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The Uniform Disposition of Community Property Rights at Death Act

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THE UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT

INTRODUCTION

Today, eight of the United States[1] use community property systems[2] instead of the common law systems used in the other 42 states. Because the community property system is totally alien to common law states which do not recognize community interests in property, when domiciliaries of a community property state migrate to a common law state[3] problems develop over the definition of property rights.[4] Two ques-

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[1] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

[2] *See generally* Lay, *A Survey of Community Property*, 51 IOWA L. REV. 625 (1966).

[3] This comment will not deal with the reverse problem that occurs when the change in domicile is from a common law state to a community property state. For an examination of how California has dealt with this problem *see* CAL. PROBATE CODE § 201.5 (Supp. 1976); Comment, *Marital Property and the Conflict of Laws: The Constitutionality of the "Quasi-Community Property" Legislation*, 54 CAL. L. REV. 252 (1966); and De Funiak, *Conflict of Laws in the Comunity Property Field*, 7 ARIZ. L. REV. 50 (1965).

[4] Most of the literature on this problem has been written by Norvie L. Lay, Associate Dean at the University of Louisville School of Law. For articles dealing with various aspects of the migration problem, *see* the following by Lay: *Community Property: Its Origin and Importance to the Common Law Attorney*, 5 J. FAM. L. 51 (1965); *A Survey of Community Property*, 51 IOWA L. REV. 625 (1966); *Transmutation of Community Property*, 18 S.C.L. REV. 755 (1966); *Property Rights Following Migration from a Community Property State*, 19 ALA. L. REV. 298 (1967); *Marital Property Rights of the Non-Native in a Community Property State*, 18 HASTINGS L. J. 295 (1967); *Community Property and the Kentucky Attorney*, 31 KY. ST. B.J. 53 (No. 3, 1967); *Community Property in Common Law States: A Comparative Analysis of Its Treatment in Foreign Jurisdictions*, 41 TEMP. L. Q. 1 (1967); *Retirement Income Credit and Community Property: A Problem of Vesting*, 42 TUL. L. REV. 304 (1968); *Tax Aspects of Estate Planning for the Migrant Client from a Community Property State*, 35 TENN. L. REV. 262 (1968); *Migrants from Community Property States—Filling the Legislative Gap*, 53 CORNELL L. REV. 832 (1968); *Community Property Problems of the Migrant Client*, U. MIAMI, 3RD INST. ON EST. PLAN. Ch. 69-21 (1969); *Community Property and the Migrant Executive—The Need for Legislation*, 108 TRUSTS AND EST. 1043 (1969); *The Recognition of Community Property in the Common Law Provinces*, 34 SASK. L. REV. 264 (1969); *The Role of the Matrimonial Domicile in Marital Property Rights*, 4 FAM. L.Q. 61 (1970); *Coping with the Special Tax Problems of the Migrant Client with Community Property*, 33 J. TAX. 264 (1970); *Estate Planning Considerations Involved with Community Property and the Migrant Client*, 11 J. FAM. L. 255 (1971); *Community Property in the Common Law Provinces: The Possible Need for Statutory Relief*, 19 CHITTY'S L.J. 152 (1971); and *Community Property and Estate Planning in a Common Law State*, 9 LAW NOTES 13 (1972). *See also* Bartke, *Community Property Law Reform in the United States and in Canada: A Comparison*

tions usually arise: do the spouses' rights and interests in the community property change if they move to a common law state? And if not, how are these rights and interests protected?[5] The first question clearly has been answered in the negative.[6] The answer to the second question is in doubt, however, because the common law states have developed no consistent pattern for dealing with the disposition of estates which include both the separate property of each spouse and community property or property traceable to community property.[7]

To remedy this confusion, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the Uniform Disposition of Community

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and Critique, 50 TUL. L. REV. 213 (1976); LeFlar, *From Community to Common Law State*, 99 TRUSTS & EST. 882 (1960); Wiley, *Community Property in a Common Law State*, 21 PRAC. L. 81 (April 15, 1975).

[5] Interview with Norvie L. Lay, Associate Dean at the University of Louisville School of Law, in Louisville, Kentucky September 16, 1976 [hereinafter cited as Interview with Lay].

[6] *See* text accompanying notes 11 through 25 *infra*, particularly notes 21, 22. *See also* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 91 (2d ed. 1971):

> It is well settled in this country that a change of domicile does not affect the nature of property which had already been acquired by the spouses at the time of the change of domicile. Thus, property which is separate property under the law of the noncommunity property state under which it was acquired remains separate property when the spouses move to a community property state, whatever may be the situation as to the nature of property acquired by them thereafter in the community property state; likewise, community property according to the law of the community property state in which it was acquired will be recognized as the property of both spouses in a noncommunity property state to which they thereafter remove, and though the title may be in the name of only one of the spouses, the courts will effectuate the equal ownership by evoking the "trust" theory. The foregoing is true even though the form of the property is changed after it is brought to the new domicile.

See also Annot., 14 A.L.R.3d 404 (1967).

[7] UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT, 8 UNIFORM LAWS ANNOTATED, ESTATE, PROBATE AND RELATED LAWS 61 (Master Edition 1972) [hereinafter cited as UNIFORM DISPOSITION ACT], Prefatory Note. The lack of a dependable pattern for dealing with this issue in common law states is a result of two factors. First, the question of how property rights are defined after spouses migrate to a common law state is often not recognized as a problem area. Second, if the issue *is* recognized by the parties involved, it is often ignored and all the property is treated as if it were acquired in the common law state which is the new domicile. Consequently, the question of how these rights are defined and protected is infrequently litigated and is not widely enough recognized to be dealt with on a statutory basis. Interview with Lay.

Property Rights at Death Act in 1971.[8] Kentucky adopted this uniform act in 1974.[9] It provides a clear, statutory method for dealing with the disposition of estates in Kentucky which consist of both separate property and property acquired as community property under the laws of another state.[10]

I. COURTS' APPROACHES IN THE ABSENCE OF THE ACT

The property rights of migrants from a community property state to a common law state have always been held entitled to protection,[11] either by constitutional principles or more frequently by conflict of laws principles.[12] The California Supreme Court has held specifically that any disturbance of vested property rights[13] based solely on a change of domicile

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[8] UNIFORM DISPOSITION ACT. Norvie L. Lay, Associate Dean at the University of Louisville Law School was instrumental in the development of this uniform act. As a starting point, the commissioners used Lay's suggested statutory provisions in Lay, *Migrants from Community Property States—Filling the Legislative Gap,* 53 CORNELL L. REV. 832 (1968). Lay worked closely with the commissioners throughout the drafting and approval stages of the Act and provided them with the expertise he gained researching his series of articles, *supra* note 4. It is largely due to his lobbying efforts that Kentucky is currently in the vanguard as one of only five states to have adopted the Act soon after its recommendation in 1971.

