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NOTES

Community Property Considerations in Ohio Estate Planning: Expecting the Unexpected

FOR THE LAWYER IN THE COMMUNITY PROPERTY STATE,[1] the laws peculiar to community property are familiar ground, having in all probability made up at least a part of the law school curriculum. For the lawyer in the common law state, community property laws are generally something to be read about in the newspaper when the husband or wife of a movie star lands a huge divorce settlement due to the operation of the community property laws in California. But it is quite realistic to state that whether the attorneys in the common law states know it or not, they are in fact likely to encounter the operation of community property laws at some time during their practice. Indeed, if they fail (or worse, have failed) to determine whether any community property laws operate on the estate plans of any of their clients, such failure might amount to malpractice, if the client suffers economic detriment.[2]

The more positive side of the picture, of course, is that given the fact that a substantial percentage of those persons who move from

[1] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. In addition, a number of foreign countries, such as Canada, England, Scotland, France, Germany, Spain, and others, are community property countries. Moreover, a number of other states, including Michigan, Pennsylvania, Oklahoma, Hawaii, Nebraska, and Oregon, had community property statutes for a time, but dropped them when Congress enacted legislation allowing joint federal income tax returns for spouses. N. LAY, TAX AND ESTATE PLANNING FOR COMMUNITY PROPERTY AND THE MIGRANT CLIENT 1-6 (1970) [hereinafter cited as N. LAY.]

[2] The following figures demonstrate the likelihood of some encounter with community property laws:

Of roughly two hundred million persons in the United States in the two-year average period March, 1969 - March, 1971, 18% or approximately one of five, moved during the period. As a factor of total population, an average of 3.5% moved from one state to another, each year. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1972, at 36. [hereinafter cited as ABSTRACT]

The following chart of net migration for the community property states and for the United States as a whole during the period of 1960-1970, along with figures regarding total population change, gives one some idea of the likelihood of encounter with community property laws. ABSTRACT, *supra,* at 11.

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state to state are executives and sales personnel of large multi-state corporations, special opportunities arise for the attorneys they leave behind, or the attorneys they consult upon their arrival at their new locations, for intelligent estate planning. This note will outline the basic problems of moves to and from community property states, and will point toward the solutions of these problems.

General Outline of Community Property Laws

Community property is generally defined negatively. Community property states take pains to define that which is separate property, such as property acquired before marriage, property in trust for one spouse, gifts to one spouse, and the like, and then call all the rest community property. For our purposes, however, it will be helpful to have a positive definition. The Tenth Circuit Court of Appeals in *Hammonds v. Commissioner*[4] held that community property was whatever is gained during coverture by the toil, talent, or other productive faculty of either spouse. *Hammonds* was an income taxation case, in which Mrs. Hammonds held certain oil leases. Since the case was heard before the enactment of the provisions allowing joint returns by husbands and wives, the community property states had a distinct income tax advantage. Community property states allowed married persons to split income from community property in their separate income tax returns. This is what Mr. and Mrs. Hammonds did in this case, despite the fact that the income-producing oil leases were all in Mrs. Hammonds' name. The court held for the taxpayers, under its definition of community property as set out above.

Whether real property is to be treated as separate or as community property is determined by the law of the situs of the property.[5] Even if the husband and wife reside in a community property state, if they own real property in a non-community state, that property is not community property.[6] Similarly, if a husband and wife live in a non-community state and buy real property in a community state, that real property is community property. But in this instance, there is an option. If for any reason the husband and wife wish to keep it as separate property, and if separate funds are used for the purchase, the property can retain its characteristic of separateness.[7]

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[3] *See generally,* N. LAY, *supra* note 1, at 37-53; de Funiak, *A Review in Brief of Principles of Community Property,* 32 KY. L. REV. 63 (1943).

[4] 106 F.2d 420 (10th Cir. 1939).

[5] La Selle v. Woolery, 14 Wash. 70, 44 P. 115 (1896) (dicta).

[6] *Id.*

[7] Burlingham v. Burlingham, 72 N.M. 433, 384 P.2d 699 (1963).

As to personal property, the law of the state of the taxpayer's domicile determines whether personal property is community or separate; and any artificial means to defeat the community, except as permitted by statute or case law, will meet with failure.

In times past, community property states jealously guarded their system of property in the face of voluntary attempts by married couples to separate the property,[8] and also by creditors to attach the property of one spouse or the other, as separate property. In all community property states it is a good deal easier to convert community to separate property.[9] The simplest method, effective in all community property states, is by gift. It is imperative, however, that the local law be consulted, for in more than one state, a writing is necessary.[10] In Louisiana, however, the opposite is true — the gift cannot take the form of a written contract.[11]

That rents and profits from community assets are themselves community property goes almost without saying, under the positive definition outlined above. The difficulty arises when the rents, profits, and gains come during coverture from the separate property of the husband or the wife. Jurisdictions vary on this point. For example, in California, they are separate property;[12] but in Texas they are community property.[13] In a bizarre case in which a husband held property in one community property state in which rents were separate property, while he lived in another state in which rents were community property, the court held that the rents were separate property for federal tax purposes.[14]

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[8] *See, e.g.,* King v. Bruce, 145 Tex. 647, 201 S.W.2d 803 (1947), *cert denied,* 332 U.S. 769 (1947), *rehearing denied,* 332 U.S. 820 (1947).

[9] ARIZ. REV. STAT. ANN. §25-214 (Supp. 1973); CAL. CIV. CODE §§158, 161, 683 (Deering 1960), CAL. FINANCIAL CODE §852 (Deering 1964); IDAHO CODE ANN. §32-906 (1963); LA. CIVIL CODE ANN. §§1746, 2329, 2332 (West 1971); NEVADA REV. STAT. §§123.070, 123.080(1), 123.030 (1957); N.M. STAT. ANN. §§57-2-6, 57-2-12 (1962); TEX CONST. art. 16, §15, *as amended,* (1948); TEX. PROB. CODE ANN. §46 (1956), *as amended,* TEXAS LAWS ch. 641 §3 p. 1922 (1969); WASH. REV. CODE §26.16.050, 26.16.120 (1961); Hobbs v. Hobbs, 69 Idaho 201, 204 P.2d 1034 (1949); Shroff v. Deaton, 220 S.W.2d 489 (Tex. Civ. App. 1949); Scott v. Currie, 7 Wash. 2d 301, 109 P.2d 526 (1941).

