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Community Property and Conflict of Laws: A Cacophony of Cases

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I. INTRODUCTION

Justice Cardozo is reported to have said that "the average judge, when confronted by a problem in the conflict of laws, feels almost completely lost, and, like a drowning man, will grasp at a straw."[1] Conflict of laws can be vexing, but the resolution of a controversy involving multiple states' marital property systems can quickly become impenetrable. This is in part due to the fundamental conceptual differences between community property and common law marital property paradigms, the inconsistencies in the use of similar terms in the different systems, and the significant differences among the laws of the community property states themselves. Added to the multitude of variations in the marital property law rules to be applied, there are the myriad potential fact patterns as well as layers of other legal issues, competing for application of the determining choice of law. Courts continue to turn to traditional conflict-of-laws principles that were initially found in the Restatement (First) of Conflict of Laws (First Restatement), choosing the law of the situs for real property and the law of the domicile for characterization of marital personalty, but these rules are deceptively simple and ill-equipped to answer the more complex choice-of-law dilemmas in this area. Even with more modern approaches to conflicts of law analysis, courts struggle. The confusion affects more than just property rights between two spouses, but also creates uncertainty whenever a person does business with a married person in another state.

To set the stage, this Article begins with a description of three cases that deal with one state's rule on spousal liability for guaranty agreements, as it applies in the interstate setting. The different courts end up with three dramatically different results, using very different analytic approaches. Next, so that the reader is familiar with the various marital property laws that are in conflict in the cases discussed, the Article briefly describes community property in the United States, the common features among the nine traditional community property states,[2] examples of variations among those states' laws, and the fundamental differences between community property and common law marital property regimes. It also

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1. Walter Wheeler Cook, *Federal Courts and the Conflict of Laws*, 36 ILL. L. REV. 493, 528 (1942).

2. Five of the traditionally common law states now allow for married couples to opt into community property for some or all of their assets. ALASKA STAT. § 34.77 (2021); TENN. CODE ANN. § 35-17-105(a) (2010); S.D. CODIFIED LAWS § 55-17-5 (2016); KY. REV. STAT. ANN. §§ 386.620–.622 (West 2020); FLA. STAT. §§ 736.1501-.1512 (2022). Consideration of these systems is beyond the scope of this Article.

summarizes the available choice of law principles that are invoked in U.S. courts when two or more regimes are involved in a particular controversy.

The Article then identifies common marital property issues that raise conflicts concerns. There are some issues that are relatively straightforward and are dealt with by courts with some consistency. But the farther away the issue strays from the basic question of ownership in property of married persons, the harder it is for courts to apply the available analytic tools to arrive at consistent results. The Article proposes that courts abandon recent attempts to parrot rule-based norms and instead approach the cases by directly considering the interests and policies present in the particular case, and the effect of the various solutions on those interests and policies, before choosing the solution. That case-by-case approach might be criticized as leading to unpredictability, but it is hard to imagine a less predictable body of case law than what we have presently.

The descriptions and variations of the U.S. marital property regimes, the catalog of potential conflicts issues that can arise with respect to marital property, and the description of cases resolving choice-of-law issues with respect to marital property contained in this Article are not comprehensive but are only representative and intended to illustrate the confusion and inadequacy of traditional choice-of-law jurisprudence to resolve these issues fairly.[3]

II. A TALE OF THREE JURISDICTIONS

These three cases involve Arizona and one other community property jurisdiction. Arizona has a unique rule that requires both spouses to sign a guaranty of another's obligation in order for it to be enforceable against community property.[4] In the other states involved in the cases, the signature of only one spouse is sufficient to bind the community as long as the community benefits from the guarantee.[5]

In *G.W. Equipment Leasing, Inc. v. Mt. McKinley Fence Co.*,[6] the couple were residents of Arizona. The husband's company entered into an equipment lease with a Washington company, and the husband signed a guaranty of the lease obligations. The contract was entered into in Washington. The company and the husband defaulted, and the creditor

3. For example, issues of enforceability of prenuptial contracts and choice-of-law clauses and conflicts with marital property laws of other countries are beyond the scope of this Article.

4. ARIZ. REV. STAT. ANN. § 25-214 (2022).

5. *See discussion infra* Part IV.

6. 982 P.2d 114, 115 (Wash. Ct. App. 1999).

was now trying to collect against the couple's community property. Washington follows the Restatement (Second) of Conflict of Laws (Second Restatement), and its general approach that the law of the state with the most significant contacts with the controversy should control.[7] The Washington company argued that Washington law should apply because Washington had the most significant contacts with the lease. However, the Washington Court of Appeals cited *Potlach No. 1 Federal Credit Union v. Kennedy*,[8] a Washington Supreme Court decision that noted that some contacts are more significant than others, and that when management of the community property is at issue, the state with the most significant interests is typically the state of the spouses' domicile. In determining that Arizona law applied, the court noted that:

> Washington courts apply Washington law to determine the rights and authority of Washington spouses to enter into contracts affecting their community property. For Washington courts to conclude that residents of other community property states are bound by Washington community property law as well, rather than the law of their own state, would be illogical and unjust.[9]

The court was also concerned that a spouse should not be able to deprive the other spouse of their state law protections by doing business in another state.[10] Therefore, since Arizona law would require the wife's signature, and that was lacking, the guaranty was enforceable only against the husband's separate property.

In *First-Citizens Bank & Trust Co. v. Morari*,[11] three married couples lived in California and owned (through a company owned by the husbands) mortgaged property (a hotel) in Arizona. The company had taken a loan to purchase the hotel and only the husbands had signed guaranties. The company defaulted and the lender sued the couples in Arizona. On a ruling dismissing the spouses from the Arizona suit on the guaranties, the court treated this like a contract case rather than a marital property issue, and applied Section 194 of the Second Restatement, which would apply the law that governs the principal obligation. The contract for the underlying debt had an Arizona choice-of-law clause, and under the First Restatement, the law of another state would apply only if it has

7. *See, e.g.*, Williams v. State, 885 P.2d 845, 848 (Wash. Ct. App. 1994).
8. 459 P.2d 32, 36 (Wash. 1969).
9. *G.W. Equip.*, 982 P.2d at 117-18.
10. *Id.*
11. 399 P.3d 109, 111 (Ariz. Ct. App. 2017).

a more significant relationship to the transaction.[12] Arizona was the state where the credit was extended, so there was sufficient basis to apply Arizona law and dismiss the spouses from the case. However, the decision did not clarify whether and to what extent the California couples' California community property would be subject to the debt because of the Arizona law, although it would likely apply Arizona law, which does not allow community property to be liable for a spouse's separate debts.[13]

The court did not give a reason as to why the state of the couples' domicile did not control the community property management issue, but it discussed a previous case, *Phoenix Arbor Plaza, Ltd. v. Dauderman*,[14] also involving a California spouse's potential liability on a guaranty signed in Arizona. Notably, the *Phoenix* court refused enforcement of "a unilateral promise by the husband to bind his wife to a promise [that] would jeopardize property rights provided by her state of domicile,"[15] even though her state of domicile (California) would have held her community liable. The *Phoenix* court stated that applying Arizona law would expand her community property rights and restrict the Arizona creditor's rights, so "it makes sense" to apply Arizona law.[16] It would only make sense to restrict their own resident's rights if spousal protection was the ultimate policy to be honored. If so, then the significant contacts case becomes irrelevant.

By contrast, in *In re Miller*,[17] a married couple domiciled in Arizona owned an apartment in California. The husband's California limited partnership borrowed money from a California bank and the husband guaranteed the loan. The limited partnership and the husband defaulted on the loan and the bank obtained a judgment against the husband. The issue of enforceability of the judgment against the apartment arose in the husband's Chapter 7 bankruptcy. The United States District Court for the District of Arizona described the question as "whether an Arizona judgment against a husband on his sole and separate debt may be executed against the Arizona couple's community property in California" and held that California "has no interest in ousting Arizona marital law."[18]

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12. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 194(c) (AM. L. INST. 1971).
13. ARIZ. REV. STAT. ANN. § 25-215(A) (2022).
14. 785 P.2d 1215, 1216 (Ariz. Ct. App. 1989).
15. *Id.* at 1219.
16. *Id.*
17. 853 F.3d 508, 513 (9th Cir. 2017) (applying Arizona law because Arizona had the most interest).
18. *Id.* at 514 (internal quotations and citations omitted).

Therefore, Arizona law applied and the apartment was exempt from the judgment.[19]

On appeal, the United States Court of Appeals for the Ninth Circuit first determined that federal choice-of-law rules, which are based on the Second Restatement, would be applied. Because the issue involved real property, the court looked to the law of the *situs*, California, including its choice-of-law rules. The court first came to the remarkable conclusion that the California apartment was not community property because it did not come within the California statute's definition of community property, which states, "[e]xcept as otherwise provided by statute, all property . . . acquired by a married person during the marriage *while domiciled in this state* is community property."[20] Without citing other authority, the court assumed that California would only recognize its own residents' community property, ignored the fact that the apartment was purchased with Arizona community property, and did not consider how out-of-state community property would be treated under California law.[21] Instead, the court concluded that since it was not community property, it must be held by the spouses as their separate property, as tenants in common, putting the property in an unexpected form of property ownership.[22] After it announced that preliminary conclusion, the court turned to the choice of law. California uses governmental interest mode of conflicts analysis, which weighs the interests of the states in the particular controversy and applies the law of the state whose interests would be most impaired by application of the other state.[23] The difference between California and Arizona law on the enforceability of the guaranty created a conflict. The interest of Arizona in enforcing its law would be protecting innocent spouses, in this case an Arizona resident. However, the court noted that there was no evidence that the wife did not know about or agree to the guaranty, implying that the interest of Arizona would be lessened if she knew about the guaranty. There is no indication in the opinion, however, that there are exceptions to the Arizona rule for spouses who knew, acquiesced, or ratified the action.[24] The interest of California was

19. *Id.*

20. CAL. FAM. CODE § 760 (West 1994) (emphasis added).

21. *See infra* notes 94-141 and accompanying text (discussing the characterization of community property when moved to another state).

22. *See* HAROLD MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 240 (1952).

23. *See infra* note 82 and accompanying text.