[9] KY. REV. STAT. §§ 391.210 to .260 (Supp. 1976) [hereinafter cited as KRS]. Kentucky is currently one of only five states to have adopted this act. The other four states are Colorado, COLO. REV. STAT. §§ 15-20-101,-111 (1973); Hawaii, HAW. REV. STAT. §§ 510-21,-30 (Supp. 1975); Oregon, OR. REV. STAT. §§ 112.705-.775 (1973); and Michigan, MICH. COMP. LAWS ANN. §§ 557.261-.271 (Supp. 1976).

[10] The Act has a very limited scope. It defines only "dispositive rights, at death, of a married person as to his interests at death in property 'subject to the Act' and is limited to real property, located in the enacting state and to personal property of a person domiciled in the enacting state." UNIFORM DISPOSITION ACT, Prefatory Note.

The Act was drafted with such a limited scope to promote wide acceptance among the common law states. Interview with Lay.

[11] *See* Doss v. Campbell, 54 Am. Dec. 198 (Ala. 1851); Quintana v. Ordono, 195 So. 2d 577 (Fla. Dist. Ct. App. 1967); Wallack v. Wallack, 88 S.E.2d 154 (Ga. 1955); Beard's Ex'r v. Basye, 46 Ky. 133 (1846); and Depas v. Mayo, 49 Am. Dec. 88 (Mo. 1848).

But cf. Succession of Packwood, 41 Am. Dec. 341 (La. 1845) and Wyatt v. Fulrath, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965), discussed in text accompanying notes 89 to 94 *infra.*

[12] *See* text accompanying notes 21 through 25 *infra,* particularly notes 21, 22.

[13] Interests in community property were not always characterized as vested interests. *See* Bartke, *Community Property Law Reform in the United States and in Canada—A Comparison and Critique,* 50 TUL. L. REV. 213, 219-21 (1976). But today, all eight community property states do characterize these interests as vested. For Arizona, see LaTourette v. LaTourette, 137 P. 426, 429 (Ariz. 1914) and Lyons,

violates the federal constitution.[14] In *In re Thornton's Estate,*[15] the court construed a statute which provided in part that personalty (except separate personalty)[16] acquired by spouses while domiciled outside California would devolve as community property under the statutes of succession in California if the spouses died domiciled in California,[17] so that the change in domicile alone would convert what was acquired as separate or joint property in a common law jurisdiction into community property in the community property jurisdiction.[18] Finding this

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Development of Community Property Law in Arizona, 15 LA. L. REV. 512, 517 (1955); for California, see CAL. CIV. CODE § 5105 (Supp. 1976) (community interests are "present, existing and equal"); for Idaho, see Kohny v. Dunbar, 121 P. 544, 546 (Idaho 1912); for Louisiana, see Messersmith v. Messersmith, 86 So. 2d 169 (La. 1956) and Comment, *Nature of the Wife's Interest During the Existence of the Community,* 25 LA. L. REV. 159 (1964); for Nevada, see NEV. REV. STAT. § 123.225(1) (1975) (community interests are "present, existing and equal"); for New Mexico, see N.M. STAT. ANN. § 29-1-9 (Supp. 1975); for Texas, see Magnolia Petroleum Co. v. Still, 163 S.W.2d 268, 270 (Tex. Civ. App. 1942) (the wife's interest in community property is "that of real ownership, equal to that of the husband") and TEX. FAM. CODE ANN. § 5.22 (1975); and for Washington, see *In re* Coffey's Estate, 81 P.2d 283, 284 (Wash. 1938) and cases cited therein.

[14] *See also* De Funiak, *Conflict of Laws in the Community Property Field,* 7 ARIZ. L. REV. 50, 51 (1966): "[O]f course, once these [property] rights are fixed, they cannot be *constitutionally* changed during the lifetime of the owner merely by moving the personalty across one or more state lines, regardless of whether there is or is not a change of domiciles." (emphasis added).

[15] 33 P.2d 1 (Cal. 1934); Annot., 92 A.L.R. 1343 (1934).

[16] "Separate personalty" in this case included personalty acquired before coverture and personalty acquired after converture by gift, devise, or descent, with all the rents, issues and profits thereof.

[17] Although this case deals with the reverse situation (where the migration was *from* a common law state to a community property state) it can be inferred that the principle that any disturbance in vested property rights solely because of a change of domicile is unconstitutional would apply as well to the situation where the spouses migrate into a common law state. The court hints at the wider applicability of their decision when they state that, "to take the property of A and transfer it to B because of his citizenship and domicile . . . [is to deny due process of law]. This is true regardless of the place of acquisition or the state of his residence." 33 P.2d at 3.

[18] While the result of this law seems strikingly unfair, it has a legitimate theory behind it. If a married couple acquires all of its property in a common law state, it remains separate property when the couple moves to a community property state. If the husband takes title to the property in his name in the community property state, it remains classified as his separate property. As the community property jurisdictions recognize no dower, curtesy, or elective share rights (T. ATKINSON, LAW OF WILLS § 15 at 64 (2d ed. 1953)), the wife is left without protection. On the husband's death, property classified as his separate property can either be freely willed away or will devolve by statute to his children. The widow is disfranchised—she has neither the protection of her half of community property nor any dower or forced share rights. The

statute to be both an abridgement of citizens' privileges and immunities and a deprivation of property without due process of law, the court declared the statute unconstitutional.[19]

The proposition that property rights are not altered by a change of domicile because of constitutional restrictions was mentioned by the Commissioners of Uniform State Laws in their prefatory note to the Uniform Disposition of Community Property Rights at Death Act.[20] Yet an equally sound basis on which to find that property rights remain unaltered by a change in domicile is conflict of laws principles. Both the Restatement[21] and other commentators[22] specifically take the pos-

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idea behind this statute was to grant her some community rights in property acquired in a common law state and thus provide her with some protection at her husband's death.

See generally Comment, *Marital Property and the Conflict of Laws, supra* note 3.