[10] California, Louisiana, Texas, and Washington. Statutes cite in note 9 *supra.*

[11] *See* LA. CIVIL CODE ANN. §§1746, 2329-2332 (West 1972).

[12] CAL. CIVIL CODE §§5107-08 (Deering 1971); they are also separate property in four other jurisdictions: ARIZ. REV. STAT. ANN. §25-215 (1956); NEV. REV. STAT. §123.30 (1967); N.M. STAT. ANN. §§57-3-4, 57-3-5 (1962); WASH. REV. CODE §§26.16.010 (1961).

[13] TEX FAMILY CODE §5.01 (1969); King v. Matney, 259 S.W.2d 606 (Tex. Civ. App. 1953); they are also community in two others: IDAHO CODE §32-903 (1947); LA. CIVIL CODE ANN. art. 2334-35 (1952).

[14] Commissioner v. Skaggs, 122 F.2d 721 (5th Cir.), *cert. denied,* 315 U.S. 811 (1941).

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Generally, property acquired before marriage by one spouse or the other will retain its character as separate property,[15] except in cases of commingling or fraud upon creditors.

Property received by one spouse or the other by gift or inheritance, whether acquired before or after marriage, will in most cases remain separate property.[16] The most obvious corollary of this principle is that simple and effective conversion from community to separate property may be accomplished by gift from one spouse to the other.[17]

Property received by gift or inheritance to both spouses is community property.[18] Property acquired by the sale or exchange of separate property retains its character as separate property if and only if the property so acquired is carefully labeled as separate.[19] Property acquired from the sale or exchange of community property, or with community credit, is community property.[20]

There is a split of authority among community property states with regard to property acquired from the sale or exchange of "mixed" property, consisting of both community and separate property. Some jurisdictions maintain that the property so acquired retains proportionate community-separate identity in accordance with the amounts of contributions of community and of separate property, to aggregate the purchase of the new property.[21] Other states, notably Louisiana, call the new property community, and give the contributor of separate property creditor status to the extent of the value of his or her separate property contribution.[22]

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[15] Rico v. Brandenstein, 98 Cal. 465, 33 P. 480 (1893); Kohny v. Dunbar, 21 Idaho 258, 121 P. 544 (1912); Routh v. Routh, 9 Rob. (La.) 224, 41 Am. Dec. 326 (1844); Brookman v. Durkee, 46 Wash. 578, 90 P. 914 (1907).

[16] Poe v. Seaborn, 282 U.S. 101 (1930); Hatch v. Ferguson, 68 F. 43 (9th Cir. 1895); Rico v. Brandenstein, 98 Cal. 465, 33 P. 480 (1893); Kohny v. Dunbar, 21 Idaho 258, 121 P. 544 (1912); Dixon v. Sanderson, 72 Tex. 359, 10 S.W. 535 (1888); Brookman v. Durkee, 46 Wash. 578, 90 P. 914 (1907).

[17] Germania Fire Ins. Co. v. Bally, 19 Ariz. 580, 173 P. 1052 (1918); Odone v. Marzocchi, 34 Cal. 2d 431, 211 P.2d 297, *hearing denied,* 34 Cal. 2d 431, 212 P.2d 233 (1949); Reed v. Reed, 283 S.W.2d 311 (Tex. Civ. App. 1955). It should be noted, however, that such a gift would be subject to taxation.

[18] *In re* Salvini's Estate, 65 Wash. 2d 442, 397 P.2d 811 (1964).

[19] Burlingham v. Burlingham, 72 N.M. 433, 384 P.2d 699 (1963); E.I. DuPont de Nemour & Co., Inc. v. Garrison, 13 Wash. 2d 170, 124 P.2d 939 (1942).

[20] Warburton v. White, 176 U.S. 484 (1900); Gillis v. Gillis, 435 S.W.2d 171 (Tex. Civ. App. 1968).

[21] Fellows v. Fellows, 106 Cal. App. 681, 289 P. 887 (1930); Schuster v. Bauman Jewelry Co., 79 Tex. 179, 15 S.W. 259 (1890); Heintz v. Brown, 46 Wash. 387, 90 P. 211 (1907).

[22] Burns v. Thompson, 39 La. Ann. 377, 1 So. 913 (1887).

There is a split of authority, too, with respect to damages awarded or received in a civil action for personal injury to one spouse. California and Nevada consider such awards as the separate property of the spouse to whom they were awarded.[23] Arizona, Idaho, Texas, and Washington consider such damages community property.[24] In Louisiana, if the husband is the injured party, the award is community property.[25] If the wife is injured, damages for pain and suffering are her separate property,[26] but damages for medical expenses and loss of earnings are community property.[27] New Mexico treats general and special damages in the same manner as does Louisiana, but makes no distinction whether it is the husband or the wife who is injured. In New Mexico, therefore, general damages are separate property, and special damages are community property.[28]

With respect to life insurance proceeds, the law in the various community property jurisdictions is exceedingly complex and diverse. Suffice it to say that when planning the estates of a family which moved from a community property state into a common law state, more than just the pure incidents of ownership will have a bearing upon the taxability of the proceeds in the decedent's estate. If a life insurance policy on the life of either spouse was paid for in whole or in part with community funds, both spouses have an interest in that policy, and the law of the jurisdiction from which they came should be carefully checked.[29]

Community Property and Common Law Property Compared

The "statutory interest" or "non-barrable share" of a spouse in a common law state attaches to all of the property of the other spouse, whether previously or subsequently acquired, and attaches both to purchases and to gifts and inheritances. Such is not the case in community property jurisdictions.[30] In the latter states, there is no statutory share in the other spouse's separate property.

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[23] CAL. CIV. CODE §163.5 (Deering 1960); Underhill v. Anciaux, 68 Nev. 69, 226 P.2d 794 (1951), *disapproved on other grounds*, Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 420 P.2d 855 (1966).

[24] Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956); Clark v. Foster, 391 P.2d 853 (Idaho 1964); Glens Falls Ins. Co. v. Yarbrough, 369 S.W.2d 640 (Tex. Civ. App. 1963); Texas & Pac. Ry. v. Leatherman, 351 S.W.2d 633 (Tex. Civ. App. 1961); Chase v. Beard, 55 Wash. 2d 58, 346 P.2d 315 (1959).

[25] McHenry v. American Employers' Ins. Co., 206 La. 70, 18 So. 2d 656 (1944).

[26] LA. CIV. CODE ANN. art. 2402 (West 1952); Sanders v. P. & S. Ins. Co., 125 So. 2d 24 (La. App. 1960).