24. In fact, there is an exception to the signature requirement if the spouse ratified the agreement, but that exception must be applied sparingly because the "clear policy" of protecting the spouses by requiring both signatures "would be circumvented, and [the] bright line of required

characterized by the court as a strong interest in promoting commercial activities and access to credit, which would be undermined by exempting the apartment from the debt. Also, the court reasoned that Arizona policy would not be totally defeated if the apartment could be attached because like other interests held as tenancy in common,[25] the bankruptcy trustee could only collect against the husband's half interest. The court therefore applied California law and allowed enforcement of the judgment against the apartment. The court's reasoning led to a split-the-baby result, but it had to take some sharp turns in analysis to get there.

The three decisions illustrate the uncertainty arising from each court's characterization of the precise legal question. The Washington court held that the property rights of the couple were paramount, but that concern led to its conclusion that the law of the couple's domicile should always prevail because it then turned to the First Restatement rule.[26] In the facts present in the *Morari* case, however, the law of the domicile would offer less protection. When faced with a similar fact pattern, the Washington court's analysis, and application of its conflicts rule of most significant contacts, would require the path of less protection.[27] It is unclear what policy the Arizona court is supporting by its holding. Language in the opinions indicate that protection of the spouse is paramount but it may just favor applying its own laws.[28] The danger of the Arizona approach is that it may encourage forum shopping.[29] The Ninth Circuit started with the traditional law of the *situs* rule but then was able to compare the effects of each state's laws to see which would best serve the governmental interests at stake.[30] Its methodology was more transparent, but it was somewhat unconvincing in weighing the interests (and labelling the property interest) so the holding is unreliable.

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joinder blurred, if [the] courts too readily permitted ratification." All-Way Leasing, Inc. v. Kelly, 895 P.2d 125, 126 (Ariz. Ct. App. 1994).

25. *In re* Miller, 853 F.3d 508, 512 (9th Cir. 2017).

26. G.W. Equip. Leasing, Inc. v. Mt. McKinley Fence Co., 982 P.2d 114, 116-17 (Wash. Ct. App. 1999).

27. *Id.*

28. *See* Martin v. Martin, 752 P.2d 1026, 1042 (Ariz. Ct. App. 1986); *infra* text accompanying notes 216-221 (discussing the *Martin* case).

29. *See infra* text accompanying notes 216-221 (discussing the *Martin* case).

30. *In re Miller*, 853 F.3d at 515-16.

III. DESCRIPTION OF THE MARITAL PROPERTY SYSTEMS OF THE UNITED STATES

What follows is an abbreviated description of U.S. marital property laws and is intended only to highlight the differences among the states to aid the reader in interpreting the conflicts dilemmas presented in the cases.[31]

A. History of Community Property in the United States

The two very different systems of marital property have coexisted in this country since its founding. Eight states—Louisiana, Texas, Nevada, New Mexico, California, Arizona, Washington, and Idaho—have used community property as the default marital property system since statehood.[32] The ninth state to adopt community property as the default marital property system is Wisconsin, which made the change from the common law system by statute adopted in 1984.[33] The community property system first adopted in the original community property states had origins in the community property laws of Mexico, Spain, France, and the practices of the Visigoth Tribes,[34] but from the beginning variations from those laws and among the different state laws emerged.[35] Early U.S. community property shared the basic characterization of premarital property and gifts and inheritances as the owning spouse's separate property and property acquired during the marriage as

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31. *See generally* WILLIAM A. REPPY ET AL., COMMUNITY PROPERTY IN THE UNITED STATES (8th ed. 2015); ROBERT L. MENNELL & JO CARRILLO, COMMUNITY PROPERTY IN A NUTSHELL (3d ed. 2014); 1 JEFFREY SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING (2010 ed. 2009) (each discussing differences between common law marital property and community property and variations among community property states).

32. *See* Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 20 (1967).

33. James J. Podell, *The Impact of Wisconsin's Marital Property Act on Family Law*, 68 MARQ. L. REV. 448, 448 (1985).

34. MARSH, *supra* note 22, at 18; GEORGE MCKAY, TREATISE ON THE LAW OF COMMUNITY PROPERTY §§ 7-9 (2d ed. 1925); Charles W. Willey, *Effect in Montana of Community-Source Property Acquired in Another State (and Its Impact on a Montana Marriage Dissolution, Estate Planning, Property Transfers, and Probate)*, 69 MONT. L. REV. 313, 321-23 (2008). While the original settlers of Texas, Louisiana, Nevada, New Mexico, California, and Arizona were from community regimes, it is unknown why Washington and Idaho chose community property. There is speculation that it was a ploy to attract women to the territories. *See* Kelly M. Cannon, *Beyond the "Black Hole"- A Historical Perspective on Understanding the Non-Legislative History of Washington Community Property Law*, 39 GONZ. L. REV. 7, 22-27 (2003).

35. MARSH, *supra* note 22, at 18–27; MENNELL & CARRILLO, *supra* note 31, at 20–23.

community property.[36] Until the 1970s, the husband had total control over both spouses' property during the marriage, but the wife's interest in the community property was recognized as a vested property right.[37] U.S. community property systems evolved along with the slow recognition of equal rights of women. Initially, there were modest steps taken in some of the states, such as requirements that the wife must join in any transaction involving community real estate, and provisions that gave the wife the right to manage her own separate property, that began to be added in some of the states.[38] Some of those reforms account for some of the differences among the community states currently. For example, the departure in most but not all of the states from the civil law rule that income from separate property was community most likely originated as a way to free more of the wife's property from the husband's control.[39] It was not until gender equality reforms beginning in the 1960s, which introduced no fault divorce and changes to alimony rules, that community property states began to change the rule that the husband was sole manager of community property and adopt equal management of community property.[40] Louisiana was the last of the eight original community property states to make the change, in 1980.[41]

B. *Common Aspects of the Community Property System in the Nine Traditional Community Property States*

In all of the nine community property states, the property of married persons will fall into one of three categories: community property, separate property of one spouse, and separate property of the other spouse.[42] Separate property is generally described as property acquired before the marriage and property acquired during the marriage by *inter vivos* or testamentary gift or inheritance.[43] Community property of the couple is sometimes described as all other property of the couple (the

36. Warburton v. White, 176 U.S. 484, 484-85 (1900).

37. MENNELL & CARRILLO, *supra* note 31, at 12.

38. Vaughn, *supra* note 32, at 45-46.

39. MENNELL & CARRILLO, *supra* note 31, at 86.

40. *See* Stevia Marie Walther, *Selected Problems in the Equal Management of Community Property*, 60 TUL. L. REV. 821, 821-23 (1986). *See generally* Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 IND. L. REV. 853 (2015) (discussing the evolution of community property management rules).

41. Walther, *supra* note 40, at 821.

42. *See, e.g.*, WASH. REV. CODE §§ 26.16.010–.030 (2008) (noting the three categories that property can fall into).

43. *Id.*

"wastebasket" approach)[44] and sometimes described as property acquired onerously, that is, through the labor of one of the spouses, during the marriage.[45] Each of the states has a strong presumption that property owned by a married person is community property.[46] Once community character is established, most community property states follow the "item theory" of community property, and each spouse is deemed to hold an undivided one-half interest in each community property asset as it is acquired.[47] Title of an asset is not determinative with respect to ownership of the property; a community asset can be titled in one spouse's name alone but is still presumed to be community, and owned equally by the spouses, unless the presumption is rebutted.[48] Spouses in all of the community property states can now change the character of some or all of their property by agreement.[49]

C. *Comparison of the Two Marital Systems—Community Property vs. Common Law*

Both the community property system and the common law system for marital property give rights of a married person in the property of the

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44. *E.g.*, CAL. FAM. CODE § 760 (West 1994); WASH. REV. CODE § 26.16.030 (2008); Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 WASH. L. REV. 13, 28 (1986).

45. *E.g.*, MENNELL & CARRILLO, *supra* note 31, at 7.

46. *E.g.*, Yesler v. Hochstettler, 30 P. 398, 399 (Wash. 1892); TEX. FAM. CODE ANN. § 3.0013 (West 1997); WIS. STAT. § 766.31(2) (1985). Some expressions of the presumption apply it to property "acquired" during marriage rather than "possessed," and there is a corollary presumption that property possessed by a married person in a long-term marriage is presumed to be community. *See In re* Jolly's Estate, 238 P. 353, 355 (Cal. 1925); Cross, *supra* note 44, at 29; SCHOENBLUM, *supra* note 31, § 10.21(A)(6); *cf.* Fidelity & Casualty v. Mahoney, 161 P.2d 944, 946 (Cal. Ct. App. 1945) (noting that flight insurance purchased shortly after marriage was characterized based on funds used to purchase; the presumption did not attach to when those funds were acquired).

47. WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 1-6 (2d ed. 1971); SCHOENBLUM, *supra* note 31, § 10.21(A)(1).

48. Cross, *supra* note 44, at 29.

49. The states vary on the formalities required. Louisiana requires a married couple to get court approval of any agreement that eliminates community property, but a couple may enter into a prenuptial agreement without court approval, and a couple moving to Louisiana has a limited time to enter into such an agreement before the court approval requirement is triggered. Spouses are allowed to partition community assets into separate property without court approval. LA. CIV. CODE ANN. arts. 2328–2336 (1979). Texas has specific requirements for any agreement converting separate property to community property. TEX. FAM. § 4.203. California requires a writing for a transmutation of property. CAL. FAM. § 852(a). In Washington, couples may recharacterize assets as community or separate by oral or written agreement. *In re* Marriage of Mueller, 167 P.3d 568, 571 (Wash. Ct. App. 2007).

other, recognizing the economic partnership of marriage. However, the difference between the common law system of marital property and the community property system that is critical for conflicts analysis is timing. In a common law system, each spouse retains full ownership over their earnings and acquisitions during the marriage.[50] The spouse's claims to the other's property comes at the end of the marriage, through death or divorce.[51] At death, all but one of the common law systems give the surviving spouse the right to an elective share, which is a percentage of the deceased spouse's assets, thereby preventing the deceased spouse from disinheriting the survivor.[52] At divorce, common law states primarily provide for equitable distribution of what the court labels as marital property of the couple.[53] By contrast, in the community property system, the economic partnership is recognized during the marriage. The couple's earnings are treated as being owned equally by the spouses as the property is acquired.

The co-ownership of community property during marriage creates complexities for a couple in the community property state, and for anyone transacting with them. Characterizing property as separate or community is subject to very complex rules, particularly if assets are acquired over time.[54] Management of community property by either or both spouses is also subject to complex rules, creating uncertainty in contracts with third parties, gifts, and other transactions. Because the survivor has received an interest in marital property during the marriage, community property states do not provide the right to an elective share, and the first spouse to die is free to leave their one-half of the community as they wish without any provision for the surviving spouse.[55] If the lower-earning spouse predeceases the earner spouse in a community property state, the deceased

50. *See generally* ALEX S. TANOUYE & ELISA SHEVLIN RIZZO, 2ND EDITION: SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE (ACTEC Aug. 2021), https://www.actec.org/assets/1/6/Surviving_Spouse%e2%80%99s_Rights_to_Share_in_Deceased_Spouse%e2%80%99s_Estate.pdf [https://perma.cc/NR73-JXN3] (cataloging surviving spouse's rights state by state).

51. *Id.*

52. Georgia is the one state allowing disinheritance of the spouse, although Georgia gives a surviving spouse at least one year's support under certain circumstances. GA. CODE ANN. § 53-3-3 (1996); *see* TANOUYE & SHEVLIN RIZZO, *supra* note 50, at 14. *See generally* Naomi Cahn, *What's Wrong About the Elective Share "Right"?*, 53 U.C. DAVIS L. REV. 2087 (2020) (examining the elective share as one form of property rights available to a surviving spouse).

53. BRETT R. TURNER, *Chapter 2: Property Division System*, *in* EQUITABLE DISTRIBUTION OF PROPERTY ch. 2 (4th ed. 2020).

54. *See* MENNELL & CARRILLO, *supra* note 31, at 165-212.

55. *E.g.*, WASH. REV. CODE § 11.02.070 (2008); *see* Cross, *supra* note 44, at 92.

lower-earner spouse's estate includes that spouse's one-half interest in the community property and is inheritable and devisable through the deceased's estate.[56] In a common law state, only a surviving spouse can claim their right to an elective share.[57] If the poorer spouse dies first, that spouse loses the right to direct distribution of any part of the assets that are in the other spouse's name.[58]

D. Variations Among the Community Property States

While the community property states share the core principles described above, there are a number of significant differences in how the states characterize property as separate or community as well as how the marital property is managed. These differences can present choice-of-law issues when two different community property states are involved in a transaction.

The community property states have characterization rules for specific types of property beyond the general characterization of community as all property onerously acquired during the marriage. For example, income from separate property is characterized as separate property under most of the states' laws, which is known as the "American rule,"[59] but Idaho, Texas, Wisconsin, and Louisiana follow the so-called "civil law rule" that income from separate property is community.[60] Assets acquired over time are characterized differently in the different states depending on the type of asset. For example, proceeds of a life insurance policy whose premiums were paid over many years may be characterized based on the last premium payment or may be apportioned between separate and community property based on the character of the premium payments over the years the policy was held.[61]

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56. The surviving spouse continues to own an undivided one-half interest in the community property. *E.g.*, Wassmer v. Hopper, 463 S.W.3d 513, 527 (Tex. App. 2014).

57. *See* TANOUYE & SHEVLIN RIZZO, *supra* note 50, *passim.*

58. TANOUYE & SHEVLIN RIZZO, *supra* note 50, *passim.*

59. MENNELL & CARRILLO, *supra* note 31, at 86.

60. MENNELL & CARRILLO, *supra* note 31, at 86.

61. Characterization of assets acquired over time can be based on one of three approaches: inception of title, vesting, and apportionment. REPPY ET AL., *supra* note 31, at 91. Under an inception of title approach, the character is fixed at the time the item is acquired, and any contributions of another character create a right of reimbursement. *E.g.*, Cross, *supra* note 44, at 39-40. A vesting approach characterizes the property as the marital status at the time title finally vested. This approach is rarely used and may be used for unusual circumstances such as adverse possession and qui tam actions. *See, e.g.*, Alvin E. Evans, *Some Sources of Acquisition of Community Property*, 31 YALE L.J. 734, 738 (1922); *In re* Estate of Duxbury, 304 P.3d 480, 485-86 (Wash. Ct. App. 2013). The most commonly used method is apportionment: the ownership is

Property acquired with credit, particularly real property, with contributions of another character of property, receives different treatment in different community property states. In Washington, if a spouse owns separate real property and the community contributes labor or funds to improve the property, the property is still separate property but the community's right of reimbursement is likely to include a share in the appreciation in value of the property.[62] Contributions of community property to make mortgage payments on the same separate property give the community only a right to dollar for dollar reimbursement.[63] In California and Nevada, however, the rules are opposite. Community contributions to pay debt service on separate real property receive a share of appreciation, but community labor and expenditures to improve the property receive only a dollar for dollar reimbursement.[64]

Once property is sorted into categories based on a community property state's characterization principles, issues of management and liability rights over the co-owned community property arise. There are three possible management rules applicable to marital property in a community property state: equal management, exclusive management, and joint management. Each community property state uses these three options depending on the nature of the property. Equal management is the most commonly used. In most community property states, each spouse has independent management power over community property. In those states relying on equal management as the primary approach, exceptions are made. Joint management—where both spouses must join in the

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apportioned based on the contributions made or time spent in acquiring when married versus when single. Cross, *supra* note 44, at 43.

62. *See, e.g.*, Elam v. Elam, 650 P.2d 213, 216 (Wash. 1982).

63. *See, e.g.*, Miracle v. Miracle, 675 P.2d 1229, 1230-31 (Wash. 1984).

64. *See generally In re* Marriage of Marsden, 181 Cal. Rptr. 910 (Cal. Ct. App. 1982); Malmquist v. Malmquist, 792 P.2d 372 (Nev. 1990) (describing the rules in California and Nevada, respectively). Another example of state variation is the treatment of separate business interests. When a spouse brings a closely held business into the marriage and continues to work in the business, the states have adopted a number of approaches to determine whether and to what extent the community has acquired an interest in the business. In California, the community will acquire most of the increased value in the business during marriage if the primary reason for a growth in value during marriage was the skill of the spouse managing the business, but if the increase was due to the inherent nature of the business, the increase remains separate. *See generally* Van Camp v. Van Camp, 199 P. 885 (Cal. Ct. App. 1921); Pereira v. Pereira, 103 P. 488 (Cal. 1909) (illustrating skill derived value and inherent business value as a basis for property characterization). In Washington, if the employee spouse received a fair salary during the marriage, the business (and any increase in value) remains separate property, but if the salary was below fair compensation, then community had commingled with separate property and the business becomes all community. *See e.g.*, Hamlin v. Merlino, 272 P.2d 125, 129 (Wash. 1954).

transaction—is required for specific types of transactions. The two most typical are gifts of community property and any transaction involving community real property. Exclusive management, where only one spouse has management control, is used for that spouse's separate property, and in most community property states, for limited property types such as closely held businesses where only one spouse is involved in management.[65] Texas and Wisconsin use a very different system of management. Exclusive management is the norm. Each spouse has exclusive management over the property that would have been theirs had they not been married, unless both spouses' names are on the title or property from both spouses is commingled.[66]

The community property states have two general approaches to determining creditor rights in community property, and there are significant variations among the two approaches. Under the managerial approach, the property that a spouse manages is obligated for that spouse's debts, regardless of the nature of the debt.[67] Under the community debt approach, debts are characterized as separate or community, and charged against property with that characterization.[68] Even among states that follow the same approach, the differences can wreak havoc in a cross-border fact pattern. For example, New Mexico and Wisconsin allow a separate creditor to reach the debtor spouse's one-half of community property if there is insufficient separate property,[69] but Washington only allows separate tort creditors to reach the tortfeasor's one-half of community property.[70]

IV. SUMMARY OF GENERAL CONFLICT-OF-LAW APPROACHES USED IN THE UNITED STATES

Current conflict-of-law approaches used in the states vary from the traditional, territorial approach espoused in the First Restatement, to modern formulations that range from the Second Restatement to Professor Currie's interest analysis, Professor Leflar's better law approach, and combinations of the modern functional analysis.[71] With

65. *E.g.*, WASH. REV. CODE § 26.16.030 (2008).

66. *E.g.*, MENNELL & CARRILLO, *supra* note 31, at 285.

67. REPPY ET AL., *supra* note 31, at 311.

68. REPPY ET AL., *supra* note 31, at 327.

69. N.M. STAT. ANN. § 40-3-10 (1978); WIS. STAT. § 766.55 (1983).

70. *See generally* deElche v. Jacobsen, 622 P.d 835 (Wash. 1980); Colorado Nat'l Bank v. Merlino, 668 P.2d 1304 (Wash. Ct. App. 1983) (illustrating Washington's treatment of a tortfeasor's property).

71. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 7-15 (6th ed. 2010).

respect to marital property issues, the traditional rules of the First Restatement still hold a certain amount of authority. The choice of law for issues affecting real property has been *lex rei sitae*, or law of the *situs*, since the First Restatement, and continuing to the Second Restatement.[72] The source of "this most monolithic of all choice-of-law rules"[73] is the common law.[74] The Second Restatement also retained the First Restatement's rule that the effect of marriage on land owned by a spouse is determined under *situs* law.[75] For marital personal property, again, the First Restatement rule has been for the most part carried over to the Second Restatement, which is that the law of the domicile of the parties at the time of acquisition applies.[76] However, the Second Restatement loosened the rule to provide that the applicable law is the law of the state with the most significant relationship to the spouses and the property, in light of the particular issue in question, with "greater weight" given to the state of domicile at time of acquisition.[77]

The First Restatement and Second Restatement also addressed moving marital property to another state. The First Restatement provides that personalty "held by spouses in community continue to be held in community when taken into a state which does not create community interests,"[78] and personalty held separately by a spouse remains separate when taken into a community property state.[79] The Second Restatement provides that moving personalty to another state does not affect the marital property interests of the spouses, but states that the "interest, however, may be affected by dealings with the [property] in the second state."[80]

Once a court is willing to move beyond the traditional choice of *situs* or domicile law, a functional analysis of underlying interests and policies is available. The Second Restatement's formulation of this approach is to

72. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 214-254 (AM. L. INST. 1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 223–243 (AM. L. INST. 1971).

73. WEINTRAUB, *supra* note 71, at 574.

74. *See* Hughes v. Winkleman, 147 S.W. 994, 996 (Mo. 1912).

75. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 237-238; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 223-234.

76. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 290; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258.

77. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258.

78. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 292.

79. *Id.* § 293.

80. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259.

determine the state with the most significant contacts, after consideration of the following factors:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.[81]

Professor Currie's interest analysis approach looked at the state policies affected and the parties involved, and asked whether both states truly were interested in the result (a true conflict) or only one state had a stake in the outcome (a false conflict). The comparative impairment approach, followed in California, is a refinement of interest analysis and asks three questions:

> (1) [W]hether the relevant law [varies between] the potentially affected jurisdictions[?]
>
> (2) [I]f there is a difference [in law, does] a true conflict exist[] [such that each of the states involved has a legitimate but conflicting interest in applying its own law?]
>
> (3) [I]f . . . there is a true conflict, . . . "which state's interest would be more impaired if its policy were subordinated to the policy of the other state[?]"[82]

Professor Robert Leflar developed another approach, which he called choice influencing considerations and which is colloquially known as the "better law" approach.[83] Under this approach, the court is to consider the following:

> (1) Predictability of results;

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81. *Id.* § 6.

82. Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 922 (Cal. 2006).

83. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966).

(2) Maintenance of interstate and international order;

(3) Simplification of the judicial task;

(4) Advancement of the forum's governmental interests; [and]

(5) Application of the better rule of law.[84]

States have adopted variations on these approaches and have sometimes applied different approaches to different areas of law. The result is almost as much variation on the law to be used to resolve the choice of law as there is in the states' marital property laws.[85] A chart published annually in the *Choice of Law Annual Survey*[86] lists the methodologies followed in U.S. jurisdictions for torts and contracts cases as follows: Traditional, Significant Contacts, Second Restatement, Interest Analysis, Lex Fori, Better Law, and Combined Modern.[87]

V. THE THICKET OF MARITAL PROPERTY CHOICE OF LAW ISSUES AND CASES

The choice-of-law issues in the marital property area range from the relatively straightforward issue of determining each spouse's ownership stake in a particular asset titled in one or both spouses, to the more complex issues involving third party rights or variations between community property state characterization or management rules. Some of these issues can be resolved by a court without much confusion using the traditional rules, but fairly quickly, as levels of other legal issues are introduced and labels begin to break down, the analysis suffers.

A relatively straightforward case where the court had no problem applying the proper state law is *Clark v. Kelly*.[88] At issue was the ownership of a Delaware LLC that was owned equally by two California corporations. The LLC agreement had a Delaware choice-of-law clause. One of the California corporations was originally solely in the name of Mr. Danis, although there was a Mrs. Danis at the time. The corporate stock was then transferred into a revocable living trust for the benefit of and management by both Mr. and Mrs. Danis. Under the LLC agreement,

84. *Id.*

85. *See* SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 406 (4th ed. 2019).

86. *E.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey*, 69 AM. J. COMP. L. 177, 194-95 (2021).

87. *Id.*

88. No. C.A. 16780, 1999 WL 458625, at *4 (Del. Ch. June 24, 1999) (unpublished).

an unauthorized transfer of interest would cause the transferee to lose rights to manage the LLC. The other owner of the LLC argued that the transfer to the revocable living trust was an unauthorized transfer because it transferred an interest to Mrs. Danis that she did not previously have, applying Delaware law that would assume Mr. Danis was the sole owner of the stock since he alone was on title. The court agreed with the Danis' position however, that Mrs. Danis was an original owner before transfer to the revocable living trust because the stock was community property. The court noted that even under Delaware law, California law would control the question of who owned a California corporation. The argument that the Delaware choice-of-law clause would have such an extensive reach was an easy one for the court to refuse.

The *situs* rule for real property[89] may lead one to conclude that if a couple living in a common law state buys real property in a community property state, the real property would be characterized as community property. However, in a community property state, the character of property is determined by the consideration paid, and if earnings of a common law state domiciliary were used, those assets would be considered separate property. In *Brookman v. Durkee*,[90] the couple resided in New York. The husband purchased real estate in Washington using his New York earnings, and the couple remained in New York. The wife died a year after the purchase, and then the husband died thirteen years later, leaving the Washington property to persons other than the couple's children. The children claimed that the Washington property was community, giving them a one-half interest as their mother's heir. The Washington Supreme Court rejected their claim. The character of the property would be determined by the funds used to acquire it, and those funds were to be characterized by reference to the law where acquired, which in this case would be New York.

> [W]e are clear that personal property acquired by either [spouse] in a foreign jurisdiction, which is by law of the place where acquired the separate property of one or other of the spouses, continues to be the separate property of that spouse when brought within 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 such spouse.[91]

Any other rule, "would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion

89. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 234 (AM. L. INST. 1971).
90. 90 P. 914, 914 (Wash. 1907).
91. *Id.* at 915.

and ownership, and vest an interest therein in the other."[92] Note that "separate property" has different definitions in New York, the common law jurisdiction, and Washington, the community property state. For example, a spouse's earnings are separate property in New York but community in Washington. However, the Washington court acknowledged that the ownership interest in the money used to purchase the Washington property was owned entirely by the husband under New York law and therefore the property in Washington was entirely his separate property as described under Washington law. A similar holding by the California court is found in *In re Niccoll's Estate*.[93]

A frequently raised question that should be straightforward (but is anything but) is the effect on a couple's property interests when they move from a common law state to a community property state, or vice versa. Does the move affect the respective ownership rights of the couple, such as eliminating a spouse's community property one-half in an asset titled only in the other spouse's name when moving to a common law state? And if the equal ownership is preserved, what is the character of that ownership?

As noted by the *Brookman* court, there may be constitutional restrictions on rearranging spousal property interests because of a move. Property ownership as defined under state law is a vested interest protected by the Fifth Amendment.[94] It was on those grounds that a California statute that would convert property earned in a common law state to community property immediately upon the couple's change in domicile to California[95] was held unconstitutional.[96] The purpose of the statute was to address the inequity to such a couple because California did

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92. *Id.*

93. 129 P. 278, 279-80 (Cal. 1912); *see also* Bauer v. White, No. 13-16-00054-CV, 2016 WL 3136608, at *1 (Tex. Ct. App. June 2, 2016) (unpublished) (holding husband's Texas property separate because the couple had lived in Nebraska).

94. *See, e.g.*, Dunbar Corp. v. Lindsey, 905 F.2d 754, 760 (4th Cir. 1990); Robert A. Leflar, *Community Property and Conflict of Laws*, 21 CALIF. L. REV. 221, 227 (1933).

95. CAL. CIV. CODE § 164 (repealed 1969):

> All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property . . . .

96. *In re* Thornton's Estate, 33 P.2d 1, 3 (Cal. 1934); *see also In re* Estate of Drishaus, 249 P. 515, 515 (Cal. 1918); *In re* Bruggemeyer's Estate, 2 P.2d 534, 538 (Cal. Ct. App. 1931) (citing California civil code section 164).

not offer a forced share at the death of the first spouse.[97] The statute was held to deprive the owner of the separate property brought from the common law state of a one-half interest in the property when it converted to community.[98]

If a couple moves from a community property state to a common law state, automatic conversion of community property to separate property of the spouse in title would also be an unconstitutional taking because it would deprive the untitled spouse of their vested interest in the property.[99] In *Quintana v. Ordono*,[100] the couple had been married in Cuba, a community property jurisdiction, and later immigrated to Florida. The husband purchased stock in a Florida corporation in his name alone while the couple still resided in Cuba, using funds earned in Cuba. When the husband died, the wife claimed her community property interest in the stock, and the court agreed that "the wife had a vested interest in the stock equal to that of her husband. The interest [that] vested in the wife was not affected by the subsequent change of domicile from Cuba to Florida in 1960."[101] The court cited *In re Thornton's Estate*,[102] which held that the interest of a spouse in property brought into California from a common law state was constitutionally protected.[103] The court further cited the "almost unanimous authority in America," First Restatement Section 290, that the interests of one spouse in movables purchased by the other spouse are determined by the law of the spouses' domicile at time of

97. *See infra* text accompanying notes 174-177.

98. *Thornton's Estate*, 33 P.2d at 3-4.

99. Charles Horowitz, *A Practitioner's Guide to Estate Planning in Washington*, 22 WASH. L. REV. 155, 168 (1947). While early versions of community property in some states treated the wife's interest as only inchoate and not vested, all of the community property states have long recognized that the ownership interest of each spouse in community property is vested as of acquisition. *See, e.g.*, Warburton v. White, 176 U.S. 484, 490-91 (1900). Professor Leflar and others have argued that moving from one type of state to another, where the second state by statute changes the ownership of movables brought into the state based on marital status, may be constitutional because at some point in time it was considered constitutional for a woman to lose control over her own assets upon marriage. *See* Leflar, *supra* note 94, at 226–227; Robert Neuner, *Marital Property and the Conflict of Laws*, 5 LA. L. REV. 167, 175 (1943). Whether the deprivation of women's property rights upon marriage would still be considered constitutional is hopefully unlikely today. Professor Marsh suggested that a statute such as California's could be constitutional if the spouse losing a property interest would be given a right of reimbursement. MARSH, *supra* note 22, at 231-233.

100. 195 So. 2d 577, 578 (Fla. Dist. Ct. App. 1967).

101. *Id.* at 580; *see* Willey, *supra* note 34, at 352.

102. 33 P.2d at 3.

103. *Quintana*, 195 So. 2d at 580.

acquisition.[104] Under Florida law at the time, a resulting trust in favor of the wife exists as a result, so that the husband owned one-half of the asset and held the other one-half in trust for his wife.[105]

Other cases have preserved spouses' interests in property when moving from one type of marital jurisdiction to another based on conflict-of-law principles rather than constitutional grounds. Section 259 of the Second Restatement provides:

> 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[e] to the other state on the part of one or both of the spouses.[106]

The comments to this section state that the rule is an application of Section 247, which provides that "[i]nterests in a chattel are not affected by the mere removal of the chattel to another state." Section 234 provides that with respect to real property the law that would be applied by the *situs*' courts would determine the effect of marriage on the ownership of the property. The comment to that section notes that a *situs* court 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."[107]

> 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, 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.[108]

For example, in *People ex rel. Dunbar v. Bejarano*,[109] a widow challenged the inclusion of half of her deceased spouse's employee death benefits in the estate subject to Colorado inheritance tax, because the benefits accrued while the couple lived in California and Texas. The court recognized that the "fundamental characteristic of community property is that property acquired during the marriage is as much that of the wife as the husband,"[110] and, citing the First Restatement Section 292, that

104. *Id.* at 579.
105. *Id.* at 580.
106. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259 (AM. L. INST. 1971).
107. *Id.* § 234 cmt. a.
108. *Id.*
109. 358 P.2d 866, 866-67 (Colo. 1961).
110. *Id.* at 869.

interests in movables acquired during marriage are determined by the law of the marital domicile at time of acquisition and "that community property retains its character as such when it is removed to a common law state."[111]

Professor Harold Marsh describes the colorful facts of *Edwards v. Edwards*,[112] in his outdated but still authoritative book, *Marital Property in Conflict of Laws*:

> In that case [a husband] and [wife] moved their domicile from Oklahoma to Ranger, Texas, which was "then booming," in June 1919. In the space of some seventeen months, they had acquired $50,000, by means which the court is loath to discuss in detail. However, "[a]fter she had found him in bed with another woman, in Ranger, Texas, . . . infelicity arose." In November 1920, they returned to Oklahoma, and [the husband] deposited part of the $50,000 in a bank in the name of his mother and purchased real estate in her name with the balance. Shortly thereafter, [the husband] died as a result of being shot. (The finger that pulled the trigger was [the wife]'s, but she apparently was acquitted of murder.)[113]

The Oklahoma court agreed that the wife was entitled to her community one-half of the $50,000 because the funds were "acquired" while the couple lived in Texas.

Application of the rule that interests in marital property remain the same when a couple moves from one type of jurisdiction to the other still leaves open the question of how the property will be administered after the domicile change. The Second Restatement essentially punts on this question by stating: "The interest, however, may be affected by dealings with the chattel or document in the second state." [114] The comment to this section provides that a creditor or transferee's rights in the property would be determined by the law applied by the courts in the state where the property was located when the third party's interest arose. Local law would be applied, according to the comment, "when required to do so by considerations of justice to the third person."[115] The language does not

111. *Id.* at 868.

112. 233 P. 477, 483 (Okla. 1924).

113. MARSH, *supra* note 22, at 242.

114. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259 (AM. L. INST. 1971).

115. *Id.* cmt. c. The comment notes that the third party's rights may need protecting when community property is brought into a separate property jurisdiction, but when separate property is brought into a community property state, the third party's interests will not need additional protection since the separate property rules of the jurisdiction will give the owning spouse greater autonomy over the property than if the property was classified as community. *See infra* text accompanying note 164 (describing creditor rights).

clarify if the property moved from a community property state to a common law state still has the status of community property, either as between the spouses or with respect to a third party. The comment to Second Restatement Section 234 (applicable to land) states that while courts of the *situs* of land would usually apply the law used to characterize the funds used to purchase the land, which may be another state, "these courts would usually apply their own local law in situations where the rights of some third person, such as a creditor or a transferee, are involved."[116] The characterization as community may or may not affect a creditor's right to satisfy claims from those assets. The local law in a common law state would most likely follow the title to the property, but as seen above, community property states that are less friendly to creditors, like Washington, may deny the creditor access to those assets.[117]

The First Restatement had a more direct statement that "[m]ovables held by spouses in community continue to be held in community when taken into a state which does not create community interests."[118] However, the comment that follows states: "It is not within the scope of the Restatement of this [s]ubject to describe the exact characteristics of community property."[119]

Several cases from common law states have stated that community property brought into the state by a migrating couple retain its status as community property.[120] In *State v. Bejarano*,[121] a case involving pension benefits earned when the couple lived in California and Texas and then the couple moved to Colorado, the Colorado court held that "community property retains its character as such when it is removed to a common law state."[122] There are several cases from common law states recognizing that personal property taken from a community property state when the couple moves to the common law state remains community property.[123] The context of these cases is primarily division at death or divorce.

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116. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 234 cmt. a.

117. *See supra* text accompanying notes 6-8.

118. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 292 (AM. L. INST. 1934).

119. *Id.* cmt. a.

120. *See generally* Ladd v. Ladd, 580 S.W.2d 696 (Ark. 1979); Commonwealth v. Terjen, 90 S.E.2d 801 (Va. 1956) (each stating that community property brought into a state by a migrating couple retained status as community property).

121. 358 P.2d 866, 868 (Colo. 1961) (en banc).

122. *Id.*

123. *See generally In re* Marriage of Whelchel, 476 N.W.2d 104 (Iowa Ct. App. 1991) (divorce of couple who had moved from Texas); Newman v. Newman, 558 So. 2d 821 (Miss. 1990) (divorce of couple who had moved from California); Ladd v. Ladd, 580 S.W.2d 696 (Ark. 1979) (divorce of couple who moved from New Mexico); Quinn v. Quinn, 689 N.W.2d 605 (Neb.

Other cases, however, have indicated that the spouse's interest in the community property brought into the common law state would be treated as joint property or a resulting trust in the common law state.[124] Professor Beale took this position,[125] citing *Depas v. Mayo* and *Edwards v. Edwards*, but Professor Marsh disagreed with this approach:

> [I]t is difficult to see any justification for a rule that community property is transformed into a tenancy in common, by a change of domicile and transportation of the property to a common-law state .... If this were in fact the rule, the court in the common-law state would be applying the law of *neither* the first nor the second domicile to the case. By the law of the first domicile, which is indicated by the choice-of-law rule, property so acquired is community property. This differs more from a tenancy in common between husband and wife than it does from the husband's statutory "separate" property in the common-law state.[126]

The Uniform Community Property Disposition at Death Act[127] and its predecessor, the Uniform Disposition of Community Property Rights at Death Act,[128] provide that the surviving spouse's one-half interest in what was community property is preserved at the death of the first spouse after the couple move to an enacting state.[129] It does not, therefore, directly answer the question of whether the property retains the character as community.[130]

Interpreting the cases that seem to address the issue is problematic, because while the cases seem to fall on one side or the other as to whether

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Ct. App. 2004) (divorcing couple moved from Washington); Jackson v. Russell, 533 N.E.2d 153 (Ind. Ct. App. 1989) (wife's community property interest in Arizona property protected from judgment against husband); *In re* Estate of Martin, 686 N.Y.S.2d 195 (N.Y. App. Div. 1999) (distribution at death); Estate of Bach, 548 N.Y.S.2d 871 (N.Y. Sur. Ct. 1989) (citing the Uniform Disposition of Community Property Rights at Death Act).

124. *See, e.g.*, Quintana v. Ordono, 195 So. 2d 577, 580 (Fla. Dist. Ct. App. 1967) (suggesting that if the community property had not been exchanged in Florida, it might have remained community property); Stone v. Sample, 63 So. 2d 555, 556 (Miss. 1953); Depas v. Mayo, 11 Mo. 314, 318-19 (Mo. 1848); *In re* Hunter's Estate, 236 P.2d 94, 95-96 (Mont. 1951) (dicta); Rozan v. Rozan, 129 N.W.2d 694, 707 (N.D. 1964); Edwards v. Edwards, 233 P. 477, 485 (Okla. 1924); 1955 MD. ATT'Y GEN. OP. 526.

125. 2 JOSEPH HENRY BEALE, A TREATISE ON THE CONFLICT OF LAWS 1016 (1935).

126. MARSH, *supra* note 22, at 240.

127. UNIF. CMTY. PROP. DISPOSITION AT DEATH ACT (UNIF. L. COMM'N 2021).

128. UNIF. DISPOSITION CMTY. PROP. RTS. AT DEATH ACT 61 (UNIF. L. COMM'N 1971).

129. UNIF. CMTY. PROP. DISPOSITION AT DEATH ACT § 6.

130. *See generally* Succession of Duke, 2009-44377 (La. App. 2 Cir. 7/1/2009), 16 So. 3d 459 (finding that under Arkansas Uniform Disposition of Community Prop. Rights at Death Act, Arkansas real estate purchased by a Louisiana couple was properly characterized as community property on death of the wife).

the property is still community or some other form, the language is never that precise and in fact is essentially dicta because the characterization is not decisive in the ultimate question before the court: determining whether the untitled spouse holds a one-half interest in the property, whatever it may be labeled.[131] The courts' language is perhaps less trustworthy in part because the common law state courts may not fully grasp the significance of a community characterization, and probably did not need to in order to resolve the issue at hand. Another difficulty with relying on these cases is that they were mostly decided in an era when it was considered acceptable to limit women's control over their own property. For example, in *Commonwealth v. Terjen*,[132] a case containing language that is cited for support of the retention of community character,[133] the court was considering whether a gift of Virginia real estate from the husband to the wife as her separate property, which was funded with California community property, was a gift of 100% or just 50% of the property. The court considered the husband's control over community property under California law and decided that the wife's interest in community property was not sufficiently "vested" because of the husband's control, so the gift was valued at 100% of the property for tax purposes.[134] However, this holding seems at odds with the United States Supreme Court decision in *Warburton v. White*,[135] which held that a wife's interest in Washington community property was a vested property right, regardless of her husband's exclusive management control of the property.

If the couple reinvests the community property in an asset in a common law state and takes title in a form inconsistent with community, the property likely has lost its community characterization. In *In re Estate of Martin*,[136] involving the estate of Billy Martin (the Baseball Hall of Famer, New York Yankees shortstop, and five-time Yankees manager), Mr. and Mrs. Martin lived in California but had purchased a home in New York, taking title as tenants by the entirety. Before the New York home was purchased, the Martins signed a community property agreement that

131. *See* MARSH, *supra* note 22, at 241-243.

132. 90 S.E.2d 801, 804 (Va. 1956).

133. *See, e.g.*, Willey, *supra* note 34, at 358; J. Thomas Oldham, *Conflict of Laws and Marital Property Rights*, 39 BAYLOR L. REV. 1255, 1277-78 (1987); *see also* Norvie L. Lay, *Property Rights Following Migration from a Community Property State*, 19 ALA. L. REV. 298, 344, 349 (1967) (citing *Commonwealth v. Terjen*).

134. 90 S.E.2d at 804.

135. 176 U.S. 484, 493 (1900).

136. 686 N.Y.S.2d 195, 196-97 (N.Y. App. Div. 1999).

stated that all real property "held of record in the name of both parties as individuals, or . . . hereafter acquired as joint tenants or as tenants-in-common, are so held for convenience only and are the community property of the parties."[137] The court held that under California law, tenancy by the entirety was inconsistent with community property, and the agreement made no mention of tenancy by the entirety, so the New York residence was not community property.[138] Presumably, however, if they had taken title as joint tenants or tenants in common, the New York court would have recognized the property as community. In *Murphy v. Commissioner*,[139] a California couple had transferred community real property into joint tenancy, which at the time was considered inconsistent with community property characterization,[140] and then later into tenancy in common. When the husband died, the wife asserted that she should get a double step-up in basis under Section 1014(b)(6) of the Internal Revenue Code, because the property was community, but the court agreed with the Internal Revenue Service (IRS) that since the couple had moved the property from community to a separate tenancy in common, Section 1014(b)(6) did not apply.[141]

One significant consequence of a characterization of community property is the double step-up in basis of community property on the death of the first spouse.[142] Whether community property retains the right to the step-up after the couple moves to a common law state is not resolved.[143]

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137. *Id.* at 197.

138. *Id.*

139. 342 F.2d 356, 358 (9th Cir. 1965).

140. Joint tenancy was considered to be a common law title and therefore could not also be community property. Most of the community property states now have statutes that allow community property to be held with a right of survivorship. *See* MENNELL & CARRILLO, *supra* note 31, at 130.

141. I.R.C. § 1014(b)(6); *see also* Rev. Rul. 68-80, 1968-1 C.B. 348 (1968) (showing where a couple moved from New Mexico to Virginia and traded New Mexico property for Virginia real estate that they held as tenants in common, no double step-up).

142. The double step-up for community property is an anachronism, based on what is now outdated generalizations. It was adopted in the 1940s, when married couples consisted of a husband and a wife, most if not all of the money was earned by the husband, and the husband was likely to die first. Therefore, the widow in a common law state would get a full step-up in basis for the couple's assets, but the widow in a community property state would own one-half of the assets and only the deceased husband's half would get a step-up. Section 1014(b)(6) was adopted to address the inequity, which of course is much less likely to occur today. *See* Willging v. United States, 474 F.2d 12, 14 (9th Cir. 1973); Jeremy T. Ware, *Section 1014(b)(6) and the Boundaries of Community Property*, 5 NEV. L.J. 704, 705 (2005).

143. *See* Ware, *supra* note 142, at 709.

In a Field Service Advisory,[144] the IRS noted that the key question is how the property is characterized under controlling state law. The property in question was California community property that was converted into Oregon real estate, and Oregon had adopted the Uniform Disposition of Community Property Rights at Death Act. The Field Service Advisory held that the Uniform Act preserved the community property characterization so the property was entitled to the double step-up.[145] Field Service Advisories cannot be relied upon as precedent, of course. The Internal Revenue Manual, under a section entitled "Termination of the Community Estate," states that "[a] community property estate, having been created, is terminated when spouses change their domicile from a community property state to a common law state."[146] However, that section also lists death, divorce, and separation (in Washington and California) as events of termination of the community property estate and in all of those instances, the termination of the community estate does not change the character of property previously acquired by the couple and only prevents new community from being created.[147] The language in the manual therefore should be read to apply only to the cessation of accumulation of new community property once the couple moves and does not speak to the status of the property already accumulated by the couple.

Only the IRS can clarify the extent to which a migrating couple's community property will retain eligibility for the double step-up. Federal law requires that state law determines property rights, but the difficulty for using that technique to answer this question is that state law is murky at best and inconsistent, and state law holdings on the issue have not turned on the precise question presented by this section of the tax code.

There are steps couples can take, however, to protect the step-up. The couple can retain real property in the community property state, or they can sign an agreement similar to the agreement in *In re Estate of Martin*[148] that provides that assets are to retain their community character. A common recommendation is to transfer the community property into a revocable trust, to segregate the property from future acquisitions in the

144. *Field Serv. Advisory*, 1993 WL 1609164 (Nov. 24, 1993).

145. *Id.*

146. IRM 25.18.1.3.4 (Mar. 4, 2011), https://www.irs.gov/irm/part25/irm_25-018-001 [https://perma.cc/2AM3-X3SW].

147. *Id.*

148. *See supra* text accompanying notes 136-141.

common law state and label such assets as community by agreement.[149] If community property is used to purchase real property in a common law state after the couple moves there, and title is held in a type inconsistent with community and absent an agreement, the double step-up is most likely lost.[150]

Once a couple moves to a new state, the character and interests in assets acquired after the move will be determined by the law of the new domicile, which likely would characterize the asset based on the character of the consideration paid. This rule, that the rights of a spouse in a moveable asset acquired during marriage is determined by the law of the state of domicile at the time of acquisition, is "partial mutability"—the prevailing rule in the United States.[151] By contrast, many foreign countries with community property systems apply strict immutability, meaning that the spouses' domicile at time of their marriage applies to all property acquired during the marriage, regardless of any change in domicile, unless the parties altered the applicable law by agreement.[152] Under the U.S. partial mutability approach, for example, if a couple moves from a community property state to a common law state, earnings accumulated in the community property state will remain owned equally by the spouses but earnings once domicile has changed will be owned separately by the earning spouse under the new domicile's law. If the community property state follows the civil law rule and treats income from separate property as community, once the couple moves to a common law state (or a community property state that treats income from separate property as separate),[153] then presumably the income would be treated as newly acquired property and characterized as separate property of the owning spouse. The same logic could be used even if the separate property was real property located in the community property state, so that the income should depend on the spouses' domicile rather than *situs*. There is case law that holds the law of the *situs* should apply and characterize the income as owned by both spouses.[154] However, the better answer is that

149. Ware, *supra* note 142, at 721-722; Willey, *supra* note 34, at 368.

150. Ware, *supra* note 142, at 722.

151. Jeffrey Schoenblum, *U.S. Conflict of Laws Involving International Estates and Marital Property: A Critical Analysis of* Estate of Charania v. Shulman, 103 IOWA L. REV. 2119, 2121 (2018).

152. J. Thomas Oldham, *What if the Beckhams Move to L.A. and Divorce: Marital Property Rights of Mobile Spouses When They Divorce in the United States*, 42 FAM. L. Q. 263, 265 (2008).

153. *See supra* text accompanying notes 59-60.

154. *See generally* Comm'r v. Skaggs, 122 F.2d 721 (5th Cir. 1941) (holding that law of *situs*—California—applies rather than law of couple's domicile—Texas).

the property characterization would cease once the couple moved away, under a most significant contacts analysis.[155] Otherwise, applying a strict law of the *situs* rule might result in a married person in Oregon that purchased rental property in Idaho losing one-half of the income to their spouse.

Although moving from one state to another cannot disturb vested ownership interests in property,[156] incidents of ownership can be subject to the law of the new *situs* or domicile and affect respective rights of the spouses.[157] A significant example of this is distribution of assets when the marriage ends, either by death or divorce. This is one issue where conflict principles have been used successfully to solve the problem, and the approach can be instructive in resolving other marital property conflicts dilemmas where the courts have not been as successful.[158] The problem arose because common law states and community property states have very different methods of giving spouses interests in the other spouses' property. As noted above,[159] in common law states, the spouse's interests in the other's property comes only at the end of the relationship, by death or divorce, whereas in community property states the protection comes during the marriage. As a result, in community property states there is no elective share at death, because the spouse has already received one half of the property earned by the other during the marriage, and distribution of property at divorce is more restrictive in community property states.[160] This creates a disparity for migrating couples: if property is acquired while living in the common law state, and then the couple retires to a community property state and the first spouse dies, the survivor would not be entitled to an elective share, and would not have their one-half interest in the decedent's earnings that they would have had if they had lived in

155. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 234 reporter's note (AM. L. INST. 1971) ("It is believed that, as between the spouses, the marital property character of income from land should be determined in accordance with the rule of § 258, which provides for the usual application of the local law of the state of the spouses' domicil[e] at the time when the income is earned. This is because the state of the spouses' domicil[e] has the greatest interest in them. Also, income can reasonably be treated as separate and distinct from the land from which it is derived."); *see also* Russell J. Weintraub, *Obstacles to Sensible Choice of Law for Determining Marital Property Rights on Divorce or in Probate:* Hanau *and the Situs Rule*, 25 HOUS. L. REV. 1113, 1113-14 (1988) (providing an overview of the significant relationships test).

156. Leflar, *supra* note 94, at 226-227.

157. *Id.* at 228; see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259.

158. *See infra* text accompanying notes 191-222, discussing creditor rights cases.

159. *See supra* text accompanying notes 52-53.

160. For example, most community property states will not allow for equitable distribution of the separate property of one spouse to the other spouse. TURNER, *supra* note 53, § 2.5.

the community property state during their working years. With respect to divorce, the property brought in from the common law state will be labeled as separate property in of the earning spouse[161] and most community property states do not allow for distribution of separate property of one spouse to the other upon divorce.[162] The poorer spouse has now lost the right given in the common law state for equitable division of that same property.[163]

Note that there is no corresponding protection issue when couples move in the other direction, although a richer spouse's freedom to leave property to a third party at death is curtailed. A couple moving from a community property state has already equalized property under the community property regime, and the lower earning spouse will have not only their one-half community property[164] but also the protections in the common law state, such as elective share and equitable division of all the couple's property upon divorce. A court in a common law state dissolution can take the community property interests into consideration so there is no need to have special rules for migrating couples, but there does not appear to be concern about being overly generous to the surviving spouse when the first spouse of a migrating couple dies in a common law state. Presumably the policy of protecting the survivor outweighs protection of the first spouse's testamentary freedom.

The community property state faced with this dilemma can constitutionally apply their own laws to the division of property and offer no relief to the surviving (or poorer) spouse under their police power.[165] However, the community property states have addressed the issue and provided protection to the lower earning migrating spouse in several ways. Initially, some state courts protected the migrating spouse using a conflict-of-laws approach and applied the divorce laws of the common

161. *See supra* text accompanying notes 52-53.

162. ARIZ. REV. STAT. ANN. § 25-318 (2022); CAL. FAM. CODE § 2550 (West 1994); IDAHO CODE § 32-903 (1996); NEV. REV. STAT. § 125.150 (2021); N.M. STAT. ANN. § 40-4-7.B (1997); TEX. FAM. CODE ANN. § 7.001 (West 1997). Washington and Wisconsin allow for equitable division of separate property at divorce. Traditionally, the eight community states would divide the community property equally on divorce, regardless of title, and separate property was distributed entirely to the titleholder. *See* TURNER, *supra* note 53, § 2.5.

163. TURNER, *supra* note 53, § 2.10.

164. As discussed above, the one-half ownership of community property is retained after moving to the common law state. *See supra* text accompanying notes 107-113.

165. *See* Addison v. Addison, 399 P.2d 897, 902 (Cal. 1965).

law state to the property brought in from that state. In *In re Marriage of Landry*,[166] the Washington Supreme Court explained:

> [T]he judicial decisions . . . have recognized that just as the owner spouse's legal title survives the transfer of the property into a community property state, under conflict of laws principles, the nonowner spouse's equitable interests in an asset, as established under the law of the state of acquisition, also survive the transfer.[167]

Similarly, in *Berle v. Berle*,[168] a case involving a divorcing couple who had moved from New Jersey to Idaho, the Idaho Supreme Court noted that the concept of separate property in New Jersey is qualitatively different than what would be labeled separate property in Idaho and held that the Idaho statute prohibiting distribution of a spouses' separate property on divorce[169] was not applicable to property brought in from a common law state. Instead, the court applied New Jersey law allowing for equitable distribution of property in a marital dissolution, citing *Rau v. Rau*[170] and Professor Marsh.[171] It is a rare instance of a court acknowledging that the category of "separate property" holds different assets in different states.

Therefore, even though courts overseeing the couple's divorce had authority to determine distribution of property, a court could apply a conflict-of-laws approach and use the common law state's rule of equitable distribution for property brought from the common law state. Of course, using another state's system of property distribution on divorce for some of the couple's assets presents a significant administrative burden for the court.[172] Several states, however, continue to rely on the conflicts approach either at death or divorce.[173]

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166. 699 P.2d 214, 216 (Wash. 1985).

167. *Id.*; *see also* Hughes v. Hughes, 573 P.2d 1194, 1201 (N.M. 1978) (establishing that nonowner spouse's equitable interest survives transfer into a community property state).

168. 546 P.2d 407, 410 (Idaho 1976).

169. IDAHO CODE § 32-903 (1996).

170. 432 P.2d 910, 913 (Ariz. Ct. App. 1967).

171. MARSH, *supra* note 22, at 45.

172. TURNER, *supra* note 53, at 3.13.

173. *See generally Rau*, 432 P.2d 910 (relying on the conflicts approach at death); Hughes v. Hughes, 573 P.2d 1194 (N.M. 1978) (relying on the conflicts approach at death); Estate of Hanau, 730 S.W.2d 663 (Tex. 1987) (relying on the conflicts approach at death); *Berle*, 546 P.2d 407 (relying on the conflicts approach at divorce); Braddock v. Braddock, 542 P.2d 1060 (Nev. 1975) (relying on the conflicts approach at death and divorce); Kenneth W. Kingma, *Property Division at Divorce or Death for Married Couples Migrating Between Common Law and Community Property States*, 35 ACTEC J. 74 (2009) (exploring the property disposition issues

California attempted to address the issue by statute first in 1917 that converted property of a migrating couple that would have been community property under California laws immediately into community property upon the couple establishing California domicile.[174] That approach, however, was held to be unconstitutional since it deprived the titled spouse of one-half ownership in the property.[175] Because the incidents of ownership do not receive the same protection as actual ownership interests,[176] statutes that allow for distribution on death or divorce that take the discrepancy into consideration are constitutional. States have an inherent right under their police power to distribute property as between spouses at death or divorce.[177] California's next attempt at a statutory fix was an exercise of this power in 1961.[178] The 1961 statute created a new type of property—"quasi-community property"—that would arise only on death of one spouse or dissolution of the marriage. The new approach treats property brought in from a common law state differently than separate property acquired before marriage or when domiciled in California, when the couple divorce, or when the first spouse dies.[179] The property brought in from the common law state that would have been community property if acquired while living in California is treated as community property upon death or divorce.

Louisiana has followed the California approach and has quasi-community property protection by statute at both death and divorce.[180] Arizona,[181] New Mexico,[182] and Texas[183] have quasi-community property

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that arise on dissolution of marriage or death of a spouse when a married couple has resided in more than one state).

174. *See* Barbara Brudno Gardner, *Marital Property and the Conflict of Laws: The Constitutionality of the "Quasi-Community Property" Legislation*, 54 CALIF. L. REV. 252, 255-56 (1966).

175. *In re Thornton's Estate*, 33 P.2d 1, 3-4 (Cal. 1934)

176. Leflar, *supra* note 94, at 227.

177. *See generally* Williams v. State, 317 U.S. 287 (1942); Kujawinski v. Kujawinski, 376 N.E.2d 1382 (Ill. 1978) (each holding that states have police power to distribute property).

178. Brudno Gardner, *supra* note 174, at 257.

179. *Id.*

180. LA. CIV. CODE ANN. art. 3526 (1992).

181. ARIZ. REV. STAT. ANN. § 25-318(A) (2022).

182. N.M. STAT. ANN. § 40-3-8(C)(1) (1990).

183. TEX. FAM. CODE ANN. § 7.002 (West 1997). *See generally* Tener v. Short Carter Morris, LLP, No. 01-12-00676-CV, 2014 WL 4259885 (Tex. App. Aug. 28, 2014) (unpublished) (confirming that the Texas quasi-community property statute applies to common law property while the spouse is domiciled in Texas).

at dissolution of the marriage only. Idaho,[184] Washington,[185] and Wisconsin[186] only have quasi-community property at the death of the first spouse.[187]

Quasi-community property statutes essentially allow the community property state to treat the common law state property under an approximation of the common law state's approach. Characterizing earnings from a common law state as quasi-community at divorce moves the property from being categorized as separate and non-divisible into being categorized as community and divisible. When one spouse dies, the property of the spouse that was acquired by that spouse while married and domiciled in a non-community property state, and which would have been community property under the community property state's law had the acquiring spouse been a domiciliary and resident at the time of its acquisition, is characterized as quasi-community property upon the death.[188] The surviving spouse is entitled to an undivided one-half interest in such property, and the remaining one-half interest is subject to disposition by the decedent. In the event the decedent leaves an incomplete testamentary plan, all of the quasi-community property not otherwise disposed of will be distributed to the surviving spouse in the same manner as community property under the laws of intestacy. If the non-acquiring spouse dies first, however, this spouse possesses no rights in the quasi-community property of the (surviving) acquiring spouse and the survivor keeps this property, free and clear of any claim of the deceased spouse. In this respect, quasi-community property is radically different than true community property, as to which each spouse has a vested half interest, regardless of who dies first. Quasi-community property therefore functions as a stand-in for the elective share that a surviving spouse would have had in the common law state, rather than a true conversion of the common law state's couples' rights to the community property regime.

184. IDAHO CODE § 15-2-201 (1972).

185. WASH. REV. CODE § 26.16.220-230 (2008).

186. WIS. STAT. § 861.02-03 (2005).

187. Washington does not require quasi-community property at divorce because the court has discretion to distribute all of the couple's property as long as the distribution is just and equitable. WASH. REV. § 26.09.080. The Wisconsin statute avoids the problem at divorce by defining the nondivisible property as property that was received by a spouse as a gift from a third party or through the death of a third party, and allows the court to divide all other property of the couple equitably. WIS. § 767.61 (which allows the court to divide even this property if necessary to avoid a hardship on the other party or the children).

188. CAL. PROB. CODE § 66 (West 1990).

A gap remains, however. If a couple moves from a common law state to a community property state and at the end of the marriage there is real property in the common law state, the law of *situs* is likely to govern and the state may or may not choose the law of domicile to govern the spouses' rights in the property.[189] Real property in another state is generally excluded from the reach of the quasi-community property statutes.[190]

The community property states have therefore been able to use both the legislative process and conflicts principles to successfully address the disconnect between their laws and common law states' laws for migrating couples at death or divorce. Courts' treatment of interstate creditor rights when a community property state is involved have not been as successful.

The Inconsistencies in these cases are particularly troubling because they create uncertainty in commercial transactions. Courts struggle when depending on labels such as community and separate. A particularly disastrous example is *Blackwell v. Lurie*.[191] A husband and wife, while residents of Missouri, purchased a valuable sketch by Frederic Remington. The husband was a partner in a law firm that filed for bankruptcy. Around the same time as the bankruptcy filing, the husband and wife placed the sketch on consignment in a Santa Fe, New Mexico gallery, and then they moved to Montana. The bankruptcy trustee had registered a deficiency judgment against the husband as a New Mexico judgment and was attempting to execute on the sketch. The husband and wife claimed that the sketch was held as tenants by the entirety, under Missouri law, which also provided that tenancy by the entirety property was only subject to claims on which both spouses were jointly liable. The bankruptcy trustee argued that the sketch should be characterized as community property under New Mexico law, but the court disagreed, holding that New Mexico would look to the time and place of acquisition (Missouri) to determine character of the property and whether a creditor could enforce the debt against the asset.[192] This first step seems correct: it would be inconsistent with cases such as *Brookman v. Durkee*[193] to hold that merely moving a chattel into a community property state would

189. *See, e.g.*, Mbatha v. Cutting, 848 S.E.2d 920, 925 (Ga. Ct. App. 2020); Estate of Harrington, 648 P.2d 556, 574 (Wyo. 1982).

190. *E.g.*, CAL. FAM. CODE § 2660 (West 1994); CAL. PROB. § 66; WASH. REV. § 26.16.220(2)(b).

191. *See generally* 71 P.3d 509 (N.M. Ct. App. 2003) (applying conflict of laws to determine that a couple held property as tenants by entirety).

192. *Id.* at 511.

193. 90 P. 914, 915-16 (Wash. 1907); *see supra* text accompanying notes 90-92, discussing *Brookman v. Durkee*.

convert it to community property. The court then assumed that since the judgment had been domesticated in New Mexico, its own laws would apply to the bankruptcy trustee's access to the sketch.[194] The court struggled to apply its statutes regarding the availability of a married person's assets to creditors but was unable to do so because the Missouri characterization of the property as tenancy by the entireties did not correspond to the categories in the applicable New Mexico statutes. After trying to fit Missouri's round pegs into New Mexico's square holes, the court then said that since the New Mexico statutes that specified what marital property is available for certain debts did not name tenancy by the entirety, the court refused the creditor's attempt to execute on the sketch.[195] The court's methodology relied on the labeling of marital property under its own statutes. The court was correct that the act of moving the artwork into the state did not convert it to community property, but failed to consider whether Missouri law should have been applied to determine the creditor's rights in the asset, as the law of the marital domicile at the time of acquisition. The result was most likely correct because Missouri law would have exempted the asset from the claim, but the court reached the result only by chance.

A pair of Washington cases illustrates a better approach that considers the expectations of the parties. First, it should be noted that Washington is not as generous to creditors as other community property states. A contract claim is classified as separate or community, and if it is a separate claim, the creditor only has access to the separate property of the debtor spouse.[196] In *Pacific States Cut Stone Co. v. Goble*, two husbands, while domiciled in Washington, had incurred debt in Oregon without the involvement or signature of their spouses.[197] The trial court applied Oregon law because the contract was made in Oregon, and held that only the husband's separate property (as labeled in Washington) was subject to the debt, relying in part on a previous Washington case, *LaSelle v. Woolery*.[198] The Washington Supreme Court reversed, holding that there

194. *Blackwell*, 71 P.3d at 511.

195. *Id.* at 513.

196. Separate debts include debts incurred prior to marriage, and there is a very narrow statutory exception that allows premarital creditors to reach the debtor spouse's earnings if a judgment is obtained within two years of the marriage. WASH. REV. CODE § 26.16.200 (2008). Separate tort claims receive treatment more favorable to the creditor. *See* deElche v. Jacobsen, 622 P.2d 835, 840 (Wash. 1980).

197. 425 P.2d 631, 631-32 (Wash. 1967) (en banc).

198. 44 P. 115, 115-16 (Wash. 1896). The case was criticized by Professor Marsh, in a critique that included the syllogism quoted at the beginning of this Article, because the court held

was no true conflict. Oregon law would give the creditor access to all of the husband's property and none of the wife's property, and Washington law would give the creditor access to all of the couple's property except the wife's separate property, because the debt would be considered a community debt and enforceable against the husband's separate property (because he entered into the contract) and all of the community.[199] However, there was in fact a discrepancy, because the Washington rule would give the creditor access to the wife's earnings as well as the husband's, and Oregon would limit access to only the husband's. The result was still uneven because the court considered the Oregon rule that the debt was enforceable against everything but the wife's separate property in Oregon (as defined under Oregon law to include her earnings) was equivalent to the Washington rule that the debt was enforceable against everything but the wife's separate property as defined in Washington.[200] The wife's separate property in Washington was a smaller category than under Oregon law, because the wife's earnings in Oregon would be separate property.

This discrepancy was identified and the rule was refined in *Pacific Gamble Robinson Co. v. Lapp*.[201] In that case, the husband incurred the debt in Colorado, a common law state, while the couple lived there, and then the couple moved to Washington, a community property state. Unlike the creditor in *Pacific States*, at the time the debt was incurred, the creditor would have no reason to question the vulnerability of the husband's earnings to the debt but would have no reason to expect access to the wife's earnings. The court characterized the question as: Is the creditor in an obligation incurred by one spouse in a foreign, non-community property state where both spouses were domiciled, restricted in its recovery to the separate property of the obligor spouse, as the term "separate property" is defined by Washington law, after the couple moves to Washington?[202] The court first determined that there was a true conflict, that it was an issue of contract, and applied the First Restatement's most significant relationship test.[203] The court determined that under Colorado

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that a debt labeled as separate under Wisconsin law was equivalent to a separate debt under Washington's community property system. MARSH, *supra* note 22, at 150; *see also* Pacific Gamble Robinson Co. v. Lapp, 622 P.2d 850, 854 n.1 (Wash. 1980) (noting the error in the court's finding of no conflict).

199. *Pacific States*, 425 P.2d at 634-35.

200. *Id.*

201. 622 P.2d at 853-54.

202. *Id.* at 853.

203. *Id.* at 853-54.

law, where the debt was incurred, all but the wife's separate property (which unlike Washington, would include her wages) was liable for the debt.[204] In order to properly apply Colorado law, the court held that the wife's separate property as well as all of her earnings (which were owned 50% by the husband as community property) were exempt from the debt, but that the judgment was enforceable against the remainder of the couple's property. There was a strong dissent, arguing that while Colorado law applied to the contract, Washington law should apply to the liability of the couple's current property now that they relocated to Washington, because of Washington's strong policy underlying community property.[205] Similar to the cases using conflict-of-laws principles to distribute a migrating couple's property at the end of the marriage under the law of the previous domicile,[206] the court in both *Pacific States* and *Pacific Gamble* were attempting to reconcile the two states' rules for marital property liability. The courts were able to look past the labels, albeit in a flawed fashion, since those labels had inconsistent meanings in the two states, and instead focus on the expectation of the parties. However, the court could also have followed the reasoning of the dissent in *Pacific Gamble* and the policy choice of the Washington court in *G.W. Equipment*[207] and chosen the law of the couple's domicile to control creditor rights in their property instead of favoring the expectations of the creditors.

A legitimate concern of a community property state is whether couples may migrate to use community property as a shield against existing creditors. In an Arizona case, *Alberta Securities Commission v. Ryckman*, the couple had been Canadian residents, where the husband had entered a settlement agreement with the Alberta Securities Commission requiring him to pay $250,000 Canadian dollars.[208] The couple then moved to Arizona and defaulted on the obligation. The court stated the rule in Arizona to be that:

> [A] judgment rendered against one spouse in a non-community property jurisdiction may be enforced against the community's property consistent with due process as long as (1) the obligation on which the foreign judgment was based would have been a community obligation if it had

204. *Id.* at 854.

205. *Id.* at 857 (Horowitz, J., dissenting).

206. *See supra* text accompanying notes 166-173.

207. 982 P.2d 114, 117 (Wash. Ct. App. 1999); *see supra* text accompanying notes 6-10 (discussing G.W. Equipment Leasing, Inc. v. Mt. McKinley Fence Co.).

208. 30 P.3d 121, 124 (Ariz. Ct. App. 2001).

> been incurred in Arizona, and (2) the non-defendant spouse is joined in the Arizona domestication action and has an opportunity to contend that the foreign judgment was based on an obligation of the other spouse that would have been separate if incurred in Arizona.[209]

The court found that it would have been a community debt, and that the spouse had been joined in the Arizona action.[210] It further stated:

> We live in a mobile society: it is commonplace for people to move from state to state as they pursue job opportunities and better living conditions. Inevitably, some judgment-debtors in non-community property states will move to Arizona, where community property is the law. It would be asking too much to require the creditor to foresee such a move, and to comply with Arizona laws at the time it files the original suit.[211]

In *American National Bank v. Medved*,[212] the facts were similar to *Pacific States*, in that the couple lived in a community property state (Arizona) and one of the spouses owed money from business transactions in a common law state (Nebraska). The Nebraska creditors were attempting to collect against assets the couple claimed were community property whose exposure to creditors would be governed by Arizona law. The court held that there was no conflict because Arizona law would allow access to community property under a statute that provides: "The community property is liable for a spouse's debts incurred outside of this state during the marriage which would have been community debts if incurred in this state."[213] The court therefore did not need to rely on labels to sort out the liability question. The Arizona statute resolved the issue for this particular set of facts, but like the decision in *Pacific States*, the statute could be a windfall for the common law creditor who would be able to enforce its claim against both spouses' earnings and accumulations rather than just the debtor spouse's property. That result would not be consistent with the expectations of the creditors.

Other creditor cases add to the uncertainty. In *In re Estate of Greb*,[214] promissory notes signed by an Arizona husband payable to a Nebraska resident would be enforceable against the wife to the extent of their community property, under Arizona law, but not enforceable against the

209. *Id.* at 129.

210. *Id.* at 130.

211. *Id.* at 130-31 (quoting from Nat'l Union Fire Ins. v. Greene, 985 P.2d 590, 593-96 (Ariz. Ct. App. 1999)).

212. 801 N.W.2d 230, 233 (Neb. 2011).

213. ARIZ. REV. STAT. ANN. § 25-215.C (2022).

214. 848 N.W.2d 611, 622-23 (Neb. 2014).

wife under Nebraska law because she did not sign the note. The court relied on Second Restatement Section 188 to hold that Nebraska had the most significant contacts to the transaction, so Nebraska law applied. The court did not clarify the exact property of the couple that would be liable and the extent that there would be overlap between Arizona and Nebraska law. The husband's separate property, as defined under Arizona law, would be liable, but it left unclear to what extent any portion of the Arizona community property would be liable. Presumably the issue could have been resolved using the approach of *Pacific Gamble*, giving the creditor access to the same property available to the creditor as under Nebraska law, but the court did not get that specific.

In *National Bank of Arizona v. Moore*,[215] the New Mexico court applied its own laws as to creditor access based on the slim reed of a bank account present in the state. The couple were Arizona residents, and a bank had obtained a judgment against the husband. The bank domesticated its judgment in New Mexico and was attempting to enforce the judgment against a bank account of the couple in New Mexico. Under Arizona law, the couple's community property was exempt from the husband's separate debt, but under New Mexico law, the husband's one-half of the community was available to satisfy his separate debts. The couple argued that Arizona law should apply, under the First Restatement principles, since they were domiciled in Arizona and under First Restatement Section 290, the property should be characterized by the law of the domicile at time of acquisition. The issue at hand was not characterization, however, and the court held that once the judgment was domesticated, New Mexico law applied. The court rejected the couple's constitutional arguments. However, the court's holding that moving funds to a New Mexico bank exposed the funds immediately to New Mexico marital property rules seems reminiscent of the original California quasi-community property statute that would convert property immediately upon moving to California, which was held unconstitutional.

The holdings have jumped around from a significant contacts analysis to a choice-of-forum-law analysis (when there was a domesticated judgment) to an approach similar to the divorce and death cases for migrating couples, where a result was fashioned to give a close approximation of what would have happened had the events all occurred in the common law state. The relevant question, however, should be based on the expectations of the parties and the weight given by the court to the

215. 122 P.3d 1265, 1268 (N.M. