appear even more questionable.

44. For example, the original trial transcript was lost and had to be reconstructed from Judge Donnelly's fortunately copious notes.

45. See note 12 *supra*.

natives, and (c) eliminate as much as possible the need for litigation as a means of distributing marital property. Such a solution is found in quasi-community property legislation.

THE QUASI-COMMUNITY PROPERTY SOLUTION

California was the first community property state to attempt a statutory solution to the problem of the in-migrating spouse at the time of divorce or death of the husband. After an abortive attempt to declare all marital property brought into California community property,⁴⁶ the California legislature enacted a provision which transmuted the in-migrating husband's separate property to community property at the time of issuance of a decree of divorce or separate maintenance.⁴⁷ Such property was classified as "quasi-community property." The California Supreme Court upheld the quasi-community property provision, ruling that the state had a "sufficiently necessary"⁴⁸ justification to divest the husband's separate property in favor of the otherwise unprotected wife. Where the state has an immediate interest in protecting the wife, this use of its police power does not deprive the husband of his property without due process of law.⁴⁹

46. The California Legislature in 1917 passed legislation (Cal. Civ. Code § 164) declaring that (a) separate personal property located anywhere and (b) real property located in California acquired during coverture in a common law state (that is, all property which would have been community property if the couple had been domiciled in California) would be transmuted to community property once the marital couple became domiciled in California. This approach was found unconstitutional by the Supreme Court of California in *In re Estate of Thornton*, 1 Cal. 2d 1, 33 P.2d 1, 92 A.L.R. 1343 (1934), since it was held to violate the privileges and immunities and due process clauses of the California state constitution. The divesting of the in-migrating husband's separate property merely because he moved to California was held to (a) discriminate against non-native Californians and (b) deprive the husband of property in the absence of a permissible state purpose. Similar legislation or judicial decisions in New Mexico would doubtless conflict with the due process provision of the New Mexico Constitution.

47. Cal. Civ. Code § 140.5 (1961). Subsequently repealed and reenacted as § 4803 (Supp. 1978).

48. *Addison v. Addison* 62 Cal. 2d 558, —, 399 P.2d 897, 902, 43 Cal. Rptr. 97, 102, (1965).

49. The *Addison* test has been described as "interest balancing," a weighing of the husband's interest in maintaining his vested right to marital property against society's interest in protecting the wife. Comment: *Marital Property and the Conflict of Laws: The Constitutionality of the "Quasi-Community Property" Legislation*, 54 Cal. L. Rev. 252, 262 (1966). A second argument advanced in justification of the *Addison* decision holds that the quasi-community property scheme merely substitutes community property rights for the common law rights which the wife already possessed to the marital property. Schreter, *Quasi-Community Property in the Conflict of Laws* 50 Cal. L. Rev. 206, 218-19 (1962). But note that the quantitative measure of the right may vary considerably from common law to community property systems, e.g., from a one-third to a one-half share. A sizeable variance in the wife's favor suggests that the community property philosophy of equality between spouses actually confers a right on the wife.

Under the quasi-community property scheme, the husband holds the property during coverture as his separate property. It may be conveyed for consideration or given away inter vivos.⁵⁰ The husband can encumber it without spousal consent, manage it, and subject it to his separate debt. Until divorce, separate maintenance, or the husband's death, the wife holds no interest in the property, only an expectancy.⁵¹ If the marital couple should migrate back to a common law state, the community property system never affects the property. In sum, under the quasi-community property scheme, the protection of the community property system is not invoked until necessary, and, in the case of the couple's out-migration, it is not invoked at all.