[27] Johnson v. Shreveport Transit Co., 137 So. 2d 463 (La. App. 1962).

[28] Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952); Richards v. Richards, 59 N.M. 308, 283 P.2d 881 (1955).

[29] For a good general discussion of insurance in community property states, see 1 H. WREN, CREATIVE ESTATE PLANNING 99-105 (1970); N. LAY, *supra* note 1, at 28-33.

[30] McClanahan, *Property Problems of the Migrant Client: A Statutory Solution*, 111 TRUSTS AND ESTATES 950 (1972).

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The common law statutory interest is non-possessory. The community interest is present, possessory, and co-equal.[31] The common law non-acquiring spouse has no management control or other elements of ownership during life, especially when the property is in the name of the husband. In community states, the husband is usually given management rights over the community, but as previously stated, ownership is co-equal. This particular facet of community property law has significant bearing upon federal estate tax planning, as will be discussed later. In addition, whether this facet of community property law is honored or ignored by a common law state to which the couple removes, will have a bearing upon the state inheritance or estate tax liability, as will also be discussed.

It should be noted at this point that while in common law states the non-acquiring spouse has no elements of ownership during life, the acquiring spouse is still not free to dispose of the property and ignore the statutory interest of the other spouse. Ohio Revised Code §2103.02 is typical, in this regard, in stating that the statutory dower right of the non-acquiring spouse arises at the death of the other, or when the acquiring spouse sells or encumbers the real property without obtaining the release of the statutory interest of the other. In community property states, by contrast, the holder of separate property may dispose of it at will, inter vivos or by testamentary disposition to anyone, without regard for the form of title or any imagined interest of the other.[32] This gives rise to an interesting problem.

If a family whose assets are all in the husband's name but are in fact community property moves from a community property state to a non-community state, and the husband then dies intestate or leaves his property by will to someone other than his wife, perhaps in reliance upon what he knew would happen in the community state (half automatically, in fee, to the wife), the wife's former mandatory one-half of all community could be reduced from that one-half to a maximum of one-fourth to one-half in fee, down to a minimum of a life estate in one-third of all of the property, depending upon the laws of the state to which they had moved.[33]

Assume, for example, that a husband and wife and two children move from California to Ohio, and that shortly after the move, the husband dies intestate. Under Ohio Revised Code §2105.06, the wife would receive one-third of the estate in fee, and the children would receive the other two-thirds. If the husband had died in California, the wife would automatically own her community one-half, plus whatever share of the husband's one-half would pass to her under Cali-

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[31] *Id.* at 951.

[32] *Id.*

[33] *Id.* at 952, *citing* MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 27-58 (1952).

fornia's law of descent and distribution. If the wife needed more than her Ohio statutory share to live on, or if for any other reason she was required to sell property passing to the children under §2105.06, a costly and time-consuming process of sale of property out of the guardianship would result.

The ABA Section of Real Property, Probate, and Trust Law, Committee on Property Problems of the Migrant Client, has proposed a Uniform Law mandating that in cases such as this, the decedent's property is treated as it would be if he or she had died domiciled in the state in which the property was acquired.[34]

One distinct advantage enjoyed by residents of community property states, and by those who were fortunate enough or astute enough to keep property in community after a move out of a community property state is that upon the death of one, (his) half will pass according to his will to devisees and legatees and will acquire a stepped-up basis to fair market value in the process and, more important, so will the one-half passing to the surviving spouse, despite the fact that (her) half did not pass through decedent's estate, as is normally required by §1014 of the Internal Revenue Code.

It is difficult to explain exactly why this phenomenon exists, especially since no specific language to this effect appears in either §1014 or §2040 of the Code. Yet all of the text writers are clear and unequivocal on the subject, however, and there are cases so holding.[35]

The mechanics and effect of the step-up in basis of the survivor's one-half are not unlike the operation of the §2056 marital deduction under which, when up to one-half of the husband's adjusted gross estate passes to the wife, it is exempted from federal estate taxation and yet, since it did pass to the wife through the husband's estate, the wife takes the property at a stepped-up basis under §1014. There is still an advantage in owning community property as opposed to owning common law property and taking advantage of the marital deduction, as the operation of the community system has none of the strictures of §2056 leaning toward eventual inclusion of the marital deduction property in the wife's estate, and as the community system requires no positive steps by husband or wife in pre-death or post-death planning to avail themselves of the marital deduction. It happens automatically.[36]

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[34] McClanahan, *supra* note 30, at 953.

[35] Bordenave v. United States, 150 F. Supp. 820 (S.D. Cal. 1957);Vinnie A. Murphy, 41 T.C. 608 (1964), *aff'd sub nom.* Murphy v. Commissioner 342 F.2d 356 (9th Cir. 1965); Laura Massaglia, 33 T.C. 379, *aff'd sub nom.* Massaglia v. Commissioner 286 F.2d 258 (10th Cir. 1961).

[36] Lest the reader conversant with estate planning techniques assume that election of the maximum marital deduction (and no more) is a foregone conclusion, he is referred to the 1949 statistics quoted by Dean Wren, indicating that where there are wills extant, the vast

(Continued on next page)

The difference between the two systems with regard to step-up in basis arises most graphically in some of the common law substitutes for community property, such as joint tenancy or tenancy in common. Under §2040, all of the value of property held jointly by the married couple is included in the husband's estate if he predeceases his wife, and yet, since the wife's interest passes to her directly, by contract as it were, there is no §1014 step-up in basis.[36a] Obviously, if the husband's interest were a tenancy in common with a value of one-half the total value of the property, only that one-half would be in his estate, and the wife's one-half would be hers as it was before, but at the old basis.

At the risk of being repetitive, community property presents the best features of both, plus an added benefit: only one-half of the community is included in the husband's estate, and the wife's half automatically receives a stepped-up basis when, at the husband's death, the community is severed and the wife's community one-half becomes her separate property. This advantage to the community property system should never be overlooked when planning for the family moving into or out of a community state, especially if any substantial portion of the couple's property will appreciate or has appreciated in value.

Another significant area of difference between community and common law states is in the treatment which must be accorded marital deductions in estates and gifts, under Code §§2056 and 2523. In the estate tax area, the law is complex. The basic rule is that since community property acts much like an "automatic" §2056 marital deduction, the executor must deduct the value of the community property held by decedent at date of death, in figuring the adjusted gross estate for marital deduction purposes.[37] For example, if the married couple owned $200,000.00 worth of property in community, upon the husband's death $100,000.00 would pass automatically to the wife. The husband could not leave the remaining $100, 000.00 to her tax free under the §2056 marital deduction provisions. He must exclude the value of all community property in which he had an interest, thus reducing his adjusted gross estate (for marital deduction purposes) to zero, making any portion of his remaining $100,000.00 which passes to the wife under his will, fully taxable.