[19] California has since resolved the constitutional objections to their so-called "quasi-community property" law. *See* CAL. PROB. CODE § 201.5 (Supp. 1976) and articles cited *supra* note 3.

While the *Thornton* decision is still the law in California, a later decision of the court has called it into question. In Addison v. Addison, 399 P.2d 897, 43 Cal. Rptr. 47 (1965), the court upheld a quasi-community property statute on the grounds that the statute was not activated merely when a spouse changed his domicile to California but only when a divorce or separate maintenance action was filed. Thus, as a state has a legitimate interest in domestic relations and enforcement of marital responsibility, this statute was found not to take property without due process of law nor to abridge privileges and immunities. While the court was careful to distinguish this latter statute, which is activated by divorce, from the statute voided in *Thornton* which was activated solely by a change of domicile, the court also stated that, "[T]he correctness of the rule of Thornton is open to challenge." 399 P.2d at 901, 43 Cal. Rptr. at 101.

[20] The commissioners state that, "As a matter of policy, and probably as a matter of constitutional law, the move should not be deemed (in and of itself) to deprive the spouses of any preexisting property rights." UNIFORM DISPOSITION ACT, Prefatory Note.

[21] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259 (1971) states that:

> A marital property interest in a chattel, or right embodied in a document, which has been acquired by either or both of the spouses, is not affected by the mere removal of the chattel or document to a second state, whether or not this removal is accompanied by a change of domicil to the other state on the part of one or both of the spouses. The interest, however, may be affected by dealings with the chattel or document in the second state.
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> Comment: a. *Rationale.* Considerations of fairness and convenience requird that the spouses' marital property interests in a chattel or right embodied in a document should not be affected by the mere removal of the chattel or document to another state. *Likewise these interests are not affected by a change of domicil to another state by one or both of the spouses.* Similarly, an interest in a right not embodied in a document that was acquired by either or both of the spouses during the marriage is not affected

ition that a change in domicile will not alter preexisting property rights. Moreover, the majority of courts which found that property rights were not altered by a migration did so on conflicts principles.[23] For example in *Wallack v. Wallack,*[24] the husband and wife were married from 1940 to 1950 during which time they were domiciled in Texas, a community property state. After a divorce in 1950 the parties moved to Georgia, a common law state. When the wife demanded an accounting of all their property, the husband contended their property rights were defined by Georgia law. The court found that Texas law controlled in this case, however, and stated that: "In an action in the courts of this state involving property acquired by the wife while domiciled in another state, her title or interest therein will be determined by the laws of such foreign state, where such laws are properly pleaded and proven."[25]

Thus, whether the authority relied on is the federal constitution or conflict of laws principles, the property rights of the spouses are not altered by their change of domicile and their interests are protected in the new jurisdiction. Although it is clear that the spouses' property interests are entitled to protection by the law, the implementation of the protection is uncertain. Courts facing the responsibility of providing protection for the property interests of an aggrieved spouse[26] usually choose

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by a subsequent change of domicil to another state by one or both of the spouses (emphasis added).

[22] R. LEFLAR, AMERICAN CONFLICTS LAW § 236 (Student Ed. 1968) states that: "It is quite clear that marital titles in the goods do not change by reason of the removals, either where separate property has been taken into a community state, or where community property has been taken into a common-law state [footnotes omitted]." *See also* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 201.1 at 463 (2d ed. 1971):

> [U]nder principles of . . . conflict of laws . . . when property is removed from one jurisdiction to another it retains the same character or nature that it had before its removal, and . . . this is true even where it is, after its removal, converted to some other form. Thus, property which has acquired the character or nature of separate or community property at the time of its acquisition, according to the law governing at that time, still retains its same character or nature as separate community property when removed to another jurisdiction (footnote omitted).

[23] Doss v. Campbell, 54 Am. Dec. 198 (Ala. 1851); Quintana v. Ordono, 195 So. 2d 577 (Fla. Dist. Ct. App. 1967); Depas v. Mayo, 49 Am. Dec. 88 (Mo. 1848).

[24] 88 S.E.2d 154 (Ga. 1955).

[25] *Id.* at 156.

[26] *See, e.g.,* Quintana v. Ordono, 195 So. 2d 577 (Fla. Dist. Ct. App. 1967); Beard's Ex'r v. Basye, 46 Ky. 133 (1846); Depas v. Mayo, 49 Am. Dec. 88 (Mo. 1848); Rozan

the device of a resulting[27] or constructive trust.[28] For example, if a husband and wife moved from a community property state to a common law state, purchased a home with community funds, and the husband took title in his name alone, the title holder-husband would be deemed a constructive trustee of one-half of the property for the benefit of the wife. The first court to apply this remedy to an analogous fact pattern was the Kentucky Court of Appeals. In *Beard's Executor v. Basye*,[29] the spouses were married in Louisiana where the wife had a large estate including several slaves who were classified as the wife's separate property[30] by Louisiana law. One year after they were married, the spouses moved to Kentucky, and three years later the wife sued for divorce and restoration of her property.[31] The

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v. Rozan, 129 N.W.2d 694 (N.D. 1964); and Edwards v. Edwards, 233 P. 477 (Okla. 1925).

[27] Broadly speaking, a resulting trust arises from the nature or circumstances of consideration involved in a transaction whereby one person thereby becomes invested with a legal title but is obligated in equity to hold his legal title for the benefit of another, the intention of the former to hold in trust for the latter being implied or presumed as a matter of law, although no intention to create or hold in trust has been manifested, expressly or by inference, and although there is an absence of fraud or constructive fraud. Indeed, there is usually no element of fraud in a resulting trust, and the presence of fraud makes the trust a constructive one.

76 AM. JUR. 2d *Trusts* § 196 (1975) (footnotes omitted).

[28] A constructive trust is defined as:

A trust by operation of law which arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who is any way against equity and good conscience, either as obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy [footnote omitted]. It is raised by equity to satisfy the demands of justice.

76 AM. JUR. 2d *Trusts* § 221 (1975). *See also* Moses v. Moses, 53 A.2d 805, 808 (N.J. Ct. Err. & App. 1947) (citation omitted):

In general, a constructive trust arises where a person holding title to property is under an equitable duty to convey it to another because he would be unjustly enriched if he were permitted to retain it. There may be a constructive trust where the retention of the property would unjustly enrich the person retaining it, even though its acquisition was not wrongful. The enforcement of such a trust consists merely in the restoration of the status quo.