If New Mexico were to enact a quasi-community statute, distribution of the marital property of in-migrating couples would be relatively simple. At divorce, in a situation like *Hughes*, the court would divide evenly between the spouses the property which would have been community property if the couple resided in New Mexico when it was acquired. All marital property brought into New Mexico, as in *Hughes*, and all real property situated in New Mexico, would be distributed in this way.⁵² In New Mexico, a presumption exists that property not traceable to separate property is community property.⁵³ This presumption would likely apply to quasi-community property as well and would make fact-finding as to the characterization of marital property reasonably predictable. Given a quasi-community property statute and the community property presump-

50. Although quasi-community property can be transferred gratuitously, there are provisions in both California and Idaho probate codes which prevent the husband from making incomplete transfers to third parties of the sort that (a) defeat the wife's interest at the husband's death, but that (b) leave a substantial measure of control or enjoyment in the husband during the remainder of his life. Thus, at probate, the widow may enforce a one-half interest in so-called Totten trusts, joint bank accounts, and revocable trusts. These statutes (Cal. Prob. Code § 201.8 (West, Cum. Supp. 1978); Idaho Code § 15-2-202 (Cum. Supp. 1977) represent the application of the "augmented estate" concept to quasi-community property. The augmented estate provision of the Uniform Probate Code § 2-202 (1972) prevents disinheritance of wives in common law states. Uniform Probate Code, ULA (1972).

51. The Federal Internal Revenue Service considers quasi-community property to be the acquiring spouse's separate property until his or her death; the restrictions on his or her disposition of the property do not affect its title. If the husband gives the property away inter vivos the transfer is subject to taxation as his separate gift. At the husband's death all of the property is subject to estate tax. Insofar as the property goes to the widow, it may be included in the husband's gross estate for purposes of the marital deduction. Anderson, *Community Property and the Marital Deduction Planning for the Use of Both*, 1 Community Prop. J. 71, 73 (1974). The state of California taxes only one-half the value of quasi-community property at the death of the husband. Medaille, *The Taxation of California Quasi-Community Property*, 45 Taxes 341, 342 (1967).

52. See text accompanying note 57 *infra*.

53. See, e.g., *Hollingsworth v. Hicks* 57 N.M. 336, 338, 58 P. 2d. 724, 726 (1953).

tion, marital property would be distributed with fairness and economy. Litigation would presumably mark the exceptional case.

The quasi-community property scheme provides protection for the in-migrating wife at dissolution of the marriage. It provides a practical solution to a difficult choice of laws problem. The *Hughes* court approved the quasi-community property concept, as attested by its endorsement of the California quasi-community property legislative scheme.⁵⁴ Yet, it declined to adopt a quasi-community property solution.

It seems likely the *Hughes* court's choice against a quasi-community property solution resulted from deference to legislative prerogative. The community property system in New Mexico is a product of statute. From the enactment of the community property statute in 1901,⁵⁵ the New Mexico Supreme Court has honored the statute as an exception to the common law rules of decision which were adopted *in toto* in New Mexico in 1876.⁵⁶ Recognizing the statutory origins of New Mexico's community property system, the *Hughes* court no doubt felt constrained to leave substantive change to the legislature. The *Hughes* court seemed motivated first to do equity in the case at bar, and secondly, to point to the better solution for the progeny of *Hughes*, namely, a quasi-community property statute. At the same time, it refrained from imposing its wishes without legislative authorization.

Doing equity in the *Hughes* case required four years of post-divorce litigation at tremendous expense. Not all such cases will so severely tax the parties involved. Nevertheless, the judicial solution to the progeny of *Hughes* will be unacceptable to the parties, the courts, and the taxpayers. To protect the in-migrating wife at divorce, quasi-community property legislation should be enacted; a simple and inexpensive solution is preferable to a complex and expensive one.

PROPOSED STATUTORY PROVISION

The current New Mexico statute⁵⁷ classifies marital property as either community property or separate property. The proposed provision adds a third classification, quasi-community property, for purposes of divorce or legal separation. Quasi-community property consists of that marital property which would have been community

54. 91 N.M. at 346, 573 P.2d at 1201.

55. DeFuniak & Vaughn, *supra* note 4, § 49 at 80.

56. *Id.* at 79.

57. N.M. Stat. Ann. § 40-3-8 (1978).

property if the acquiring spouse had been domiciled in New Mexico at the time of acquisition. The existing marital property classification together with a proposed quasi-community property provision would read as follows:^{5 8}

AN ACT

RELATING TO PROPERTY; AMENDING SECTION 40-3-8 N.M. STAT. ANN.
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

“40-3-8. CLASSES OF PROPERTY.—

A. “Separate property” means:

(1) property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage;

(2) property acquired after entry of a decree entered pursuant to Section 40-4-3 NMSA 1978 unless the decree provides otherwise;

(3) property designated as separate property by a judgment or decree of any court having jurisdiction;

(4) property acquired by either spouse by gift, bequest, devise or descent;

(5) property designated as separate property by a written agreement between the spouses; and

(6) each spouse’s undivided interest in property owned in whole or in part by the spouses as co-tenants in joint tenancy or as co-tenants in tenancy in common.