The complexity arises in the area of community property converted to noncommunity, before death. In most cases it, too, must be

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(Continued from preceding page)

majority name the spouse as sole legatee, and that only nineteen percent of the adult population, and only forty-one percent of the one-third wealthiest Americans, even *have* wills! 6 R. POWELL, REAL PROPERTY 606 n.2 (1958), *quoted in* 2 H. WREN, CREATIVE ESTATE PLANNING §10.02[3], at 817, 819 (1970).

[36a] Provided that the decedent died before 1954.

[37] INT. REV. CODE OF 1954, §§2056(c)(2)(B)(i), 2056(c)(2)(C)(ii); Regs. §20.2056 (c)-2(h).

excluded from decedent's adjusted gross estate. A thorough review of §2056 and its regulations is necessary whenever it comes to the attention of counsel that decedent had once been possessed of community property.[38] This is especially important for the practicioner in a noncommunity state, when planning for clients who at any time in the past lived in a community property jurisdiction.

The same peculiarities with respect to deduction of community property from the adjusted gross estate when using the §2056 marital deduction apply to §2523 inter-spousal gifts of community property. These provisions should be borne in mind when filing gift tax returns on inter-spousal gifts given for the purpose of separating community property. §2523 of the Internal Revenue Code provides a marital deduction for gifts from one spouse to the other. If, for example, a husband owns property worth $20,000.00 and he gives it to his wife, §2523 states that half the value of the gift is exempted from tax, so that in our example, the gift is taxable only in the amount of $10,000.00. The section contains the same prohibition as does §2056, however, against using the deduction if the donated property is community property. The result, however, is the same as if the deduction were available. In the example, if the $20,000.00 property in the husband's name were really community, he would in effect only own half of it, so that a gift from him to the wife of his entire interest would in fact be a gift of only $10,000.00. As in the case of the estate tax marital deduction, however, the entire $10,000.00 is a taxable gift. He has no marital deduction for that portion, which effectively erases the former advantage held by those residing in community property states.

Overall, even though the joint return provisions of the Internal Revenue Code eliminated what had formerly been the most desirable aspect of community property, there are some advantages in holding property in community rather than in any other form, most of which have already been outlined. The two most important advantages are the stepped-up basis of the survivor's half, and, for most persons, the fact that the community property laws operate independent of any positive election to take advantage of the marital deduction. Most persons fail to adequately plan their estates, and an automatic statutory estate plan in the form of community property laws operates to the advantage of such persons.

There are, however, some disadvantages in holding community property. First, the more property that is held as community, the more that is locked into a 50-50 split, and the less that is available for flexible planning once the wife has enough to sustain her, or is

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[38] An excellent general discussion of the availability, and an outline of trouble spots, may be found in N. LAY, *supra* note 1, at 194-201.

given enough outright, or has separate property. In other words, it is tantamount to a mandated maximum marital deduction, which is not always desirable.[39]

Second, the community property system has disadvantages in the area of small business. If a business is started by a husband in a community property state, his wife owns half of it, especially if community property is used as the initial capital for the business. If his labors during marriage increase its value, and if his wife dies first, IRS will tax the one-half of the business she owned, which financial drain may well hurt the company or the husband or both. If she leaves her half of the business to someone other than her husband, perhaps unwittingly, or if she places her half in trust, the husband has intruders in the business which he did not have before his wife's death.[40]

The only method of avoiding either of these undesirable effects is by severance of the community property, preferably before the business venture is begun, coupled with a written agreement between husband and wife that the business, its capital and its earnings, is to be and remain the separate property of the husband. Whether such an agreement will be honored, especially in a state such as Texas that considers rents, profits, and gains from separate property during coverture community property, is doubtful.[41] Moreover, such a severance of the community might be an unwise tax move, since the benign attribute of community property resulting in stepped-up basis for the survivor's half of the community upon the death of the other spouse, would be obviated. Such a consideration might become critical if there had been substantial appreciation in the value of the business as a capital asset.

The third disadvantage in holding community property, and probably most important from the viewpoint of the planner, is the effect of community property laws on the unhappy family. Obviously, in most cases it is desirable to equalize the estates of husband and wife for planning purposes. If the planner counseling a couple who is moving to or has just moved from a community property state is told that there is domestic difficulty and that a divorce may be in the making, he not only has the usual difficulties attendant to such a dis-

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[39] Logan, Moore, Schwartz (Halbach, Moderator), *Estate Planning for the Migratory Executive: A Panel,* 5 REAL PROP., PROBATE & TR. J. 407 (1970), at 449 [hereinafter cited as *Panel*]; *see* 2 H. WREN, CREATIVE ESTATE PLANNING §§12.04-12.07, at 955-975 (1970).

[40] *Id.* at 453.

[41] TEX. FAMILY CODE §5.01 (1969); King v. Matney, 259 S.W.2d 606 (Tex. Civ. App. 1953).

closure when planning estates, but has them compounded by the knowledge of what the community laws may do to any attempt to purposely create imbalance, for whatever reason.

Migration From Community to Non-Community States

Theoretically, property acquired when the couple was domiciled in the community property state will retain its community character when the couple moves to a non-community state.[42] The problem arises in getting the non-community state to recognize the community property, if desired, or to recognize a conversion, if the particular estate plan makes a separation of the community property advantageous.

No non-community state recognizes community as a separate system of titleholding.[43] Those which do recognize the retention of community characteristics generally allow title to stand in the form chosen by the couple upon their arrival in the non-community state, imposing a constructive trust for the benefit of the other, if necessary.[44]

If the community property is left in the community state, some (but not all) of the problems are eliminated. In *Succession of Packwood,*[45] husband and wife moved from Louisiana to New York leaving certain real property in Louisiana. That property produced sugar cane which was sold, and the proceeds were placed in a bank in Louisiana. The bank sent negotiable certificates of deposit to the husband in New York. After the wife died in New York, the husband tried to sell his deceased wife's part of the land in Louisiana, and did not declare any of the proceeds of the sugar cane sale as hers. The heirs sued in Louisiana, challenging both of the husband's actions.