[29] 46 Ky. 133 (1846).

[30] Although this case deals with protecting the wife's separate property as opposed to protecting her interests in the community property, the theory of the constructive trust would operate similarly in either case.

[31] When the spouses in this case moved to Kentucky in 1826, Kentucky did not

Court held that the property remained the wife's notwithstanding the move[32] and that the husband took only legal title as trustee for the benefit of the wife.[33]

The remedy of a constructive trust was applied again in *Depas v. Mayo*.[34] The spouses were married in Pennsylvania but moved immediately to Louisiana. Here they acquired substantial property, all of which was classified as community property by Louisiana law. Several years later the couple moved temporarily to Missouri, a common law state, where they bought some realty, the husband taking title in his name alone. They then moved back to Louisiana keeping title to the realty. The wife subsequently sued for divorce, and the husband began to dispose of all his property, including the Missouri land, to avoid alimony. The wife brought suit asking that one-half the land in Missouri be made hers by constructive trust. The court found that the wife had a vested interest under Louisiana law, and that the migration to Missouri did not affect this interest.[35] The court stated that the law in Missouri

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permit married women to own property. The law was that at marriage, all the wife's property became the property of the husband. Thus when the wife in this case sued for "restoration of her property," the Court was concerned only with the property she owned in Louisiana and which by Louisiana law remained her separate property.

[32] The Court refused to determine that:

> [B]y the removal to Kentucky of a husband and wife with property which belonged to the wife at the place of their marriage and former residence, and until they entered Kentucky, the property became at once, either in virtue of her consent to the change of domicil, however obtained, or in virtue of the actual change, whether with or without her consent, absolutely lost to her, and absolutely transferred to her husband.

46 Ky. at 143.

[33] The Court stated:

> But if it were necessary for the preservation of the interest which they [the laws of Louisiana] undoubtedly reserve to the wife, it might not be doing violence to them to consider them as making the husband, in fact, a trustee.
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> . . . .
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> . . . [A]t most, our law operated to invest the husband with the legal title and use, until separation, or until the dissolution of the marriage by his death, when it reverted to the wife, except as to such property as he may have sold to a *bona fide* purchaser, not having notice of her title; and that as Bayse purchased the slaves with a knowledge of her claim, she had a right to recover them from him in the action of detinue.

Id. at 147-48.

[34] 49 Am. Dec. 88 (Mo. 1848).

[35] *Id.* at 91:

was that "if A. purchases land with the money of B. and takes the legal title to himself, a court of equity will regard him as a trustee . . . ."[36] Thus a constructive trust was used to protect the wife's interest.

In a more recent case,[37] the Supreme Court of Florida reached a similar conclusion. The husband and wife were domiciliaries of Cuba, a community property country. In 1952 and 1958, the husband purchased stock in companies in the United States; in 1960, the couple moved to Florida, a common law state and in 1963, the husband sold the stock for a promissory note worth $810,000. When he died later that year, the question arose whether the wife had any rights in the $810,000. The court stated that the law of the parties' domicile at the time of acquisition of personal property controls to define the interests taken therein,[38] and a subsequent change in domicile does not alter these interests.[39] Thus the stock was classified as community property, since it was acquired while the spouses were domiciled in Cuba. As the promissory note was directly traceable to the stock, it was also classified as community property, although title was in the husband's name alone. The court was clear on the remedy applicable to this situation:

> Under Florida Law, if a portion of the consideration belongs to the wife and title is taken in the husband's name alone, a resulting trust arises in her favor by implication of law to the extent that consideration furnished by her is used. A resulting trust is generally found to exist in transactions affecting

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> The removal of Depas and his wife from Louisiana to this state [Missouri] does not alter the character of this transaction. Had Depas, whilst residing in Louisiana, remitted a sum of money, belonging to the community, and procurred its investment in Missouri lands, would the rights of the parties in Louisiana have been changed? What difference can it make, that previous to the investment the parties had changed their domicile?

[36] *Id.*

[37] Quintana v. Ordono, 195 So. 2d 577 (Fla. Dist. Ct. App. 1967).

[38] *Id.* at 579:

> Whether the source of the purchase price of the stock was from enterprises within Cuba or Florida is not material. What is material and not in conflict is that the husband and wife were domiciled in Cuba at the time of the acquisition of the stock.

See also note 65 *infra* and accompanying text.

[39] "The interest which vested in the wife was not affected by the subsequent change of domicile from Cuba to Florida in 1960." 195 So. 2d at 588 (footnote omitted).

> community property in noncommunity property states where a husband buys property in his own name. Therefore, while the husband held legal title to the note and contract, he held a one-half interest in trust for his wife.[40]

While other courts have also used the constructive trust remedy,[41] its main disadvantage is that it forces the aggrieved spouse into court battles over applicable law in order to get protection for his or her property interests. In contrast, under the Uniform Disposition of Community Property Rights at Death Act, the spouses' dispositive rights at death are codified and clearly defined. Thus court battles are avoided and interests are protected automatically.[42]

II. STRUCTURE AND ANALYSIS OF THE ACT

The Uniform Disposition of Community Property Rights at Death Act as enacted in Kentucky consists of 11 statutes of which the first 3 are the most important.[43] The first statute,[44] entitled "Application," defines property which is subject to the Act.[45] This includes (1) personal property wherever situated

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[40] *Id.* (footnotes omitted).

[41] Rozan v. Rozan, 129 N.W.2d 694 (N.D. 1964); Edwards v. Edwards, 233 P. 477 (Okla. 1924).

[42] Interview with Lay.

[43] In the Prefatory Note to the UNIFORM DISPOSITION ACT, the Commissioners describe the first three statutes as "the heart of the Act."

[44] KRS § 391.210 (Supp. 1976) provides as follows:

> Application. -KRS 391.210 to 391.260 applies to the disposition at death of the following property acquired by a married person:
> (1) All personal property, wherever situated:
> (a) Which was acquired as or became, and remained, community property under the laws of another jurisdiction; or
> (b) All or the proportionate part of that property acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, that community property; or
> (c) Traceable to that community property;
> (2) All of the proportionate part of any real property situated in this state which was acquired with the rents, issues or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property.

