Washington Law Review

Volume 46 | Number 2

1-1-1971

Washington Disinherits the Non-Native Wife

James B. Gilchrist

WASHINGTON DISINHERITS THE NON-NATIVE WIFE†

James B. Gilchrist*

I. THE PROBLEM

Washington is one of the eight states[1] which do not follow the general common law with regard to marital property rights. These eight states have developed a community property system of marital property rights which recognizes the contributions of both spouses to the marital community and rewards both with vested property interests.[2] In Washington, and generally in other community property states, property acquired by either spouse during marriage (other than by gift, bequest, devise or descent) is community property, and, as such, is vested in both spouses.[3] The spouse who is not the wage earner gains an ownership interest in the accumulations of the community simply by being a member of the marital community. On death or other dissolution of the community, the non-acquiring spouse is protected in the distribution of the accumulated property because he or she is already an owner of one-half of the community's property.[4]

This is in sharp contrast to the forty-two common law jurisdictions, where title to property acquired during marriage usually vests solely in the acquiring spouse.[5] These jurisdictions have developed a large body of law, however, designed to protect the non-acquiring spouse, especially upon dissolution of the marriage by death or divorce. For example, in 1952, thirty-eight of the then forty non-community property states gave the wife (usually the non-acquiring spouse) a non-barrable interest in

† This article is adapted from a paper submitted to the Pacific Coast Banking School at the University of Washington (April 1970).

* Member, Washington State and Colorado Bar Ass'n, A.B., Dartmouth, 1961; LL.B., Stanford, 1964.

1. The other community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico and Texas.

2. *See generally* 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943) [hereinafter cited as DE FUNIAK].

3. Cross, *The Community Property Law in Washington*, 15 LA. L. REV. 640 (1955).

4. *Id.*

5. H. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 29, 51 (1952) [hereinafter cited as MARSH]; 1 DE FUNIAK at 299.

her husband's real property upon his death,[6] and in twenty-one of these states her interest ranged from a one-fourth to a one-half fee ownership.[7] In thirty-one of the non-community property states the wife was given a non-barrable interest in her husband's personal property upon his death.[8] These forced heirship interests of the wife upon the death of the husband are often reinforced by restrictions on the husband's inter vivos transfers of his property.[9] Similar rights exist in many of these states in favor of the husband with respect to property acquired by his wife.[10] Thus, in over three-fourths of our states the wife is protected on the death of her husband by a right to a forced heirship even when she was the non-acquiring spouse without an ownership interest in the marital property.

In our increasingly mobile society, married couples often move to jurisdictions with different marital property ownership systems than the one under which they previously lived. Since 1900, primarily as a result of people moving into the area, the Pacific Northwest has grown at a higher rate than the nation as a whole,[11] and it is estimated that this population trend will continue through 1980.[12] With the large influx of people, there are many married adults who move to Washington with an intent to remain and thereby become subject to Washington's marital property and succession laws.[13] It is estimated that far in excess of 175,000 people have moved to Washington in the last ten years.[14] Many

6. MARSH at 40-41. Hawaii and Alaska were territories at the time the survey was taken.

7. *Id.*

8. *Id.* at 42-43.

9. *Id.* at 34-36; *see also* Annot., 157 A.L.R. 1184 (1945); Annot., 112 A.L.R. 649 (1938); Annot., 64 A.L.R. 466 (1929). The protection of the non-barrable share is extended to property transferred by the deceased spouse "in fraud" of the surviving spouse's rights. In some cases, this is found where the decedent used an illusory will substitute. *See, e.g.*, Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937). In others, the court has upset transfers where the property was transferred with the intent of defeating the surviving spouse's rights. *See, e.g.*, Ibey v. Ibey, 93 N.H. 434, 43 A.2d 157 (1945), *remanded and appealed*, 94 N.H. 425, 55 A.2d 872 (1947).

10. MARSH at 56-58.

11. BATTELLE MEMORIAL INSTITUTE, THE PACIFIC NORTHWEST 31 (1967). The Pacific Northwest has grown at a higher rate than the nation as a whole in every decade except the 1920's and 1950's.

12. *Id.* It is estimated that the Pacific Northwest will grow at a compound annual growth rate of 1.68 compared with the national rate of 1.50.

13. That is, become domiciliaries of Washington for the purpose of marital property and succession.

14. BATTELLE MEMORIAL INSTITUTE, THE PACIFIC NORTHWEST 31 (1967); WASHINGTON STATE PLANNING and COMMUNITY AFFAIRS AGENCY, POPULATION SERIES No. 2 (1969);

of these are married couples from common law jurisdictions who naturally bring with them the property they acquired in the common law jurisdiction. The prospective Washington couple is in no way advised that Washington will not treat the couple's existing property in the same fashion as it treats the property of its present residents, and that while Washington cannot constitutionally change the ownership of common law acquired property, it will deny the non-acquiring spouse, usually the wife,[15] the protection she would have been afforded by her old state at her husband's death. In short, she is not advised that Washington will disinherit the non-native wife.

The non-native wife is disinherited through a combination of differing marital property rights and the conflict of laws rules used to resolve the difference between the property rights granted by the old state and Washington. The change of domicile will not affect the character of the property which her husband had accumulated at the time domicile changed. Property which was his separate property under the law of the non-community property state where it was acquired will remain his separate property when they move to Washington, regardless of the nature of the property acquired thereafter in Washington.[16]

Since the change in domicile to Washington did not change the nature of the property, Washington will look to the non-community state where the property was acquired to determine its character. It will generally be found to be separate property, and Washington law relating to separate property will then be applied to the marital property of its new domiciliaries whenever the need arises, generally on dissolution of the community. The marital property rights of all property subsequently acquired in Washington by the new domiciliaries will be determined by Washington law, and the new property acquired during the marriage, other than by gift, bequest, devise or descent, will be community property.[17]

Since the husband and wife are now Washington domiciliaries, Wash-

interview with Economic Research Department, Seattle-First National Bank, Seattle, Washington (1970). In the past decade, Washington experienced a growth of approximately 625,000 with 450,000 representing natural population growth. 175,000 is the net migration figure showing the net gain after allowing for those who have moved out.

15. Throughout this article, the wife will be assumed to be the non-acquiring spouse, although the problem affects whoever may be the non-acquiring spouse.

16. 1 DE FUNIAK at 252.

17. WASH. REV. CODE §§ 26.16.010-030 (1953).

ington probate and succession laws will apply on the death of either. The impact at death of the rules used to determine the respective marital property rights of the parties can best be illustrated with the following hypothetical situation: Husband and wife are married and live in New York for forty years, during which time husband accumulates $100,000 from his earnings. Husband had an additional $25,000 in securities when they were married. The $125,000 nest egg is husband's "separate" property under the laws of New York. Husband retires and they both move to scenic Washington, bringing the nest egg with them and becoming domiciliaries. Husband then becomes disenchanted with wife, predeceases her, and leaves a will disinheriting her as to all his property. The result is quite simple: the wife is totally disinherited. The change of domicile did not change the character of the husband's separate property, and in Washington he is free to dispose of his separate property as he desires. The wife's forced heirship or non-barrable share protection available in New York is unavailable here because that is not characteristic of separate property in Washington. Nor do any community property rights protect the wife as they would if the property had been acquired while they were domiciled in Washington. Had husband and wife been domiciled in Washington for the forty years, wife would have owned a $50,000 portion of the nest egg.

The wife would have fared better if her husband had died intestate. One of the general legislative purposes of the descent and distribution statutes is to allocate property in the manner in which the "average" decedent would have intended. In distributing separate property under this standard, Washington assumes that the average decedent would want his wife to have at least one-half his net separate estate ($62,500) if he should die before making a valid will, and she will take more if no issue, parents, brothers or sisters of the decedent survive him.[18]

Thus when the two systems of marital property law come into contact in Washington, the surviving wife loses the protective benefits of both, and her husband has the option of using his will to deprive her of everything, including what she might have expected had he died without a will.

18. WASH. REV. CODE § 11.04.015 (1965).

II. WASHINGTON'S PRESENT APPROACH

A. Background

A similar problem exists in the other community property states. Assuming Nevada would follow the case law in the other community property jurisdictions, all the community property states except California deny the wife the protection she had in her husband's property before the couple moved to or purchased property in the community property state.[19] Community property states have presumptions of various degrees that all property owned by the new couple in the community state is community property,[20] and to the extent that this presumption cannot be overcome, the new wife gains the protection of the community property system. All the states allow a tracing of the funds used to acquire property in the community state back to the time of original acquisition to determine their character under common law rules.[21] Applying community property rules of descent and distribution to property previously characterized as separate elsewhere destroys any rights the wife had in her husband's property because separate property in a community property jurisdiction does not carry with it any protective rights for the wife.[22]

Legal writers in Arizona,[23] New Mexico,[24] and Texas[25] have pointed out that the potential or actual disinheritance in their state is both unfair and contrary to the philosophy of protection for the surviving spouse which is inherent in both marital property systems. With a lengthy legislative effort, California has already succeeded in giving

19. Stephen v. Stephen, 36 Ariz. 235, 284 P. 158 (1930); Douglas v. Douglas, 22 Idaho 336, 125 P. 796 (1912); Tanner v. Robert, 5 La. Rep. 84 (1826), *but see* Fleming v. Fleming, 211 La. 860, 30 So. 2d 860 (1947); *In re* Faulkner's Estate, 35 N.M. 125, 290 P. 801 (1930); Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S.W. 290 (1902); Lay, *Marital Property Rights of the Non-Native in a Community Property State,* 18 HASTINGS L.J. 295 (1967).

20. *See, e.g.,* LA. CIV. CODE ANN. art. 2401-02 (West 1952); TEX. FAMILY CODE § 5.02 (1969); *In re* Gulstine's Estate, 166 Wash. 325, 6 P.2d 628 (1932).

21. MARSH at 204-07, 226; Lay, *supra* note 19.

22. *In re* O'Connor's Estate, 218 Cal. 518, 23 P.2d 1031 (1933); 1 DE FUNIAK at 568.

23. de Funiak, *Conflict of Laws in the Community Property Field,* 7 ARIZ. L. REV. 50 (1965); Wilkinson, *Quasi-Community Property: California's New Property Concept,* 6 ARIZ. L. REV. 121 (1964).

24. Werner, *Rights of Surviving Spouse in New Mexico in Property Acquired by Decedent Spouse While Domiciled Elsewhere,* 5 NAT. RES. J. 373 (1965).

25. Buchschacher, *Rights of a Surviving Spouse in Texas in Marital Property Acquired While Domiciled Elsewhere,* 45 TEXAS L. REV. 321 (1966).

the newly domiciled California wife protection almost as extensive as that granted under community property concepts to the native California wife.[26]

In Washington the problem has generally been ignored. One writer who mentioned the problem briefly noted the beneficial results intended by the California Legislature in its efforts to protect the wife and suggested similar reform in Washington.[27] However, he pointed out that California's approach (at that time) of converting separate property into community property on a change of domicile to California was not only unconstitutional, but would not necessarily promote family solidarity or be fair to creditors.[28] It was proposed that reform in Washington be limited to a local law characterization or derivation of local property. That is, the rents and profits of Washington property, even if acquired with separate property, could be classified as community property. This approach had been tried briefly by an early Washington statute which provided that the proceeds of separate property during marriage would become community property.[29] The statute was repealed two years after its enactment,[30] however, and shortly thereafter the rents, issues and profits of separate property were expressly declared to be separate property[31] as they are today.[32] Other than this brief noting of the harsh results established by the courts, there has been no effort in Washington to explore or resolve this gap in marital property rights.

B. The Tracing Concept

The Washington Court has followed the general practice of the community property states in tracing the funds used to acquire a Washington asset back to their origin in order to determine the character of the funds at the time they were first acquired.[33] The tracing

26. CAL. CIV. CODE §§ 140.5-149, 176, 1237.5, 1238, 1265 (West 1961); CAL. PROB. CODE §§ 201.5-201.8, 661, 663 (West 1961); CAL. REV. & TAX. CODE §§ 13555, 13672, 15300-15306 (West 1961). See Section III, text.

27. Horowitz, *Conflict of Law Problems in Community Property*, 11 WASH. L. REV. 121, 212 (1936).

28. *Id.* at 225.

29. P. 67, § 2, [1871] Wash. Terr. Sess. Laws (repealed 1873).

30. P. 486, § 1, [1873] Wash. Terr. Sess. Laws.

31. P. 77, § 1, [1879] Wash. Terr. Sess. Laws.

32 WASH. REV. CODE §§ 26.16.010-020 (1953).

33. *See, e.g.*, Brookman v. Durkee, 46 Wash. 578, 90 P. 914 (1907); *In re* Gulstine's

doctrine was applied early in Washington in a creditors' rights situation.[34] In determining whether the property which the wife brought to Washington from Kansas (where it had been her separate property) was insulated from the husband's liabilities, the court stated: "[I]t was in effect her separate property, and the laws of this state do not undertake to change the status or liability of such property merely by its coming across our borders."[35] Fourteen years later the court was asked to determine the marital property rights in realty purchased in Washington with the husband's separate money while both the husband and wife were domiciled in New York.[36] On the husband's death, the heirs of the wife, who had predeceased her husband, sought one-half of the Washington real estate as her community property as defined in Washington.[37] The court denied relief, questioning the constitutionality of changing ownership of separate property into community property, and stated:[38]

> [P]ersonal property acquired by either H or W in a foreign jurisdiction which is by the law of the place where acquired the separate property of one or the other of the spouses continues to be the separate property of that spouse when brought within this state; and it being the separate property of that spouse owning and bringing it here, property in this state, whether real or personal, received in exchange for it, or purchased by it if it be money, is also the separate property of each spouse. . . .
>
> The rule that property acquired in a foreign jurisdiction, which is there the separate property of one of the spouses, maintains its separate character when brought into a state having community property laws, prevails also in California, Texas and Louisiana.

In re Gulstine's Estate[39] presented the first case where the domicile of the parties was changed to Washington. The husband and wife came

Estate, 166 Wash. 325, 6 P.2d 628 (1932); Meyers v. Albert, 76 Wash. 218, 135 P. 1003 (1913); Witherill v. Fraunfelter, 46 Wash. 699, 91 P. 1086 (1907).

34. Freeburger v. Gazzam, 5 Wash. 772, 32 P. 732 (1893).

35. *Id.* at 773, 32 P. at 733.

36. Brookman v. Durkee, 46 Wash. 578, 90 P. 914 (1907); *accord*, Stephen v. Stephen, 36 Ariz. 235, 284 P. 158 (1930).

37. BALLINGER'S ANNOT. CODES AND ST. §§ 4480-4490, the predecessors to WASH. REV. CODE §§ 26.16.010-030 (1958). The definitions under both codes make no distinction between domiciliaries and non-domiciliaries at time of acquisition.

38. Brookman v. Durkee, 46 Wash. at 583-84, 90 P. at 915.

39. 166 Wash. 325, 6 P.2d 628 (1932); *accord*, *In re* Faulkner's Estate, 35 N.M. 125, 290 P. 801 (1930); Douglas v. Douglas, 22 Idaho 336, 125 P. 796 (1912); Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S.W. 290 (1902).

from South Dakota bringing the husband's separate property with them. The court found that Mr. Gulstine's property had been separate under the "law of the place where the same was acquired," and stated that it would remain separate in Washington "as long as the same could be directly traced."[40] The court found that since there had been no effort to keep Mr. Gulstine's property segregated from the community property, only the amount that was still traceable into the original infusion of separate property into local real estate was still his separate property.

A recent case summarized these principles as they are applied in Washington today. In *Rustad v. Rustad*,[41] the court was asked to determine if a parcel of realty purchased in Washington with the husband's separate property from North Dakota was still his separate property. No proof of tracing to the source of the funds was presented. The court reiterated that separate property acquired in a foreign jurisdiction retains that character when brought into Washington until it is intermingled with funds accumulated in this state, at which time it becomes community property. In finding the property to be community, the court started with the presumption that property acquired during coverture is community property, and then held that the burden of proof to show the separate source of funds by tracing had not been met.

Gulstine and *Meyers v. Albert*[42] are the only Washington decisions resulting in a denial of property to the wife, and in both cases there was additional property available to the wife which was not affected by the characterization of the property in question as separate. The issue of total disinheritance of a Washington domiciled widow posed in the hypothetical case above has never been squarely presented to the Washington court. However, the present case law indicates rather clearly that, with proof of adequate tracing to a separate source, a widow could be totally disinherited.

Practically speaking, there are several ways in which the problem is avoided. When the new couple arrives in Washington, often its ex-

40. 166 Wash. at 327, 6 P.2d at 630.
41. 61 Wn. 2d 176, 377 P.2d 414 (1963).
42. 76 Wash. 218, 135 P. 1003 (1913).

isting cash is placed in a joint banking account, its community credit is pledged to acquire assets, and its obligations are paid with its Washington earnings (community property); in short, its assets become commingled so that tracing becomes impossible, and the wife is then adequately protected since all the property would be characterized as community property under the reasoning of *Gulstine* and *Rustad.*

The problem may also be avoided through the use of a community property agreement in which a couple agrees to the "status or disposition" (or both) of its property.[43] If they agree that the status of their existing property is community, then the wife is protected because she is a one-half owner.[44] If they agree to the disposition of the property, then the wife is protected by what is, in effect, a survivorship agreement.[45] Because of the contractual nature of the agreement, the husband would need the consent of the wife to be able to revoke the agreement should he become disenchanted enough to wish to disinherit her. Neither the husband's subsequent will nor his subsequent insanity will revoke the agreement.[46]

The possibility of changing common law acquired property into community property by commingling or the use of a community property agreement reduces the incidence of the disinheritance problem, but the conflict of laws approach to the problem followed by the court still leaves the wife vulnerable where the parties themselves do not act to convert the property into community property.

Although the Washington court has not articulated the reason for adopting the tracing concept, one reason would seem to be that the conflict of laws rule requires tracing. Marital property rights in moveables are generally governed by the law of the domicile of the spouses at the time of acquisition of the property.[47] Since property rights are not changed merely by taking property from one state into another,[48] a community property state must look to the state of the property's

43. WASH. REV. CODE § 26.16.120 (1953).
44. Volz v. Zang, 113 Wash. 378, 194 P. 409 (1920); Neeley v. Lockton, 63 Wn. 2d 929, 389 P.2d 909 (1964); *In re* Estate of Verbeek, 2 Wn. App. 144, 467 P.2d 178 (1970).
45. *In re* Wittmann's Estate, 58 Wn. 2d 841, 365 P.2d 17 (1961).
46. *In re* Brown's Estate, 29 Wn. 2d 20, 185 P.2d 125 (1947).
47. RESTATEMENT OF CONFLICT OF LAWS § 290 (1934); *cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 258, 259 (Proposed Official Draft, 1969). *See generally* MARSH.
48. 1 DE FUNIAK at 252; Brookman v. Durkee, 46 Wash. 578, 90 P. 914 (1907).

prior situs to determine the character of the property when it was acquired there. At death however, the conflict of laws rule is that succession rights to moveable property are governed by the law of the last domicile of the decedent.[49] Thus, on death Washington will apply its own succession laws to the property according to its character in the foreign jurisdiction. Since any non-barrable share or forced heirship rights of the wife in the common law state are viewed as succession rights,[50] they will not be available to the wife unless the domicile of the decedent (Washington in this case) grants them. Washington does not.[51] Washington will trace the property and find that it was characterized as separate and then apply its succession laws to the separate property. Whatever protection the wife had under Washington law or the common law jurisdiction is now lost because the wife's previous protection was inherent in the common law succession rights regarding separate property, and in a community property state the wife has no succession rights in the husband's separate property.[52]

The hardship imposed by the conflicts rules used to characterize the property as separate is mitigated if the marriage is terminated by divorce since the Washington courts have authority in divorce cases to reach separate property in order to make an equitable dissolution.[53] It is only when the community is terminated by death that the conflicts rules deny the wife the protection of both marital property systems. Since she is partially protected if her husband dies intestate,[54] it is only when he dies testate that she can be totally disinherited. Even then an award in lieu of homestead can be set aside for a widow from either separate or community property, giving her a small degree of protection.[55]

49. RESTATEMENT OF CONFLICT OF LAWS §§ 301, 306 (1934); *accord*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 260, 263 (Proposed Official Draft, 1969); *see In re* O'Connor's Estate, 218 Cal. 518, 23 P.2d 1031 (1933).

50. *In re* O'Connor's Estate, 218 Cal. 518, 23 P.2d 1031 (1933). *See generally* MARSH.

51. *In re* Gulstine's Estate, 166 Wash. 325, 6 P.2d 628 (1932); *see* Meyers v. Albert, 76 Wash. 218, 135 P. 1003 (1913) (Washington law applied to Washington real estate purchased by Oregon decedent).

52. 1 DE FUNIAK at 568.

53. Thompson v. Thompson, 56 Wn. 2d 683, 355 P.2d 1 (1960); WASH. REV. CODE § 26.08.110 (1949).

54. *See* note 18 and accompanying text, *supra*.

55. WASH. REV. CODE § 11.52.010 (1967) provides that "The court . . . shall award and set off to the surviving spouse . . . property . . . not exceeding the value of ten thousand dollars. . . ."

C. Characterization of Unmatured Assets and Insurance Proceeds

Additional problems are encountered in trying to characterize the marital property rights which a spouse may have in a specific asset. When the asset is unmatured, such as an interest in a pension or profit sharing plan, it is difficult to determine how the community property concepts of Washington should be applied to the asset.[56] Many new Washington residents who have been transferred to Washington by a corporation will have some fringe benefits which have a steadily increasing value through continued employment. The better method[57] of characterizing these unmatured assets, consistent with the established rules regarding marital property rights, is to characterize the rights when the property interest becomes vested. Many employee benefit plans provide for a percentage vesting over a period of years. Thus it is necessary to determine the extent of vesting which occurred while the employee was domiciled in each state.

This approach was followed in Colorado in a case in which it was necessary to characterize the property in question in order to determine the ownership for taxation purposes.[58] The court found that one-half of the benefits accruing to the husband while the couple was domiciled in the community property states of Texas and California was fully vested in the wife, and that her one-half was therefore not subject to Colorado's inheritance tax on the husband's death.

If the vesting rule followed in Colorado were applied in Washington, that portion of an employee benefit plan which vests while the couple is domiciled in a common law jurisdiction would be classified as the separate property of the employee, and any subsequent benefits which become vested in Washington would be termed community property.

Washington uses a similar approach to characterize insurance proceeds.[59] The tracing principle is used to ascertain the separate or com-

56. *See* Neeley v. Lockton, 63 Wn. 2d 929, 389 P.2d 909 (1964); *see also* Hughes, *Community Property Aspects of Profit Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future*, 44 TEXAS L. REV. 860 (1966).

57. The other method would be to characterize employee benefit assets when they are granted by the employer regardless of vesting. Prior to vesting, however, the employee does not have a property right, but only an expectancy which can be lost through the actions of either the employee or employer. *See* Williamson v. Williamson, 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (1962).

58. People v. Bejarano, 145 Colo. 304, 385 P.2d 866 (1961).

59. Small v. Bartyzel, 27 Wn. 2d 176, 177 P.2d 391 (1947); *In re* Coffey's Estate,

munity nature of the funds used to pay each life insurance premium. The separate or community ownership of the total proceeds of any policy is then apportioned according to the ratio of separate to community funds used to pay the premiums.[60] This approach provides more protection for a widow than is provided for her in those states where the "inception of title" doctrine is used to determine the character of the entire proceeds.[61] There the separate or community nature of the entire proceeds is determined by the character of the funds used for the initial purchase of a life insurance policy, with merely a right of reimbursement for the amount of premiums paid with other funds.[62] Since the premiums paid by a Washington couple would probably be from earnings, and would therefore be community property, and, in any event would be presumed to be community property,[63] the newly arrived Washington wife is afforded protection by having a percentage ownership in the insurance proceeds. To the extent that life insurance policies are purchased with community funds, the proceeds can be paid only to the wife or the decedent's estate in the absence of the express consent of the wife.[64]

Because there is generally no build-up of rights or cash value in a term policy, and all previous premiums have been expended solely for the protection feature of the insurance, the character of the proceeds of a term insurance policy should be determined by the character of the last premium paid.[65] If the last payment occurred in Washington, the wife would then have the protection of the presumption that the payment was made with community funds and therefore the entire

195 Wash. 379, 81 P.2d 283 (1938); Metropolitan Life Ins. Co. v. Skov, 51 F. Supp. 470 (D. Ore. 1943).

60. *In re* Coffey's Estate, 195 Wash. 379, 380, 81 P.2d 283, 284 (1938).

61. McCurdy v. McCurdy, 372 S.W.2d 381 (Tex. Civ. App. 1963); *In re* Miller's Estate, 44 N.M. 214, 100 P.2d 908 (1940); Jackson v. Griffin, 39 Ariz. 183, 4 P.2d 900 (1931); Toussant v. National Life & Acc. Ins. Co., 147 La. 977, 86 So. 415 (1920); *contra*, Parson v. United States, 308 F. Supp. 1159 (E.D. Tex. 1970).

62. Williams, *Community Property; Life Insurance Application of the Inception of Title Doctrine*, 18 Sw. L.J. 521 (1964).

63. Berol v. Berol, 37 Wn. 2d 380, 223 P.2d 1055 (1950). *In re* Brown's Estate, 124 Wash. 273, 214 P. 10 (1923).

64. California-Western States Life Ins. Co. v. Jarman, 29 Wn. 2d 98, 185 P.2d 494 (1947); *In re* Towey's Estate, 22 Wn. 2d 212, 155 P.2d 273 (1945); Occidental Life Ins. Co. v. Powers, 192 Wash. 475, 74 P.2d 27 (1937). *But see* WASH. REV. CODE § 48.18.440(2) (1969) (presumption of consent when beneficiary is the "child, parent, brother or sister of either of the spouses").

65. *See* Small v. Bartyzel, 27 Wn. 2d 176, 185, 177 P.2d 391, (1947) (dissenting opinion).

proceeds would belong to the community. The Washington Court refused to make a distinction between term insurance and insurance with a cash value, however, so the new Washington wife has protection only to the extent that proceeds are attributable to community property premiums.[66]

There is one rather unique exception to the general rules used to characterize the marital property interests of specific assets. The federal government maintains that benefits under several of its insurance programs remain the separate property of the insured regardless of the nature of the funds used to pay the premiums.[67] Similarly, all of the insurance proceeds paid under a Veteran or National Service Life policy will be included in the gross estate of the decedent for federal estate tax purposes.[68] Neither statutory reform nor a different conflict of laws approach will have an impact on these federal insurance benefits.

D. Tax Treatment

Although Washington's present characterization of property acquired elsewhere does not significantly affect federal tax treatment, it does work a relative hardship on newcomers as to Washington's inheritance taxation.

Despite the characterization as separate, the property brought into the state by the new domiciliary can be subjected to federal estate taxes with about the same end result as if it were community property. This is because the marital deduction available to the married separate property owner was designed expressly to equate the federal estate tax treatment of separate and community property. The native Washingtonian will pay federal estate taxes on only his one-half of the community estate since he is taxed on property only to the extent

66. Small v. Bartyzel, 27 Wn. 2d 176, 177 P.2d 391 (1947). The dissenting opinion is sharply critical of the majority's failure to attach significance to the term nature of the insurance policy in the case. The dissenting justice argues that full value has already been received for all premiums except the last and that only the last premium has any significance in determining the character of the proceeds. *Id.* at 185, 177 P.2d at 395.

67. Wissner v. Wissner, 338 U.S. 655 (1950); Fleming v. Smith, 64 Wn. 2d 181, 390 P.2d 990 (1964).

68. Rev. Rul. 56-603, 1956-2 CUM. BULL. 601; Estate of L.C. Hunt v. United States, 59-2 U.S. Tax Cas. ¶ 11,891 (D. Tex. 1959).

of his interest therein.[69] On the other hand, the new Washington domiciliary with his separate property will be taxed on all his property, but will be granted a deduction for the property passing to his wife, with the deduction not exceeding one-half the decedent's adjusted gross estate.[70] Thus he will be granted a deduction approximately equal to the amount that would not have been taxed at all had the property been classified as community.

For Washington inheritance tax purposes, however, there is no marital deduction. Washington imposes inheritance taxation on all property subject to its jurisdiction "which shall pass . . . to any person."[71] If the deceased's property is characterized as community property, the surviving spouse's one-half of the community is not subject to tax because it simply continues to belong to the surviving spouse; the property does not "pass" to him.[72] If the decedent's property is characterized as separate, on the other hand, all of it will "pass" on his death and be subject to tax.[73] For two neighbors living in Washington, the one who acquired all of his property in New York will have all of his property subjected to Washington's inheritance tax, while his neighbor, who has been a life-long Washington resident, will have only one-half of "his" property subjected to the inheritance tax.[74]

A new Washington domiciliary who learns that his property will be taxed more heavily at death than that of his neighbors may seek to convert his property to community property to gain the favored tax treatment. If he consciously converts his separate property into community property through a community property agreement, however, he will have given his wife a one-half interest in what was previously entirely his, and consequently will have made a taxable gift for both federal and Washington gift tax purposes.[75] The impact of

69. INT. REV. CODE of 1954, § 2033; United States v. Merrill, 211 F.2d 297 (9th Cir. 1954).

70. INT. REV. CODE of 1954, § 2056.

71. WASH. REV. CODE § 83.04.010 (1961); *see* State v. Clark, 30 Wash. 439, 71 P. 20 (1902); *In re* White's Estate, 42 Wash. 360, 84 P. 831 (1906).

72. *In re* Coffey's Estate, 195 Wash. 379, 81 P.2d 283 (1938).

73. *See* note 71, *supra*.

74. In the hypothetical case, Washington's inheritance tax on the husband's separate property of $125,000, if he left it to his wife, would be $4,250. If the lifetime earnings had been accumulated in Washington instead, the inheritance tax on the husband's $50,000 (his one-half of the community) and $25,000 (his separate property he brought to the marriage) would be $1,400. Both calculations are pursuant to WASH. REV. CODE § 83.08.020 (1961) and assume two class A exemptions.

75. INT. REV. CODE of 1954, § 2501 (1954); H. L. Damner, 3 T.C. 638 (1944);

the federal gift tax is diminished somewhat by the gift tax marital deduction[76] which is quite similar to the estate tax marital deduction, the former being limited simply to one-half of the value of the property passing to the donor's spouse.

From a planning standpoint there are several tax advantages which result from having all the property classified as community property. On the death of one of the spouses, both halves of the community obtain as a new basis the value at the date of death, or the alternate valuation date.[77] This can greatly reduce any capital gains problems which the surviving spouse might have had as to his or her property on any subsequent sale. Also, the tax savings of the marital deduction is dependent upon the non-acquiring spouse surviving the acquiring spouse.[78] In most family situations and in the hypothetical case above, if the wife predeceases the husband, the marital deduction is lost, whereas if the property is community property, the federal estate tax consequences do not depend on the order of the spouses' deaths. Lastly, the Washington inheritance tax is lower because only the decedent's one-half of the community is subject to the tax.[79]

As a practical matter gifts designed to put the couple on a par with long-time Washington couples may go unreported to avoid the complexities of gift tax returns. Technically, however, there is a penalty imposed in the form of the gift taxes for converting the out-of-state earnings to the character they would have acquired had they been earned in Washington.

III. THE CALIFORNIA APPROACH: EVOLUTION OF THE QUASI-COMMUNITY PROPERTY CONCEPT

In considering how Washington might avoid the present inequities imposed on new Washington domiciliaries, California's approach should be examined.

WASH. REV. CODE § 83.56.030 (1961). While a conversion by community property agreement would be a clearly definable gift, there is a possibility that a gradual, informal, intermingling of property might not be considered to be a gift since a donative intent, delivery and acceptance are not clearly ascertainable. Although donative intent is not meant to be the basis for the gift tax, Treas. Reg. § 25.2511-1(g)(1) (1958), some courts have required it. H. Jones, 1 T.C. 1207 (1943).

76. INT. REV. CODE of 1954, § 2523.

77. INT. REV. CODE of 1954, § 1014(b)(6); McCollum v. United States, 58-2 U.S. Tax Cas. ¶ 9957 (D. Okla. 1958).

78. *See* INT. REV. CODE of 1954, § 2056.

79. *See* note 74 and accompanying text, *supra*.

After forty-seven years of litigation and legislation, ending in 1961, California has evolved what appears to be a complete and workable plan fairly and constitutionally to resolve the problems of treating the new domiciliaries as much like existing natives as possible.

The California courts held in 1914 that land purchased in California with funds acquired during marriage in a common law state retained its separate property characteristics and was not changed merely by being invested within California.[80]

In 1917, however, the California Legislature began its long effort to treat its newcomers fairly. It amended the California Civil Code definition of community property to include:[81]

> real property situated in this state and personal property wherever situated, acquired (by either husband or wife) while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state.

Thus, any married couple moving to California would have its property automatically converted to community property.

In 1934, in *In re Thornton's Estate*,[82] the California court was asked to determine the constitutionality of the 1917 amendment itself, apart from any question of retroactive application. A married couple had moved to California from Montana after 1917 bringing property which the husband had acquired in Montana. The husband died in 1927, leaving a will in which he attempted to dispose of all his property. The surviving wife claimed one-half of the property as her community property under the 1917 amendment. The court held the statute unconstitutional because it disturbed the property rights of the new California citizen thereby abridging "the privileges and immunities of the citizen."[83] The court also held that the taking of the property of one spouse and transferring it to the other because they changed their domicile was an unconstitutional taking of property without due process of law. One Justice, while agreeing with the basic constitutional issue, argued in his dissent that the state had full power to control the devolution of property on the death of its citizens, and merely

80. *In re* Warner's Estate, 167 Cal. 686, 140 P. 583 (1914).
81. Ch. 581, § 1, [1917] Cal. Stat. (now CAL. CIV. CODE § 164 (West Supp. 1970)).
82. 1 Cal. 2d 1, 33 P.2d 1 (1934).
83. *Id.* at 5, 33 P.2d at 3 (1934).

relabeling the property as "community property" as part of the state's control was not objectionable.[84]

In a contemporaneous case, a California widow was denied the statutory share of her deceased husband's property to which she would have been entitled in Indiana where the property was acquired. The court found the wife's interest in her husband's property to be a mere expectancy in Indiana and sustained the husband's disposition of his separate property.[85]

Perhaps taking the hint offered in the dissenting opinion in *Thornton*, the California Legislature in its next session attempted to remove the constitutional infirmity by enacting Section 201.5 of the Probate Code,[86] dealing only with rights of succession upon the death of either spouse.

Two problems arose in construing this statute. It mentioned only personal property, so it was held not to apply to California real estate.[87] The statute also provided that upon the death of *either* husband or wife, one-half of the property subject to the statute acquired by *either* husband or wife would be subject to the disposition of the decedent. The problem this provision created was that the wife, usually the non-acquiring spouse, might die first and dispose of one-half of her husband's property. Such a result took the statute out of the solely successionary role the legislature intended because it directly affected the ownership rights of the survivor in his own property. The California court found this statute unconstitutional to the extent that it allowed the decedent to dispose of property of the survivor.[88]

Following the California Law Revision Commission's recommendations,[89] the statute was amended in 1957[90] and in 1961[91] to resolve

84. *Id.* at 5, 33 P.2d at 3 (Langdon, J., dissenting).

85. *In re* O'Connor's Estate, 218 Cal. 518, 23 P.2d 1031 (1933). The wife could not claim any benefits under the 1917 legislation because the property was brought to the marriage by the husband, so it would have been his separate property even under California law.

86. Ch. 831, § 1, [1935] Cal. Stat. (*amended by* 1957 and 1961 CAL. PROB. CODE § 201.5 (West Supp. 1970)).

87. *In re* Miller, 31 Cal. 2d 191, 187 P.2d 722 (1947).

88. Paley v. Bank of America, 159 Cal. App. 2d 500, 324 P.2d 35 (1958).

89. 1 CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION AND STUDY RELATING TO RIGHTS OF SURVIVING SPOUSE IN PROPERTY ACQUIRED WHILE DOMICILED ELSEWHERE (1956).

90. Ch. 490, §§ 1-4 [1957] Cal. Stat. (*amended by* 1961 CAL. PROB. CODE § 201.5 (West Supp. 1970).

these problems. Section 201.5 was specifically amended to include local real estate because, as the Law Revision Commission pointed out, there was no reason for the Legislature to deny a surviving spouse the benefit of the statute merely because the separate property from the previous domicile was invested in California real estate. The revised probate section also very carefully limits its application to one-half the property in a *decedent's estate* so that there can be no testamentary disposition of the survivor's property by the decedent.

Since the revised section already applied only on the death of the owner of the out-of-state acquired property, the property would remain his separate property during his life absent any commingling. People dealing with him on a commercial basis will look to his separate property to determine his financial worth, so the revised statute expressly provides that although one-half of the property subject to the section will go to the surviving spouse, all of the property will be probated and subject to the debts of the decedent.

The statute does not apply to real estate purchased in California by a married person domiciled elsewhere unless the owner is actually domiciled in California at his death. If the person is a Californian at the time of death, California has a definite interest in controlling the succession rights to the property, but the state has little interest in the succession rights to a non-domiciliary's investment in California real estate. The revised probate statute does not apply to the non-domiciliary, and his surviving spouse has the same right to elect to take a portion of the real estate against the will as she would have had

91. CAL. PROB. CODE § 201.5 (West Supp. 1970):
Upon the death of any married person domiciled in this State one-half of the following property in his estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse: all personal property wherever situated and all real property situated in this State heretofore or hereafter acquired:
(a) By the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this State at the time of its acquisition; or
(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere.
All such property is subject to the debts of the decedent and to administration and disposal under the provisions of Division 3 of this Code.
As used in this section, personal property does not include and real property does include leasehold interests in real property.

if the real estate were located in the decedent's domicile at his death.[92] To avoid the situation in which the surviving spouse of a California domiciliary could take under the will and in addition exercise her statutory right to take against the will, the statute puts the surviving spouse of a domiciliary to an election.[93]

The revision of the Probate Code included an additional section[94] designed to protect the rights granted the surviving spouse under Section 201.5 from various inter-vivos transfers made by the decedent without adequate consideration. Common law jurisdictions typically protect the surviving spouse's interest in her non-barrable share with some restriction on her spouse's lifetime transfers of property.[95] The Law Revision Commission thought that the rights granted in Section 201.5 ought to be similarly protected from transactions such as the following: the husband, to avoid the provisions of Section 201.5 and prevent his wife from receiving one-half of his accumulated savings, transfers all of his property to a living trust, naming his California neighbor as the trustee, with the income to be paid to the husband for life and the corpus to be distributed to X on his death.

To deal with such a situation the California Legislature enacted Section 201.8 of the Probate Code,[96] which protects the wife without unconstitutionally restricting the husband's lifetime control of his separate property. The Legislature had many interests to balance, and the statute leaves wholly gratuitous transfers unaffected because of

92. CAL. PROB. CODE § 201.6 (West 1957). The surviving spouse previously had no interest in such real estate because the law of her husband's domicile would apply the law of California in determining the status of real property situated there. Under this statute the wife will have whatever interest is accorded her by the law of her husband's domicile at his death.

93. CAL. PROB. CODE § 201.7 (West Supp. 1970).

94. CAL. PROB. CODE § 201.8 (West Supp. 1970).

95. *See* note 9, *supra.*

96. CAL. PROB. CODE § 201.8 (West Supp. 1970).

Whenever any married person dies domiciled in this State who has made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value of property in which the surviving spouse had an expectancy under Section 201.5 of this code at the time of such transfer, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. If the decedent has provided for the surviving spouse by will, however, the spouse cannot require such restoration unless the spouse has made an irrevocable election to take against the will under Section 201.5 of this code rather than to take under the will. All property restored to the decedent's estate hereunder shall go to the surviving spouse pursuant to Section 201.5 of this code as though such transfer had not been made.

the constitutional problems of interfering with the owner's control of his Section 201.5 separate property during his lifetime. The statute does not affect transfers for which property of a substantial value is received, as this new consideration itself would be subject to Section 201.5, since by its terms Section 201.5 property includes property exchanged therefor. The California Law Revision Commission Study and Recommendation[97] indicated that the purpose of Section 201.8 is to set aside transfers made without adequate consideration of substantial worth where the transfers are of the typical will-substitute variety, such as life insurance, joint tenancy assets, Totten trust bank accounts, revocable trusts, trusts with the income reserved for life, and legal transfers with a retained life estate. Thus the statute's main target is the spouse who seeks to retain a substantial interest in Section 201.5 property during life while defeating his spouse's rights in the property at his death by having the assets pass outside his probate estate.

Only one-half of a transfer, governed by Section 201.8, is set aside because the decedent has the right under Section 201.5 to devise "his" one-half by will. The transfer should be considered effective as to the amount he could have given by will. The one-half restored to the surviving spouse must, however, pass through the decedent's estate in order to make it available to the decedent's creditors. The application of the statute is limited to Section 201.5 property in which the surviving spouse had an expectancy at the time the transfer was made, in other words, when the couple was already domiciled in California.

The net impact of the 1957 California revision was that property acquired by a couple domiciled in a common law jurisdiction, and which would have been community property if it had been acquired in California, remained separate property when the couple brought it to California for most purposes. For purposes of succession rights, inheritance taxation, and probate homestead, however, the property was treated substantially like community property, so that in these areas the surviving spouse was treated as much like a native Californian as possible. This result probably conforms to the parties' intent, and, in addition, avoids the substantial constitutional problems involved in attempts to legislatively convert separate property into community property.

97. *See* note 89, *supra.*

Shortly after the 1957 revision, the California Law Revision Commission suggested that the label "quasi-community property" be applied to all "property [of California domiciliaries] acquired other than by gift, devise, bequest or descent during the marriage by a married person while domiciled elsewhere."[98] It was suggested that this could be the shorthand label for such property which was separate, but which under certain statutory provisions would be treated more nearly like community property. It was also suggested that the quasi-community property concept be extended to the areas of divorce and separate maintenance, lifetime declaration of homestead, and gift taxes.[99] These suggestions were followed. The label "quasi-community property" now appears in California legislation and is widely used in legal writings in California; in addition, the concept was extended to these other areas.[100]

California's quasi-community concept has had little effect on federal estate and gift tax consequences. Quasi-community property is still basically the separate property of the person who acquired it despite the expectant rights which Section 201.5 gives the surviving spouse. The federal estate tax will be applied just as it would have been in the common law state where the property was acquired. The marital deduction designed to equate the tax impact on separate and community property will be available since the surviving spouse's interest in quasi-community property is a mere expectancy similar to her non-barrable share in the common law state.[101] Similarly, a gift of quasi-community property by the owner to his spouse will be treated as a gift of the owner's separate property for federal gift tax purposes and will also be able to qualify for the marital deduction.[102] Since the property is still treated as the separate property of one of the spouses, the other spouse may consent to being treated as the donor of one-half the property for gift tax purposes, when the gift is to a third person.[103]

98. CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION AND STUDY RELATING TO INTER VIVOS MARITAL PROPERTY RIGHTS IN PROPERTY ACQUIRED WHILE DOMICILED ELSEWHERE I-6 (1960).
99. *Id.* at I-7-11.
100. CAL. CIV. CODE §§ 140.5-149, 176, 1237-5, 1238, 1265 (West 1961); CAL. PROB. CODE, §§ 661, 663 (West 1961); CAL. REV. & TAX. CODE, §§ 15300-15306 (West 1961).
101. Treas. Reg. § 20.2056(c)-2(c)(1) (1958).
102. Treas. Reg. § 25.2523(f)-1(i) (1958).
103. Treas. Reg. § 25.2513(a)(2) (1958).

Thus all the federal estate and gift tax devices to equalize the treatment of separate and community property are still applicable to California's quasi-community property, and the new Californian will have almost the same net tax result as the native Californian.

IV. PROPOSED SOLUTIONS FOR WASHINGTON

Washington could simply do nothing about the problem. In many cases it does not arise, since the husband adequately provides for his wife. The surviving wife will still incur an inheritance tax penalty, however, since the property is taxed in full as her husband's separate property, while property earned in Washington is taxed at half its value, since the wife already owns one-half of it.

Although many couples avoid the problem by agreements or by commingling their property, *Gulstine's Estate*[104] indicates that the husband could totally disinherit his wife as to all of his property which was still traceable to his separate property.

One possible solution for Washington might be the suggestion posed by Professor Marsh for solving this problem in all community property states.[105] He would have each community property state recognize the wife's non-barrable share under the law of the common law jurisdiction. In other words, common law separate property would maintain its common law separate characteristics in Washington, and would not become separate property in the community property sense. Assuming in the original hypothetical that the New York laws would entitle the wife to a non-barrable claim to a one-third interest in the property which her husband owned at his death, when he died in Washington, the wife would claim that she was entitled to this one-third of all the property which was acquired during the couple's domicile in New York. Professor Marsh would resolve the case as follows:[106]

> Her claim to a share of the . . . [holdings] of the husband free from his attempted testamentary disposition . . . [would be] characterized as an issue of marital property by the community property state, and the choice-of-law rule refers the court to the

104. *In re* Gulstine's Estate, 166 Wash. 305, 6 P.2d 628 (1932). *See* discussion at note 39 and accompanying text, *supra*.
105. MARSH at 228-33.
106. *Id.* at 228.

> law of the first domicile as the governing law. By that law, she ... [would be] entitled to ... [one-third] of the husband's [holdings at death] despite his attempt to bequeath the property to a third person. Therefore, it would seem that by applying this law, the wife should prevail.

In the original hypothetical, the wife would take $41,666, representing one-third of the $125,000 estate.

If the Washington court were willing to take this approach, the disinheritance problem would be solved, and the wife's only complaint would be that the benefits granted her under the law of the previous jurisdiction were less than those granted the wife under the community property laws of Washington. There are several practical objections to having Washington courts adopt Professor Marsh's judicial solution, however. First, the Washington court has traditionally treated a wife's claim against her deceased husband's property as a question of succession rights.[107] Although the marital rights approach would allow the court to look to the state of acquisition to determine the rights of the surviving spouse, it is doubtful that the court would approve such a fundamental departure from existing precedent.

Second, Professor Marsh's approach would require the court to look to the laws of each of the forty-two common law states and even the laws of the seven other community states to the extent their laws differ from Washington's. Since the "foreign" law would be the governing law, the Washington widow whose husband acquired his property in one jurisdiction might receive outright one-third of the property on his death, while the Washington widow whose husband earned his living in another might receive a life estate in her husband's property upon his death. In short, there would be one law for lifelong residents, and forty-nine different laws for those couples who move to Washington. This would certainly be undesirable when one of the primary purposes of reform in this area must be to equalize the positions of the new Washington couple and the native couple. Furthermore, from a practical standpoint it would be difficult for Washington attorneys, judges and title insurance companies to familiarize themselves with the laws of each of forty-nine foreign jurisdictions.

107. *In re* Gulstine's Estate, 166 Wash. 305, 6 P.2d 628 (1932); Myers v. Vayette, 146 Wash. 1, 261 P. 647 (1927); Meyers v. Albert, 76 Wash. 218, 135 P. 1003 (1913).

Finally, since the judicial solution grants the wife a non-barrable share, the property passing to her would be subject to Washington inheritance tax,[108] resulting in a tax penalty for having acquired the property outside the state.

Since the judicial solution is inadequate, it is suggested that the Washington legislature consider adopting California's quasi-community property approach. Washington's version of quasi-community property need not be as broad as California's, since the Washington wife whose husband acquired separate property outside the state is already protected in the divorce and homestead areas by having the separate property of the husband included in the funds available for the wife's protection and welfare.[109] It is California's extension of the quasi-community property concept to fields outside the succession and related tax areas that has drawn the most criticism,[110] so the quasi-community property concept in Washington can be appropriately limited. Except in one area of succession rights, the California approach has been tested, so that Washington has the advantage of California's extensive judicial and legislative background. The one untested area is California Probate Code Section 201.8, which is designed to protect the succession rights in quasi-community property from those lifetime transfers which would have defeated the surviving spouse's rights in the quasi-community property. While it is arguable that the statute imposes an unconstitutional restraint on the husband's separate property during his lifetime, the state's interest in the welfare of the surviving spouse and its unquestioned authority to determine the succession rights of its domiciliaries should be sufficient to uphold the statute if it restricts only those lifetime transfers, usually characterized as will-substitutes, in which the husband retains some lifetime benefits and attempts to defeat the surviving spouse's interest in the quasi-community property. In addition, since the statute applies only after the marriage is terminated by death, the situation is analogous to the application of the quasi-com-

108. WASH. REV. CODE § 83.04.010 (1961).
109. *See* notes 53, 55 and accompanying text, *supra.*
110. Cooper & Moore, *Alice in Wonderland: A Glimpse at Two Aspects of the Quasi-Community Property Problem*, 41 L.A. BAR BULL. 565 (1966); de Funiak, *Conflict of Laws in the Community Property Field*, 7 ARIZ. L. REV. 50 (1965); Schreter, *Quasi-Community Property in the Conflict of Laws*, 50 CALIF. L. REV. 206 (1962).

munity property concept on the termination of marriage by divorce, already upheld by the California courts.[111]

In conclusion, it is suggested that the Washington legislature consider for enactment the statutes set out in the Appendix. The proposed statutes are substantially similar to California's and would apply the quasi-community property concept to succession rights, and equalize the inheritance and gift tax treatment of quasi-community property.

APPENDIX

AN ACT relating to succession rights of surviving spouses; adding four new sections to Chapter 11.04 RCW; and providing an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 016

Upon the death of any person domiciled in this State one-half of the following property in his estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and in the absence thereof, shall descend and be distributed according to the provisions of this chapter applicable to the separate estate: all personal property wherever situated and all real property situated in this state heretofore or hereafter acquired:

(a) By the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time of its acquisition; or

(b) In derivation or exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere. All such property is subject to the debts of the decedent and to administration and disposal under the provisions of Title 11 of this code.

As used in this section, personal property does not include, and real property does include, leasehold interests in real property.

NEW SECTION. Sec. 017

Upon the death of any married person not domiciled in this state who leaves a valid will disposing of real property in this state which

111. Addison v. Addison, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in the decedent's domicile at death. As used in this section, real property includes leasehold interests in real property.[112]

NEW SECTION. Sec. 018

Wherever a decedent has made a provision by a valid will for the surviving spouse and the spouse also has a right under Section 11.04.016 of this code to take property of the decedent against the will, the surviving spouse shall be required to elect whether to take under the will or to take against the will unless it appears by the will that the testator intended that the surviving spouse might take both under the will and against it.

NEW SECTION. Sec. 019

Whenever any married person dies domiciled in this state who has made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value, of property in which the surviving spouse had an expectancy under Section 11.04.016 of this code at the time of such transfer, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. If the decedent has provided for the surviving spouse by will, however, the surviving spouse cannot require such restoration unless the surviving spouse has made an irrevocable election to take against the will under Section 11.04.016 of this code rather than to take under the will. All property restored to the decedent's estate hereunder shall go to the surviving spouse pursuant to Section 11.04.016 of this code as though such transfer had not been made.

The effective date of this act is————————.

AN ACT relating to the inheritance and gift taxation of property acquired while domiciled outside the state; adding three new sections to title 83 RCW; and providing an effective date.

112. This section is added to give the surviving spouse the same protection she would have had if the property were in the decedent's domicile, since she has no protection under community or quasi-community rights which are extended only to domiciliaries. Washington has no interest in non-domiciliaries, and the surviving spouse's rights should be determined under one set of laws, so Washington can defer to the law of the other jurisdiction where the surviving spouse will have some protection.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 04.011

The one-half of any property which, under Section 11.04.016 of this code belongs to the surviving spouse, and all of any property restored to decedent's estate under Section 11.04.019 of this code are not subject to the inheritance tax imposed by this title, provided, however, that all of any property in the decedent's estate to which Section 11.04.019 of this code is applicable passing to anyone other than the surviving spouse is subject to the inheritance tax imposed by this title.

NEW SECTION. Sec. 56.035

In the event of a transfer by gift of property from one spouse to the other spouse, one-half of the following property which has been transferred shall not be subject to the gift tax imposed by this title: property acquired by the donor spouse while domiciled elsewhere which would have been the community property of the donor and donee spouse had the donor been domiciled in this state at the time of its acquisition, or any property acquired in exchange therefor.

NEW SECTION. Sec. 56.036

In the event of a transfer by gift, if both spouses so elect, a transfer of the following property may be treated for purposes of gift taxation under this title as having been made one-half by one spouse and one-half by the other: property acquired by the donor spouse while domiciled elsewhere which would have been the community property of the donor and the electing spouse had the donor been domiciled in this state at the time of its acquisition, or any property acquired in exchange therefor.

The effective date of this act is ————.[113]

113. The taxation reform is drawn to affect only quasi-community property.

WASHINGTON LAW REVIEW

EDITORIAL BOARD

VOLUME 46 JANUARY 1971