B. “Community property” means property acquired by either or both spouses during marriage which is not separate property.

C. For purposes of dividing property between the spouses by a proceeding for dissolution of marriage or legal separation, “quasi-community property” means all real or personal property owned by a married person domiciled in New Mexico, wherever situated and whenever acquired:

(1) by either spouse while domiciled outside of New Mexico which would have been community property had the spouse acquiring it been domiciled in New Mexico at the time of acquisition; or

(2) any property acquired in exchange for property which would have been community property if the spouses acquiring it had been domiciled in New Mexico at the time of acquisition.

D. For purposes of determining the property rights of a surviving spouse upon the death of the other spouse, “quasi-community property” means all personal property, wherever situated and whenever

58. The proposed statute is based on a draft by Anne K. Bingaman, J.D. The underlined portion is the proposed quasi-community property provision.

acquired, and all real property situated in New Mexico, if acquired:

(1) by either spouse while domiciled outside of New Mexico which would have been community property had the spouse acquiring it been domiciled in New Mexico at the time of acquisition.

[C.] E. "Property" includes the rents, issues and profits thereof.

[D.] F. The right to hold property as joint tenants or as tenants in common and the legal incidents of so holding, including but not limited to the incident of the right of survivorship of joint tenancy, are not altered by the Community Property Act of 1973, except as provided in Sections 40-3-10, 40-3-11 and 40-3-13 NMSA 1978."

PROBLEMS PRESENTED AT THE DEATH OF THE HUSBAND

The only problem presented in *Hughes* is how to protect the immigrating wife at the time of divorce. However, the wife migrating to New Mexico from a common law jurisdiction is equally in need of protection in the event of her husband's death because of the inadequacy of New Mexico's probate law in dealing with spouses who have acquired little or no community property. If the couple remain in a common law state, the wife is usually protected from disinheritance at her husband's death by either a statute allowing for a widow's forced share,⁵⁹ or by a dower right⁶⁰ to her husband's separate property. If the wife is omitted from or poorly provided for in the husband's will, she may elect to take her statutory forced share or dower interest "against the will."⁶¹ New Mexico, as a community property state, has no such provision, since the widow has a right to an undivided interest in one-half of the community property, regardless of the provisions of her husband's will.⁶² In New Mexico the wife has no right to the husband's separate property, which he may devise to a third party should he so choose.

The only restraints⁶³ on the husband's ability to devise his half of the community property or his separate property come from statutory provisions for a family allowance of \$10,000⁶⁴ and for a \$3,500 personalty allowance⁶⁵ in favor of the wife. If the couple

59. See, e.g., Fla. Stat. Ann. § 732.201 (1976); Minn. Stat. Ann. § 525.16(2), (3), (Repl. 1975).

60. See, e.g., Ark. Stat. Ann. § 61-201 (Repl. 1971); R. I. Gen. Laws § 33-4-1 (1970).

61. Dukeminier & Johanson, *supra* note 17, at 521.

62. N.M. Stat. Ann. § 45-2-102(B) (1978).

63. Restraints on the husband's testamentary powers also result from probate code provisions for the omitted spouse, N.M. Stat. Ann. § 45-2-301 (1978) and for pretermitted children, N.M. Stat. Ann. § 45-2-302 (1978). These provisions concern unintentional omissions from wills and are not within the scope of this note.