The Louisiana court held that the interest in the personal property was governed by the state of domicile at death, and that if the heirs were to include the money from the sugar cane sale in the wife's estate, they would have to sue in New York. It did, however, assert jurisdiction over the Louisiana real estate, and declared it community property so that the heirs, not the surviving husband, took the decedent's interest in it. In reality, the Louisiana court

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[42] Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P.2d 905 (1944); King v. Bruce, 145 Tex. 647, 201 S.W.2d 803, *cert. denied,* 332 U.S. 769, *rehearing denied,* 332 U.S. 820 (1947); RESTATEMENT OF CONFLICT OF LAWS §292 (1934).

[43] MASON, THE MIGRANT EXECUTIVE: COMMUNITY PROPERTY; EFFECT OF MULTIPLE RESIDENCE; PRESUMPTIONS, 31 INSTITUTE ON FEDERAL TAXATION 1001 (1973), at 1009.

[44] Quintana v. Ordono, 195 So. 2d 577 (Fla. Ct. App. 1967); Rozan v. Rosen, 431 P.2d 870 (Mont. 1967).

[45] 9 Rob. (La.) 438, 41 Am. Dec. 341 (1845).

hedged somewhat on the personal property. The court specifically said that the move out of the community property jurisdiction did not affect the community status of the personalty; in the same breath, however, they held it subject to the New York laws of succession.

In the second *Packwood* case,[46] involving the same husband, the same heirs, but different property, the husband and wife held stock in a Louisiana bank. The stock was not fully paid, and was secured by a mortgage on some Louisiana land. In addition there was some unsold land in Louisiana, unencumbered by the mortgage. The heirs contended that the land was still part of the community even though after the move to New York, the husband had sold it with the wife joining in the sale, and he had then reacquired it after the wife's death. The court held that the stock was still community because it was secured by an interest in Louisiana community real estate. With respect to the reacquired real estate, the court held that it was the separate property of the husband, there being no evidence presented that the initial sale by the couple was for the purpose of defrauding the wife.

In another Louisiana case some seventy-five years later,[47] a married couple held securities in Louisiana, in community. They moved to Mississippi, but left the securities in a bank in New Orleans. When the wife died, Louisiana assessed a succession tax. The husband argued that it was the couple's intention to sever the community as to the stock, especially since Mississippi law declared it and other personalty to be the property of the husband. Citing *Packwood,* the court predictably held that the community was not destroyed by the move, and held further that even though its devolution might be controlled by Mississippi law, it could still be taxed by Louisiana, especially since the property was still there.

The two cases are alike only in the holding that change of domicile does not in and of itself change community property interests. The results, however, differ in effect at least as to personalty, in light of the *Packwood* court's insistence that the heirs use the courts of a non-community state to enforce the community property rights.

If the community property moves with the persons, the difficulties redouble. In *Doss v. Campbell,*[48] the couple was married in Texas. The wife had separate property. They then moved to Alabama, where the husband had a number of debt judgments taken against him. The judgment creditors attempted to attach the property of the

[46] 12 Rob. (La.) 334, 43 Am. Dec. 230 (1845).

[47] Succession of Popp, 146 La. 464, 83 So. 765 (1920).

[48] 19 Ala. 590, 54 Am. Dec. 198 (1851).

wife, as being partly the husband's. The Alabama court held that as to that property, Texas law governed; it was the wife's property even under community property laws, and the simple fact of the move to Alabama did not alter the character of the property. The law of matrimonial domicile, rather than the law of present domicile, controlled in *Doss v. Campbell,* and even though it would have served the best interests of the Alabama creditors for the court to have declared the property to be community, it chose to respect the provisions of Texas community property law which dictated that property held by one spouse before marriage, retained its character as separate property. The courts of other states, as will be seen, have not taken the same pains to give credence to the laws of community property states.

Ohio and Virginia have placed their own peculiar twists on the law in the area, in what can only be described as questionable cases. In *In re Estate of Kessler*[49] a married couple owned stock in California in community. They moved to Ohio and took the stock with them. The husband died thereafter, with the stock in his name as it had always been, but considering it to be community. Ohio attempted to tax the entire amount, rather than only the half interest that the husband had had under the community laws. The Ohio Supreme Court ruled that indeed half was the husband's and half was the wife's, since the mere fact of the move did not change the community interests, but that because the wife's interest became pure and untainted by the community interests of the husband only upon his death, the property was subject to the Ohio succession tax. The interests of the husband to which the Court referred were those of management and control, commonplace in all community states, and considered a real ownership interest in none of them. The Ohio Supreme Court's unfortunate misinterpretation of the husband's rights of management and control, used to affix Ohio succession tax liability, is hardly mitigated by the court's nodding recognition that the property retained its community character. As far as Mrs. Kessler was concerned, the important part was that the Ohio Department of Taxation got its way. To further complicate matters, *Kessler* was a four-three decision, has engendered much criticism, and may some day be overruled.

In the Virginia case, *Commonwealth v. Terjen,*[50] the married couple moved from California to Virginia, and used community funds to purchase a home in the wife's name. The husband filed a gift tax return for the half interest he had which went to his spouse upon the purchase of the Virginia home in her name only. Virginia as-

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[49] 177 Ohio St. 136, 203 N.E.2d 221 (1964).

[50] 197 Va. 596, 90 S.E.2d 801 (1956).

sessed tax on the entire value, denying that the wife had any "real" interest in California, since the husband had statutory management and control. The Virginia court agreed, despite clear California law[51] to the contrary, giving the wife a present, existing, equal interest in the community property.

These two cases were decided the way they were for two reasons: revenue for the states involved, and lack of familiarity with community property law by all concerned, including justices and counsel.

Fortunately, not all non-community law state courts misinterpret community property rights as did the state courts of Ohio and Virginia. Colorado is an excellent example. In *People v. Bejarano*,[52] the husband received pension and profit sharing contributions from his employer while in both Texas and California. The couple then moved to Colorado where the husband died. Colorado attempted to tax all of the benefits in the deceased's estate. His surviving spouse, of course, wanted exclusion of half of them. The court rejected the state's argument that a valuable right passed to the wife upon her spouse's death, and correctly reasoned that under the California and Texas statutes defining and governing community property, the wife had a current coequal interest with her husband so that her half was not taxable in his estate.

The moral of this mini-survey of cases is that when a married couple moves from a community property state to a common law state, counsel can never take it for granted either that the community interests remain the same, or even that they change. The new state may ignore the community and call it the property of one or the other, especially if tax revenue is at stake. It is absolutely necessary for the estate planner to check the law of the new state, and to be especially careful in Ohio and Virginia.

It is difficult to outline what the best course of action is, once a move from a community state to a non-community state has taken place. Some of this difficulty arises because the financial situation of the married couple will often dictate a course of action different from what counsel would otherwise recommend if the clients were financially independent. In general, if the property must be sold, especially at a gain in the case of a residence, counsel should try to maintain the community character of the proceeds if they are reinvested in another asset which is likely to appreciate in value, perhaps by means of a written agreement between the spouses, to protect the step-up in basis upon the death of one or the other. Counsel should be prepared to intelligently argue that the new state should recognize the community.

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[51] CAL. CIV. CODE §161a (Deering 1960).

[52] 145 Colo. 304, 358 P.2d 866 (1961).

If the couple is wealthy enough to leave the community property unsold and in the community state, that is probably the safest course if the desire is to maintain the community character. That scheme, however, raises problems of its own. If the succession taxes of the community state are sufficiently high, it may be economically disadvantageous to leave the property there. What is more, there may be additional costs of ancillary administration in that state. To avoid that possibility, the property can be deeded by inter vivos gift to a resident of the community state if the couple has no reluctance to part with it, or it might be put into trust in the community state for the benefit of children or others, with life estates being retained for the benefit of the husband and wife if they still wish to use it. In any case, the property should as clearly as possible be denoted either community or non-community, and as property of one state or the other, according to the wishes and the estate planning needs of the couple. It is impossible to say that any one scheme is always better than any other, no matter what the circumstances.

It is safe to say that in most cases, it will be necessary to convert the community property upon a move out of a community state, from economic necessity of the couple. It should be noted that conversion from community to separate property is not taxable per se,[53] nor is it a gift if the property is divided equally.[54] It is essential, however, that the property be "traced."

The first step of the estate planner for the couple that moves from a community property state to a non-community property state, having sold some or all of their community property assets, is to identify the items formally held as community property. This task may be very difficult if the clients have not kept adequate track of the movement of the funds and the property. Next, it should be determined which items presently held as separate property were purchased with the proceeds of the sale of community property. It must be recalled that these items may not be included in a decedent's adjusted gross estate for marital deduction purposes. Further, IRS may posit a gift of one spouse's half to the other, if adequate tracing is not available.[55] Note, however, that if this happens and a return is filed and gift tax paid, that half may be figured in computing adjusted gross estate for marital deduction purposes, as the vestiges of community have been destroyed upon payment of the gift tax.

A very real danger of the planner's failure to inquire about community property is that he may proceed to set up a plan of inter vivos gifts from husband to wife when all of the property is in the

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[53] Walz v. Commissioner, 32 B.T.A. 718 (1935).

[54] Commissioner v. Mills, 183 F.2d 32 (9th Cir. 1950).

[55] Perkins v .Commissioner, 1 T.C. 982 (1943).

husband's name, when the wife may already have a community property one-half. This may create an undesirable imbalance in favor of the wife, and may trigger the payment of possibly unnecessary gift and estate taxes. Moreover, if there has been or will be appreciation, it may be advantageous to recognize the community status and leave the property in community to take advantage of the step-up in basis, as has been previously noted.

At this point, the planner should give general consideration to the form of title in which the assets are to be held in the non-community state, if the decision has been to sell the property in the community property state. While it is outside the scope of this note to present an all-encompassing discussion of the merits and demerits of each of the various forms of title, some brief mention of likely trouble spots might prove helpful.

Conversion to joint tenancy or tenancy by the entireties (if possible) is probably the least desirable of the alternatives. The effect, under §2040 of the Internal Revenue Code, will be to automatically include all of the property in the estate of the first to die, in effect grossly overqualifying for the marital deduction, possibly resulting in double or triple the estate tax liability if the surviving spouse is unable to dispose of the property before death. Should it transpire that counsel's first contact with the estate plan occurs at the death of the first spouse and the former community property is held in joint tenancy, counsel can legitimately argue upon the Internal Revenue Service's attempt to include all of the property in the estate of the first to die under §2040, that there is a presumption that both the husband and wife contributed equally to the purchase price of the subsequently acquired property, since it was once held half-and-half by statute, and that each spouse contributed his or her half to acquire the new property.[56] Such an argument makes logical sense, for had the couple stayed in the community property jurisdiction, only one-half would have passed through the decedent's estate. There is no good reason for penalizing those who have moved.

Conversion to tenancy in common is generally a better way to proceed. Unfortunately, it, too, has its risks. If, as is often the case, the community property is nominally held by one spouse, if upon its sale title to the new property is taken in the name of the same spouse, and if at that point the desire is to convert it to a tenancy in common, the normal procedure is for the titleholder to quit-claim an undivided one-half interest to the spouse. If at the death of one spouse the common law state does recognize the former community, it will then insist that one owns three-quarters, and that one owns one-

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[56] *Panel, supra* note 39, at 416.

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quarter, thus possibly overqualifying or underqualifying for the marital deduction, depending upon who dies first. In such a situation, it would be advisable to provide in a written instrument (perhaps the deed itself) that it is the intent of the parties to simply sever the community, and that each owns one-half. Such a technique would have the ancillary benefit of lessening the possibility of imposition of gift tax.

Further, before finally deciding upon equal division, it is wise to check the amounts of separate property that each spouse may own. If either owns a significant amount of separate property, then there can be an alteration of the division to maximize the estate tax benefits. Such a procedure may have gift tax consequences, but when faced with a choice between gift tax and estate tax, the gift tax is the better option, assuming the clients have the funds on hand to pay the tax. Similarly, if division is found necessary, it is better to separate, when possible, into undivided halves in all, rather than allocating some parts to the husband and some to the wife, especially in the case of appreciated property, lest the gain be recognized at that point. There is authority that it will not be a sale or exchange,[57] and it is as easy, and certainly surer, to divide to a tenancy in common.

Assuming it has been decided that it is desirable (and possible) to get the estates substantially equal, it should be noted that the marital deduction has in effect been taken at that point, and that under the rules described in the foregoing discussion, it is not then possible to take the marital deduction again, when one of the two dies, as to property which came out of the community.[58]

At this point, "normal" estate planning, including establishment of trusts for children, income to surviving spouse (if desired), and other special arrangements to accommodate the particular needs of the husband and wife, can be considered.

Migration From Common Law to Community Property States

If a move to a community property state is intended at the time of marriage in a common law state, the laws of the community property state will govern when the move is made.[59] Subsequent acquisitions of realty or personalty are governed by the laws of the state to which the couple moves.[60] The status of personalty previously acquired is determined by the law of the jurisdiction that was the

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[57] Walz v. Commissioner, 32 B.T.A. 718 (1935).

[58] INT. REV. CODE OF 1954, §§2056(c) (2) (B) (ii), 2056(c) (2) (C) (i).

[59] Doss v. Campbell, 19 Ala. 590, 54 Am. Dec. 198 (1851).

[60] *Id.;* Castro v. Illies, 22 Tex. 479 (1858).

couple's domicile when the property was acquired.[61] Separate property in one state does not automatically become community property if a move is made into a community state,[62] but it is extremely important if the character of separateness is to be maintained, that the husband and wife be warned against commingling, which will destroy separateness.[63]

The most common situation occurs when, after the move, husband and wife aggregate their personal property to purchase realty in the community state. There is a split of authority as to whether such action in and of itself transmutes separate property into community property.[64] If separate character is to be maintained, particularly if the planner has already taken great pains to create an intentional imbalance for one reason or another, such as disparity in age between husband and wife, a written agreement to maintain separateness is a sound idea.

Most often there is no written agreement, thus leaving the parties at the mercy of the courts of the community property states. The results vary, as the following examples from California and Texas demonstrate.

Originally, the law in California was announced in *Kraemer v. Kraemer*.[65] In that case, a married couple had accumulated cash during coverture in Illinois, and under Illinois law it was considered the separate property of the husband. Although it was used to buy real property in California with no effort to retain its character as separate property, the California Supreme Court held that it was still the separate property of the husband, and that the mere fact of the move failed to work a transmutation.

Some time later, the California legislature enacted their "quasi-community" statute, which indicates that personal property acquired anywhere, and real property acquired in California, by a couple after marriage but while living somewhere other than California, which would have been community property if the couple were living in

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[61] Slocomb v. Breedlove, 8 La. 143, 28 Am. Dec. 135 (1835); Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S.W. 290 (1902); Castro v. Illies, 22 Tex. 479 (1858).

[62] *In re* Thornton's Estate, 1 Cal. 2d 1, 33 P.2d 1 (1934), *questioned in* Addison v. Addison, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965); *In re* Estate of Kessler, 177 Ohio St. 136, 203 N.E.2d 221 (1964).

[63] The concept of commingling, and its effect, is of incalculable importance in estate planning wherein a community property jurisdiction is, has been, or will be involved. For this reason, additional discussion of the area appears at text accompanying notes 74-78 *infra*.

[64] Minnich v. Minnich, 127 Cal. App. 1, 15 P.2d 804 (1932); Brookman v. Durkee, 46 Wash. 578, 90 P. 914 (1907).

[65] 52 Cal. 302 (1877).

California, will be treated as community property upon the death of either,[66] and upon a decree for separate maintenance or divorce[67] or child support.[68]

The pronouncements of the courts and of the legislature of California are inconsistent, and somewhat confusing. According to one text writer,[69] California cannot exact a wholesale transmutation of separate property to community property, since this would force a possibly unwanted alteration of property interests upon persons merely moving into California, clearly violative of the privileges and immunities clause of the fourteenth amendment to the U.S. Constitution.[70] And yet it is clear from the enactment of the quasi-community statute cited above, that California will exercise the opportunity to convert such property unless faced with unequivocal intent of the parties to keep it separate. A writing would probably help; establishment of a trust for the benefit of one spouse or the other before the move would also help; in any case, indiscriminate commingling would almost certainly result in conversion to community property.

In Texas, there is a rebuttable presumption that property owned in that state by either or both spouses is community property. Texas courts will not take judicial notice of the laws of the state from which the couple came[71] and, if presented with controversy on the subject, Texas courts will refuse to make an automatic conversion from separate property to community property when evidence is presented that according to the law of the state from which the husband and wife came, the property in question was the separate property of one or the other.

The Texas Court of Civil Appeals in *Blethen v. Bonner*[72] held that property purchased in Texas in a husband's own name with $25,000 he brought with him from Massachusetts, where it was his separate property by statute, did become community property merely because he was married at the time. It so held because the husband offered as evidence the fact that under Massachusetts law, the $25,000.00 was his separate property. The court chided Massachusetts for retaining such "barbarism . . . of the common law . . . ."[73] but held the property to be separate property, despite its feelings. Presumably, had not the husband offered proof of the law of Massachusetts, the presumption of community would have prevailed.

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[66] CAL. PROB. CODE §201.5 (Deering Supp. 1974).

[67] CAL. CIV. CODE §4800 (Deering Supp. 1974).

[68] *Id.* §4807.

[69] N. LAY, *supra* note 1, at 242.

[70] *In re* Thornton's Estate, 1 Cal. 2d 1, 33 P.2d 1 (1934).

[71] Griffin v. McKinney, 25 Tex. Civ. App. 432, 62 S.W. 78 (1901).

[72] 30 Tex. Civ. App. 585, 71 S.W. 290 (1902).

[73] *Id.* at 586, 71 S.W. at 291.

On balance, it is best to take advantage of the availability of community property status if it is available, especially if appreciation in the value of the assets is anticipated. If there is no good reason for creating or maintaining imbalance, conversion to community property status (by commingling, not by gift) is generally advantageous insofar as it provides "automatic" election of the maximum marital deduction. Should the clients revise their estate plan at some point in the future without the advice of counsel, the marital deduction provisions can easily be overlooked. It will be of some comfort to the estate planner to know that even if his work is undone, the clients will still have the benefits afforded by the community property laws. The best method of conversion to community property is by commingling separate property. Conversely, commingling is so effective that if separateness of property is desired, especially to maintain a purposeful imbalance, the couple should execute a writing agreeing to maintain the separateness, commingling should be carefully avoided, and counsel in the community property state should be retained if any changes in the estate plan or the couple's financial position are anticipated.

It should be kept in mind, however, that such a failure to convert separate property has inherent risks in all community property jurisdictions except California. If, as an example, all of the property is in the name of the husband and the move to the community state is accomplished, whatever statutory or non-barrable shares the wife used to have in the common law state, are gone. If the husband's will left his property to someone other than his wife and no provisions were made for conversion to community, even by way of intentional commingling, the wife may take nothing. Of course, the longer the period between the move and the husband's death, the greater the chance that the couple would have acquired more property by way of the husband's earnings, half of which (assuming there is any left) belongs to the wife.

California Probate Code §201.5 eliminates the danger of such a situation by specifying that a wife may take her community property share of any property acquired by the couple during marriage, in a noncommunity state. California, however, is the only community property state that has such a provision.

Quite simply and quite generally, commingling the separate property of husband and wife will result in conversion of the property to community, unless great pains are taken to retain the separate identity of the property so commingled.[74] Similarly, separate

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[74] Kelsey v. Miller, 203 Cal. 96, 263 P. 213 (1928); Lawson v. Ridgeway, 72 Ariz. 253, 233 P.2d 459 (1951).

property that is commingled with community property becomes community property, unless the community portion is insubstantial in relation to the separate property.[75]

The more liquid the asset, the easier it will be to commingle, and the greater the care that should be taken if separateness is to be maintained. Obviously, the most liquid asset is cash, and if for any reason a husband and wife wish to retain their separate bank deposits as separate property, the temptation to consolidate them into one bank account for ease of record-keeping, or even for greater return (as in the case of certificates of deposit) should be studiously avoided.

In the case of stock, adequate records of the shares held by each spouse, to include certificate numbers, should be kept. In the case of realty, title can be held as tenants in common, with specific reference to the share each holds, in proportion to the separate funds each contributed toward the purchase price. When possible, a written agreement should be drafted, setting out the intention of the parties not to commingle the funds, to retain the separate identity of the share of each, and only to consolidate the funds or the property for a specific purpose, such as accumulation of an amount sufficient to aggregate the purchase price of a specific piece of realty. There is never any guarantee that such a written instrument will hold sway with a court in a community property jurisdiction bent on finding a commingling, but it cannot hurt.

One particular type of such written agreement which has found favor, is the antenuptial agreement. Generally, such an agreement will prevail over local community property law, unless found contrary to public policy, or unless the citizens of the community property state would suffer.[76] As an example, if a spendthrift husband and a wealthy wife are married in New York after execution of an antenuptial agreement stating that the wife's separate property is forever to remain her separate property, and the couple then moves to California and the husband incurs a mountain of debt on the strength of what the California creditors reasonably assume is a substantial amount of community property, the California courts would probably have no difficulty in finding prejudice to its citizens, to avoid the effect of the private agreement and subject the property of the wife to attachment in satisfaction of the debts of her husband.

Similarly, while it is even possible for a couple to specify before marriage that property acquired after marriage will be separate property, courts of community property states can look through these

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[75] *In re* Cudworth's Estate, 133 Cal. 462, 65 P. 1041 (1901); Catron v. First Natl. Bk. & Tr. Co., 434 P.2d 263 (Okla. 1967).

[76] Castro v Illies, 22 Tex. 479 (1858).

agreements and term the property community if the rights of contracting third parties in the community state are prejudiced by the agreement.[77]

The chances are excellent that without careful planning, conversions from separate to community property will take place in the great majority of cases. The question obviously arises when one spouse parts with an interest and the other spouse gains an interest: what about gift taxes? Peculiarly enough, as common as conversions from separate property to community would seem to be, there seems to be a dearth of law on the subject. One article[78] indicates, without citing authority, that an intentional transfer from one spouse into community would be a taxable gift. Such a conculsion would seem only to make sense, from a reading of the gift tax sections of the Internal Revenue Code, §§2501 *et seq.*

The simple and logical answer would seem to be that if a move from a common law state to a community property state is contemplated, and if the husband and wife either desire to have the property converted, or at least have no objection to its being so converted, they should either do nothing or should perhaps intentionally commingle their separate property, so that the conversion takes place by operation of law rather than clearly by gift.

Miscellaneous Considerations For The Migrating Client

While it possible for the attorney planning the estate of a nonmigrant to encounter a situation in which the client has a residence in each of more than one state, the probability is increased somewhat in the case of the migrant client, especially if it is the latter's desire after a move from a community property state to retain property in that community state for basis purposes, as previously mentioned. In all cases of multiple domicile, counsel should always attempt to resolve the question. A fairly simple method is to place all residences other than the primary one into a trust or trusts for the benefit of the owner, with the trustee in the state in which the property is located, to avoid ambiguity and ancillary administration.[79]

The following two cases are mentioned not so much for their instructional value, as for their interesting and nearly amazing facts and results. *In re Dorrance's Estate*[80] and *Dorrance's Estate*[81] involved attempts by Pennsylvania and New Jersey, respectively, to admin-

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[77] *Id.*

[78] *Panel, supra* note 39, at 425.

[79] MASON, *supra* note 43, at 1024.

[80] 309 Pa. 151, 163 A. 303 (1932), *cert. denied,* 296 U.S. 393 (1935).

[81] 116 N.J. Eq. 204, 172 A.503 (1934), *supplementing* 115 N.J. Eq. 268, 170 A. 601 (1934), *aff'd,* 13 N.J. Misc. 168, 176 A. 902 (1935).

ister the estate of the decedent, Dorrance. The Supreme Court of the United States refused to hear the matter to resolve the dispute, and as a result, both states administered Dorrance's estate and taxed it in the bargain, with the result that it cost Dorrance's estate an extra thirteen million dollars in taxes. Had *Texas v. Florida*,[82] a similar dispute involving four states, not been resolved by the Supreme Court as it was, there would have been total estate tax liability of thirty-seven million dollars on a thirty-six million dollar estate.

In general, the gift taxes, income taxes, and capital gains taxes of the state of anticipated domicile of a migratory client must be checked to see whether it will be worthwhile to shift property from state to state, or to leave the property in a particular state. In addition, it is necessary to make certain that the client is familiar with the provisions of Internal Revenue Code §217, regarding moving expenses. If sale of the client's residence has been or will be effected, the rules regarding non-recognition of gain under Code §1034 should be called to his attention.

Conclusion

To assume that every practicing attorney will someday be called upon to plan the estates of a married couple that has held or will hold property in community, would be unrealistic. To err in the other direction, however, and assume that since the attorney practices in a non-community state he will never encounter community property laws, is equally unrealistic. To be unable to recognize community property considerations when they exist, or to recognize them and be unable to properly deal with them, would clearly amount to malpractice if the clients suffer economic detriment as a result. Most of the areas of difficulty have been set forth herein. If they can be recognized and dealt with, both the attorney and the migrating client will benefit. If the only result is recognition of the problem and referral to a practitioner with expertise in the area, the best interests of the client will still have been served.

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[82] 306 U.S. 398 (1939).

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