[45] The UNIFORM DISPOSITION ACT does *not* introduce the system of community property into Kentucky. On the contrary, the Act was very carefully drafted to avoid calling property in Kentucky "community property." Instead it is referred to in the statute as "property to which KRS 391.210 to 391.260 applies." *See, e.g.*, KRS § 391.225 (Supp. 1976) reprinted *infra* note 56.Interview with Lay.

which was acquired as or became community property under the laws of another jurisdiction, and (2) real property located in Kentucky which was acquired in exchange for property defined as community property. Both subsection (1), which deals with personal property, and subsection (2), which deals with real property, incorporate the concepts of tracing and apportionment. Thus if property is traceable to a community source, absent a voluntary severance[46] by the parties, the property is subject to the Act regardless of the form in which it is held. As for apportionment, the Act applies only to "all or the proportionate part"[47] of property traceable to what would be community property under the laws of another jurisdiction. Thus if a husband and wife move from California to Kentucky and purchase a lot in Kentucky, paying 75 percent of the price with community funds and 25 percent of the price with funds classified as the wife's separate property, the Act will apply to only 75 percent of the real property; the other 25 percent will not qualify.[48]

The second statute[49] establishes two rebuttable presump-

[46] The parties are free to execute a knowing and voluntary severance of their community rights in the property and to choose how the property will be held. The difficult issue is whether a severance of community interests will be implied if the parties take title as joint tenants with right of survivorship. See discussion in text accompanying notes 87 through 94 *infra*.

[47] KRS § 391.210 (1) (b) and (2) (Supp. 1976).

[48] The Commissioners describe this apportionment requirement as a policy decision:

> To put it succinctly, the phrase ["all or the proportionate part"] represents a condensation of an area covered by many pages in a prior draft and is simply a statement of policy; it leaves to the courts the difficult task of working out the precise interest which will be treated as the "proportionate part" of the property subject to the dispositive formula of Section 3.

UNIFORM DISPOSITION ACT, Commissioners' Note to § 1.

[49] KRS § 391.215 (Supp. 1976) provides:

> Rebuttable presumptions.-In determining whether KRS 391.210 to 391.260 applies to specific property the following rebuttable presumptions apply:
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> (1) Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as or to have become, and remained, property to which KRS 391.210 to 391.260 applies; and
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> (2) Real property situated in this commonwealth and personal property wherever situated acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivor-

tions "to assist a court in applying the definitions in Section 1, through a process of tracing the property to a community property origin."[50] Subsection (1) provides that property acquired during marriage in a community property jurisdiction is presumed to have become and remained property subject to this Act. Subsection (2) states that real property in this state and personal property wherever situated acquired by a married person while domiciled in a common law state, title to which was taken in a form creating rights of survivorship, is presumed *not* to be property to which the Act applies. These presumptions are for procedural convenience only and will not affect the spouses' actual interests in the property;[51] furthermore, they can be rebutted by evidence to the contrary.

The third statute,[52] entitled "Disposition upon Death" is the main operative section of the Act. It provides that on the death of a married person, one-half of the property to which the Act applies is the property of the surviving spouse[53] and is not subject to testamentary disposition by the decedent or distribution under the laws of intestate succession. The other one-half of the property subject to the Act is the property of the decedent to dispose of as he chooses. The final sentence of this statute provides that the one-half of the property that is the decedent's is not subject to the surviving spouse's right to elect against the will.[54]

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ship, is presumed not to be property to which KRS 391.210 to 391.260 applies.

[50] UNIFORM DISPOSITION ACT, Commissioners' Note to § 2.

[51] *Id.*

[52] KRS § 391.220 (Supp. 1976) provides:

Disposition upon death.-Upon death of a married person, one-half (1/2) of the property to which KRS 391.210 to 391.260 applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this commonwealth. One-half (1/2) of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this commonwealth. With respect to property to which KRS 391.210 to 391.260 applies, the one-half (1/2) of the property which is the property of the decedent is not subject to the surviving spouse's right to elect against the will.

[53] As is the case in the community property states, at the decedent's death the property does not "pass" to the surviving spouse; the one-half interest is merely owned automatically by the surviving spouse. Interview with Lay. This has important tax consequences. *See* note 83 *infra.*

[54] KRS § 391.220 (Supp. 1976).

The final eight parts of the Act are supplementary. As the commissioners explain, "they might almost be described as precatory and have been added to clarify situations which would probably follow from the first three sections but which might raise questions."[55] These sections provide for perfection of the title of the surviving spouse,[56] perfection of the title of the personal representative, heir or devisee,[57] protection for purchasers and lenders taking a security interest for value from a person who appears to have title to this property,[58] and for the Act having no effect on creditors' rights.[59] The final four

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[55] UNIFORM DISPOSITION ACT, Prefatory Note.

[56] KRS § 391.225 (Supp. 1976) provides:

Perfection of title of surviving spouse.—If the title to any property to which KRS 391.210 to 391.260 applies was held by decedent at the time of death, title of the surviving spouse may be perfected by an order of the probate court or by execution of an instrument by the personal representative or the heirs or devises of the decedent with the approval of the probate court. Neither the personal representative nor the court in which the decedent's estate is being administered has a duty to discover or attempt to discover whether property held by the decedent is property to which KRS 391.210 to 391.260 applies, unless a written demand is made by the surviving spouse or the spouse's successor in interest.

[57] KRS § 391.230 (Supp. 1976) provides:

Perfection of title of personal representative, heir, or devisee.—If the title to any property to which KRS 391.210 to 391.260 applies is held by the surviving spouse at the time of the decedent's death, the personal representative or an heir or devisee of the decedent may institute an action to perfect title to the property. The personal representative has no fiduciary duty to discover or attempt to discover whether any property held by the surviving spouse is property to which KRS 391.210 to 391.260 applies, unless a written demand is made by an heir, devisee, or creditor of the decedent.

[58] KRS § 391.235 (Supp. 1976) provides:

Purchaser for value or lender.—If a surviving spouse has apparent title to property to which KRS 391.210 to 391.260 applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the personal representative or an heir or devisee of the decedent. If a personal representative or an heir or devisee of the decedent has apparent title to property to which KRS 391.210 to 391.260 applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the surviving spouse. A purchaser for value or a lender need not inquire whether a vendor or borrower acted properly. The proceeds of a sale or creation of a security interest shall be treated in the same manner as the property transferred to the purchaser for value or a lender.

[59] KRS § 391.240 (Supp. 1976) provides: "Creditor's rights.—KRS 391.210 to 391.260 does not affect rights of creditors with respect to property to which KRS 391.210 to 391.260 applies."

sections provide for the right of married persons to sever their interests in community property,[60] for limitations on testamentary disposition otherwise imposed by law,[61] for uniformity of application and construction,[62] and finally for the Act's title.[63]

III. APPLICATION OF THE ACT

To apply this Act, the attorney must first characterize his client's assets as separate or community property[64] as of the date the client moved to the common law state, since only community property is subject to the Act. Property interests in personalty are defined by the law of the parties' domicile at the date of acquisition.[65] Property interests in realty are defined at

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[60] KRS § 391.245 (Supp. 1976) provides: "Acts of married persons.—KRS 391.210 to 391.260 does not prevent married persons from severing or altering their interests in property to which KRS 391.210 to 391.260 applies."

See also text accompanying notes 87 through 94 *infra* regarding the parties' right to sever.

[61] KRS § 391.250 (Supp. 1976) provides: "Limitations on testamentary disposition.—KRS 391.210 to 391.260 does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person."

[62] KRS § 391.255 (Supp. 1976) provides: "Uniformity of application and construction.—KRS 391.210 to 391.260 shall be so applied and construed as to effectuate the general purpose to make uniform the law with respect to the subject of KRS 391.210 to 391.260 among those states which enact it."

[63] KRS § 391.260 (Supp. 1976) provides: "Title.—KRS 391.210 to 391.260 may be cited as the uniform disposition of community property rights at death act."

[64] The UNIFORM DISPOSITION ACT covers only community property or property traceable to community property. KRS § 391.210 (Supp. 1976). The decedent's dispositive rights in his separate property are defined in KRS § 394.020 (1972). *See also* Wiley, *Community Property in a Common Law State*, 21 PRAC. LAW. 81, 89 (April 15, 1975).

[65] *See* GOODRICH, CONFLICT OF LAWS § 124 (4th ed. 1964):

> Marital rights in movables acquired subsequent to marriage are determined by the law of the domicile of the parties at the time of acquisition. . . .
>
> . . . .
>
> The American cases are quite uniform in applying the law of the domicile at the time the property is acquired, not that of the original matrimonial domicile nor any intermediate domicile. (footnote omitted).

See also RESTATEMENT (SECOND) CONFLICT OF LAWS § 258 (1971):

> (1) The interest of a spouse in a movable acquired by the other spouse during the marriage is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the movable under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the spouses, greater weight will usually be given to the state whether [sic] the spouses were

acquisiton by the law the courts of the situs would apply.[66] As was noted earlier, once these interests are defined, there is no alteration in the interests if the owner merely migrates to a state with a different property system: the property rights are fixed unless the parties have voluntarily severed them.[67] Thus, in order to characterize the property as separate or community, the attorney must determine how it was classified under the laws of the community property state in which the parties were formerly domiciled.[68] While all eight of the community property states define separate and community property in somewhat analogous ways,[69] there are significant variations and the law of the specific state should be consulted carefully before attempting to characterize the property as separate or community.[70]

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domiciled at the time the movable was acquired than to any other contact in determining the state of the applicable law.

Furthermore, Comment (b) to § 258 states that "[T]he local law of the state where the spouses were domiciled at the time the movable was acquired will usually be applied to determine marital property interests therein in the absence of an effective choice of law by the parties." *Id.*

[66] RESTATEMENT (SECOND) CONFLICT OF LAWS § 234 (1971) provides:

Effect of Marriage on an Interest in Land Later Acquired.

(1) The effect of marriage upon an interest in land acquired by either of the spouses during coverture is determined by the law that would be applied by the courts of the situs.

(2) These courts would usually apply their own local law in determining such questions.

Comment:

a. The forum will attempt to decide questions as to the effect of marriage upon an interest in land acquired during coverture in the same way that these questions would have been decided in the very case at hand by the court of the situs. These courts would not always decide such questions in accordance with their own local law. They would usually hold that any marital property interests which the spouses had in the funds or other property exchanged for the land have been transferred to the land itself. *So if land in a common law state is purchased with funds that are held in community because acquired while the spouses were domiciled in a community property state (compare § 258), the courts of the situs would usually hold that the spouses—at least as between themselves— have the same marital property interests in the land as they formerly had in the funds* (emphasis added).

[67] *See* text accompanying notes 87 to 94 *infra*. *See also* KRS § 391.245 (Supp. 1976) reprinted *supra* note 60.

[68] Interview with Lay; Wiley, *Community Property in a Common Law State*, 21 PRAC. LAW. 81, 90 (April 15, 1975).

[69] *See generally* Lay, *supra* note 2.

[70] Definitions of separate and community property in the community property states are statutory. *See* ARIZ. REV. STAT. §§ 25-211, 25-213 (1956); CAL. CONST. art. 1,

Once the attorney has consulted the law of the particular community property state involved and ascertained how his client's property interests are defined,[71] the next problem is tracing these interests.[72] The best proof of whether a particular asset is traceable to a community source is either affidavits or lists in the client's handwriting,[73] but any proof that will establish the source of the property is acceptable.[74]

If no proof is available, *i.e.,* if the property is so commingled that it is impossible to distinguish the separate from the community property, a court might take one of three approaches. First, a court could characterize all the property as community since in all the community property states, if the assets are so commingled as to be indistinguishable, there is a presumption that they are held as community assets.[75] Second, a court could proceed on an inferred intent theory: *viz.,* that if the parties are not concerned enough to preserve the com-

§ 21 (Supp. 1976) renumbering and amending CAL. CONST. art. 20, § 8, (1954); CAL. CIV. CODE §§ 5107, 5108 (1970), 5110 (Supp. 1976); IDAHO CODE §§ 32-903, 32-906 (1963); LA. CIV. CODE ANN. art. 2334 (1971); NEV. REV. STAT. §§ 123.130-.220 (1975); N.M. STAT. ANN. § 47-4A-1 (Supp. 1975); TEX. FAM. CODE ANN. § 5.01 (1975); WASH. REV. CODE §§ 26.16.010-.030. (1976).

[71] Of course, the UNIFORM DISPOSITION ACT applies only to property acquired while the community is domiciled in the community property state and property traceable to property acquired while domiciled in the community property state. Property acquired *subsequent* to the change in domicile is governed by the law of the new domicile, in this case a common law state.

[72] *See* KRS § 391.210(1)(c) (Supp. 1976), reprinted *supra* note 44, stating that property "traceable" to a community source is also covered by the Act. This tracing of assets is usually the most difficult task involved in applying the Act. Interview with Lay.

[73] Interview with Lay.

[74] *Id.*

[75] *See* in Arizona: Evans v. Evans, 288 P.2d 775 (Ariz. 1955); Franklin v. Franklin, 253 P.2d 337 (Ariz. 1953); and Lawson v. Ridgeway, 233 P.2d 459, 464 (Ariz. 1951); in California: Austin v. Austin, 11 Cal. Rptr. 593, 595 (Cal. Dist. Ct. App. 1961); Thomasset v. Thomasset, 264 P.2d 626 (Cal. Dist. Ct. App. 1954); and Reid v. Reid, 44 P. 564 (Cal. 1896); in Idaho: Vermont Loan & Trust Co. v. McGregor, 51 P. 104 (Idaho 1897); in Louisiana: Giamanco v. Giamanco, 131 So. 2d 159, 164 (La. Ct. App. 1961); in Nevada: Ormachea v. Ormachea, 217 P.2d 355, 367 (Nev. 1950); in New Mexico: Burlingham v. Burlingham, 384 P.2d 699, 705 (N.M. 1963); in Texas: Gifford v. Gabbard, 305 S.W.2d 668, 671 (Tex. Civ. App. 1957); and in Washington: *In re* Estate of Allen, 343 P.2d 867, 870 (Wash. 1959). *See also* Wiggins v. Rush, 489 P.2d 641 (N.M. 1971) (where parties made no effort to segregate their separate funds from their community funds, and no accounting was made as to the sources of income, and all moneys were deposited in a joint account, certain realty acquired after marriage was community property even though the deeds named the parties as joint tenants).

munity or separate status of their property, a court may infer that the property was intentionally taken in the form in which it is held and that this form accurately reflects the spouses' respective interests in that property.[76] Finally, a court could protect the property interests the spouses had when they *entered* the state, assuming a breakdown of those interests is available, with all accretions being governed by the law of the current domicile.[77] This solution depends on the courts' willingness to examine the parties' assets and distinguish accretions from previously held assets.[78]

Once the attorney has categorized all the property as either separate or community by the laws of the prior domicile and dealt with the tracing problems, the parties' dispositive rights are clearly defined by Kentucky law. The decedent's separate property and one-half of the property covered by the Act are subject to the decedent's testamentary disposition[79] or pass under the statutes of descent and distribution.[80] The other half of the property covered by the Act is owned at the decedent's death by the surviving spouse.[81]

IV. POSSIBLE INTERPRETIVE QUESTIONS

Although the Act is easily understood and applied, there are some questions that will undoubtedly arise and be settled through the interpretation of a court.[82] Three issues are immediately presented.[83] The first is the effect of the Act on dower

[76] Interview with Lay. For example, if the husband takes title to the house in his name alone and the wife allows this, a court could find that the house is the husband's separate property regardless of the possibility that the house was bought with community funds.

[77] Interview with Lay.

[78] *Id.* Although this approach is one alternative, it will probably be the least likely to be used by courts because it is based on a breakdown of the married couple's property at the time of the move from the community property state to the common law state. As a practical matter, few married couples take time to inventory their property and catalogue their rights in it when they are moving from one state to another.

[79] KRS § 394.020 (1975).

[80] KRS § 391.010 (1975).

[81] KRS §§ 391.210-.260 (Supp. 1976).

[82] Interview with Lay.

[83] A question which might be presented in the area of state inheritance taxes is obviated by the UNIFORM DISPOSITION ACT'S design. Interview with Lay. Two states which have not adopted the Act, Montana (*In re* Hunter's Estate, 236 P.2d 94 (Mont.

and curtesy rights. As recommended, section 3 of the Act includes the provision that "[no estate of dower or curtesy exists in the property of the decedent]." But when Kentucky adopted the Act, this bracketed language was deleted.[84] Presumably, then, the surviving spouse retains the right of dower or curtesy. The commissioners recommended against this, stating that:

> Dower and curtesy do not exist in community property and have been abolished in many common law states; policy consideratons suggest that no such interest should exist in property subject to this Act, since the surviving spouse already has a one-half interest in such property. Similar reasons suggest a denial of any right in the surviving spouse to elect a statutory share in the one-half of the property over which the decedent had a power of disposition.[85]

As the commissioners state, the better view is that no rights of dower and curtsey exist in property of the decedent subject to the Act because the surviving spouse would then be entitled both to his half of the property subject to the Act and to dower or curtesy rights in the deceased's half of the property subject to the Act. This much protection for the surviving spouse is unwarranted. It is hoped, therefore, that the Kentucky courts will find that the surviving spouse has no dower or curtesy interest in this property.

1951) (noted in 27 TUL. L. REV. 116 (1952)) and Ohio (*In re* Estate of Kessler 203 N.E.2d 221 (Ohio 1964)) take the position that *all* community property is taxed upon the death of the husband, although the wife had present and vested ownership rights in one-half of that property. This is an illogical and much-criticized view. On the other hand, in Colorado (People v. Bejarno, 358 P.2d 866 (Col. 1961)) only one-half the community property is taxed at the husband's death.

The UNIFORM DISPOSITION ACT is intended to resolve this question and adopts the Colorado approach through language stating that "at death, one-half the property to which this Act applies *is the property* of the surviving spouse. . . ." UNIFORM DISPOSITION ACT, § 3 (emphasis added). *See generally* Lay, *Tax Aspects of Estate Planning for the Migrant Client from a Community Property State*, 35 TENN. L. REV. 262 (1968).

[84] KRS § 391.220 (Supp. 1976).

[85] UNIFORM DISPOSITION ACT, Commissioners' Note to § 3. *Accord*, Editors, *Choice of Law in Estates and Trusts*, 1969 ILL. L. FORUM 354, 364. *See generally* Lay, *Property Rights Following Migration from a Community Property State*, 19 ALA. L. REV. 298, 351 (1967); Lay, *Community Property in Common Law States: A Comparative Analysis of its Treatment in Foreign Jurisdictions*, 41 TEMP. L. Q. 1, 22 (1967); LeFlar, *From Community to Common Law State*, 99 TRUSTS & EST. 882, 884-85 (1960); LEFLAR, AMERICAN CONFLICTS LAW § 236 (2d ed. 1968); Wiley, *Community Property in a Common Law State*, 21 PRAC. LAW. 81, 93 (April 15, 1975).

The second issue presented is how property should be characterized if it is indistinguishably commingled. Of the three possible approaches described above,[86] the best approach is the first one—to characterize all the property as community property. While this treatment sounds harsh and inflexible, it has precedent in that it is the method used in all eight community property states. Additionally, this method avoids the pitfalls of the second approach (where it is inferred that the form in which the property is held in the common law state accurately reflects the spouses' interests) because it does not depend on any judicial inferences as to the parties' intent. It is also better than the third approach, because the third approach would consume too much of the courts' time in distinguishing accretions from previously held assets, and at any rate, the third approach is dependent on the parties' making an accounting of their respective interests at the time of the move—an accounting very few couples make as a practical matter. Thus the first approach provides the fairest, quickest and most accurate overall solution to the commingled assets problem.

The third question raised by the Act involves the issue of severance of interests. This issue presents the question "whether the court will infer that parties have agreed to a severance of the community by taking title as joint tenants with the right of survivorship."[87] Nothing in the Act precludes this inference,[88] and two cases have used the inference to reach undesirable results. In *Succession of Packwood*,[89] the spouses lived in Louisiana from 1804 until 1836, when they moved to New York. They held a plantation in Louisiana as community property where sugar was grown and sold. Mr. Packwood took the proceeds from the sale of sugar and put them in a bank account in his name in New York. The court held implicitly

[86] See text accompanying notes 75 through 78 *supra*.

[87] Interview with Lay.

[88] The rebuttable presumption of KRS § 391.215(2), reprinted *supra* note 49, applies only to property acquired while the couple was domiciled in a common law state. Thus if property were acquired in a community property state and then, when the spouses migrated, put in the form of a joint tenancy with right of survivorship, the court would be free to draw its own inferences in the absence of an express agreement between spouses.

[89] 41 Am. Dec. 341 (La. 1845).

that the change in the form of the property changed the interests involved—that there was an implied severence of the community interests and all the property then became the husband's.[90]

In *Wyatt v. Fulrath*[91] the court reached a similar conclusion. The Duke and Duchess of Arion were domiciliaries and nationals of Spain, a community property country. Due to political instability in Spain, they put their money in a bank account in New York but never left Spain. In establishing or continuing these accounts, the spouses "either expressly agreed in writing that the New York law of survivorship would apply or agreed to a written form of survivorship account conformable to New York law."[92] The Duke died in 1957, and the Duchess took control of the money and disposed of it in her will when she died in 1959. The Duke's administrator demanded an accounting. The issue was whether the law of Spain (the domicile at acquisition) should be applied to the property in New York, in which event only half of the property should have gone to the Duchess, or whether the law of New York should control, in which event all the property was the Duchess's as survivor. The survivorship agreement was void by Spanish law. The New York Court of Appeals, in a four to three decision, held that New York law governed and that all the property belonged to the Duchess. Chief Judge Desmond entered a blistering dissent[93] arguing that the signing of routine bank forms was neither an express nor an implied severence of the community interests. New York law was held applicable, however, although the parties never moved to New York, did not specifically contract with each other, and the law of the community

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[90] During the lifetime of Mrs. Packwood she could not be considered as having any right in or title to the sugar . . . although it may have been the fruit of property destined to be divided, as belonging to the community, upon its dissolution. It was sold before her death [and the proceeds put in a bank account in New York in husband Packwood's name]. It was therefore, the property of Packwood in New York, the place of his domicile. The fund in the bank cannot be identified with the sugar, even supposing the sugar belonged to the community, and the succession of Mrs. Packwood was entitled to one half. It no longer existed in kind; it could no longer be identified; it has merged . . . .

Id. at 346.

[91] 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965).

[92] *Id.* at 638, 264 N.Y.S.2d at 234 (1962).

[93] *Id.* at 640, 264 N.Y.S.2d at 238 (1965).

property domicile, Spain, prohibited them from entering into a severance agreement.[94] The better solution in this case and in *Succession of Packwood* would have been to find that no severance in community interests occurs except where expressly agreed by the spouses. It is hoped that the Kentucky courts will reach this solution.

While these interpretive questions may pose some problems until resolved by the courts, the Uniform Disposition of Community Property Rights at Death Act is easily understood and beneficial to everyone involved: the parties are certain of their property interests and the attorney can supply dependable estate planning advice.[95]

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[94] From RESTATEMENT (SECOND) CONFLICT OF LAWS § 258, Comment 3 (1971), *cf.* this interpretation of exactly the same fact pattern.

> H and W are domiciled in state X under whose local law spouses have community property interests in each other's movables which they do not have power to affect by an agreement with each other. H and W deposit cash and securities in a joint account in a bank in state Y and sign a form agreement prepared by the bank which provides that the Y rule of survivorship shall apply. Under this rule, the entire interest in the cash and securities would go to the surviving spouse upon the death of the other. Under X local law, on the other hand, the estate of the deceased spouse would be entitled to a one-half interest in the cash and securities. H dies and W has the cash and securities moved from Y to state Z for safekeeping. In an action brought in Z against W by H's executor, a Z court is asked to determine the respective interests in the cash and securities of W and H's estate. The first question for the Z court to determine is whether the interests of both X and Y would be furthered by the application of thier respective local law rules. This is a question that can only be determined in the light of the respective purposes of these rules. One purpose of the X rule is surely to regulate the marital property interests of X domiciliaries. Hence the interests of X would be furthered by the application of the X rule. Since H and W were never domiciled in Y, it is doubtful if Y's interests would be furthered by application of the Y rule. Y's interests would be furthered if one purpose of the Y rule was to make definite the consequences of dealing with Y banks. Even if the Y rule had such a purpose, it would seem reasonably clear that X has the greater interest in the application of its rule. The Z court should next determine if H and W really intended when they signed the form agreement with the Y bank to have Y local law govern their interests in the cash and securities. If H and W did not intend such a result, the Z court should determine the issue by application of X local law. If, on the other hand, H and W did wish to have Y local law applied, the Z court must determine whether the value of protecting the justified expectations of H and W is outweighed in the particular case by the intensity of X's interest in having its rule applied.

Id. Obviously, the Restatement drafters disagreed with the result reached in Wyatt v. Fulrath.

[95] Interview with Lay.