64. N.M. Stat. Ann. § 45-2-401 (1978).

65. N.M. Stat. Ann. § 45-2-402 (1978).

migrate to New Mexico from a common law state, the statutory forced share or dower right provided by that state will usually not be available to the widow. The accepted choice of law rule in probate matters is that the law of the jurisdiction where the will is probated applies to the decedent's personal property and to any real property located within the jurisdiction.⁶⁶ Thus, the property distribution analysis used by the New Mexico Supreme Court in *Hughes* would not apply.⁶⁷

If a husband owned separate property equal in value to that in the *Hughes* case (\$330,000)⁶⁸ and if he devised it to a friend, lodge or charity, his wife could claim only the family allowance against the will. Under the New Mexico Probate Code it is unclear whether the \$10,000 family allowance would be extracted from that property or if it would derive from the couple's community property, if any. In either case her maximum share in his separate real property would be \$10,000 which is about three percent of the separate property's value.

In case of intestacy in New Mexico, the surviving spouse takes the decedent's share of the community property that would have been disposable by will.⁶⁹ Thus all the community property goes to the widow. She takes her husband's separate property as well if there are no children.⁷⁰ If there are children, the widow takes a one-fourth share of the husband's separate property. Clearly, in New Mexico a wife is fully protected in case of her husband's death, provided there is community property. In addition, the family and personal allowance provisions are available.

Intestacy is much more problematic if there is little or no community property. If there are surviving minor children, three-fourths of their father's separate property will descend to them. The family and personal allowances are due the wife, however. The children will require a conservator for their property as well as a personal guardian. The widow is the natural personal guardian of the children and

66. De Funiak & Vaughn, *supra* note 4, § 201 at 465. For an excellent discussion of the way in which conflict of laws principles leave in-migrating wives vulnerable to disinheritance in New Mexico, see *Note: Rights of Surviving Spouse in New Mexico in Property Acquired by Decedent Spouse While Domiciled Elsewhere*, 5 N.R.J. 373 (1965).

67. At the death of the husband, the problem as to the distribution of his separate property brought in from a common law jurisdiction differs from the problem of property distribution at divorce. There is no "balancing" of the rights of the husband to his separate property against society's interest in protecting the wife. The decedent husband has no vested interest in the property, nor do his heirs at law nor his devisees. 62 Cal. 2d 558, —, 399 P.2d 897, 900, 43 Cal. Rptr. 97, 100 (1965). Nevertheless, the decedent may effectively disinherit his widow through a valid will owing to the probate choice of laws rule.

68. The trial court, Decision of the Court, at 4, found that the 115 apartments and the ranch were worth \$186,000 and \$144,000, respectively, for a total value of \$330,000.

69. N.M. Stat. Ann. § 45-2-102B (1978).

70. N.M. Stat. Ann. § 45-2-102A (1978).

may be appointed the children's conservator.⁷¹ This arrangement gives the widow the maximum control over the property that the circumstances will allow.

If the children have attained their majority at the time of the father's death, then they take three-fourths of his separate property without a conservator. Unless the estate is considerable, the middle-aged or elderly widow is likely to be hard pressed to subsist on the remaining one-fourth of the estate allotted to her. Her family and personalty allowances provide scant resources. She will then depend on the goodwill and support of the children, who are less likely to need the proceeds from the estate than will their mother. It would be better that the widow receive an inheritance from her husband as a matter of right than as a matter of charity.

Were a quasi-community property statute enacted in New Mexico, in-migrating wives would have the same protection as New Mexico residents. Only one-half of that property which would have been community property had it been acquired when the couple were domiciliaries of New Mexico would be devisable. The surviving spouse would take the other half by operation of law. In case of intestacy, the conversion of the marital property to community property would result in the wife taking that property which in most cases would represent the body of the estate in her own name. She could then freely use the property to support herself and her children without the restrictions imposed by guardianship law.

PROPOSED STATUTORY PROVISION

The New Mexico Legislature can provide for the protection of the wife in those cases where (a) the couple has migrated into New Mexico from a common law jurisdiction and (b) there has been little or no accretion of community property and (c) the husband's will would effectively disinherit the wife by devise of the husband's separate property acquired in a common law jurisdiction to third parties. The same legislative provision can protect the widow's rights to marital property under similar circumstances where the husband dies intestate. Such a statutory provision need merely state that property acquired during coverture in a common law jurisdiction which would have been community property had the couple been domiciled in New Mexico at the time of acquisition will be treated as community property at the death of the acquiring spouse. Such property would be classified as "quasi-community property" for pur-

71. N.M. Stat. Ann. § 45-5-410A(5) (1978).

poses of probate or intestate succession. Quasi-community property would include only that property over which New Mexico courts could claim jurisdiction. This would include all the decedent's personal property, wherever located, and all of the decedent's real property located in New Mexico or in a state whose laws would provide New Mexico's courts with jurisdiction over the real property. Quasi-community property would likewise encompass property received in exchange for property which would have been community property had the acquiring spouse been domiciled in New Mexico at the time of acquisition. At the death of the intestate acquiring spouse, the surviving spouse would thus take a one-half share. Even if the acquiring spouse's will did not provide for the surviving spouse, she could take one-half of the decedent's separate property as her share of the quasi-community property.

Creditors' rights to quasi-community property differ from their rights to community property. During the existence of the marriage, the non-acquiring spouse has a right to an undivided one-half interest in the community property. If the acquiring spouse dies, his creditors may not reach this half of the community property. The non-acquiring spouse has no such right to the quasi-community property during coverture; she has only an expectancy. At the death of the acquiring spouse, his creditors will have first rights to the quasi-community property. The proposed statutory provisions read as follows:

AN ACT

RELATING TO DESCENT AND DISTRIBUTION; AMENDING SECTIONS
45-2-102 AND 45-2-804, NEW MEXICO STATUTES ANNOTATED.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

45-2-102 Share of the spouse

The intestate share of the surviving spouse is determined as follows:

A. as to separate property:

(1) if there is no surviving issue of the decedent, the entire intestate estate; or

(2) if there is surviving issue of the decedent, one-fourth of the intestate estate; and

B. as to community property, the one-half of the community property as to which the decedent could have exercised the power of testamentary disposition passes to the surviving spouse.

C. as to quasi-community property, the one-half of the quasi-community property as to which the decedent could have exercised the power of testamentary disposition passes to the surviving spouse.

and,

45-2-804 Death of the spouse; community property.

A. Upon the death of either spouse, one-half the community property and one-half of the quasi-community property belongs to the surviving spouse and the other half of the community property and the quasi-community property is subject to the testamentary disposition of the decedent.

B. Upon the death of either spouse, the entire community property is subject to the payment of community debts. The deceased spouse's separate debts and funeral expenses and the charge and expenses of administration are to be satisfied first from his separate property and from the quasi-community property excluding property held in joint tenancy. Should such property be insufficient, then the deceased spouse's undivided one-half interest in the community property shall be liable.

CONCLUSION

Both the common law and community property systems of marital property provide for the protection of the wife at the dissolution of the marriage by divorce or death of the husband. The types of protection provided by each system differ and they are not easily interchangeable. When a marital couple migrate from a common law jurisdiction into a community property state and the marriage is dissolved by death or divorce before substantial community property is acquired, the community property state is faced with a conflict of laws problem. The *Hughes* case brought this problem before the New Mexico Supreme Court. The court resolved the problem by applying the law of the common law jurisdiction where the couple was domiciled when the marital property was acquired. The court decided that under Iowa law the wife has an inchoate equitable interest in the husband's separate property acquired during coverture. At divorce, this interest is to be divested in favor of the wife. The result in *Hughes* was fair to both parties. But the application of the *Hughes* holding to similar cases will impose hardships on the parties, the bar, the judiciary, and ultimately New Mexico taxpayers. The argument and interpretation of foreign states' marital property laws will be expensive, time-consuming, and uncertain. In the *Hughes* opinion, the New Mexico Supreme Court suggested a better solution in the form of quasi-community property legislation. A quasi-community property statute would provide in-migrating wives with a degree of protection equal to that enjoyed by native New Mexico wives at divorce. The expenses of determining the rights of the in-migrating wife to marital property would be minimized. A quasi-community property statute providing for protection of in-migrating

wives at divorce was proposed in this note. Since the in-migrating wife is vulnerable to financial insecurity at the death of her husband, a quasi-community property provision was proposed which would provide for protection of the wife in the event of her husband's intestacy or if the wife was unprovided for in her husband's will.

FRANK L. SPRING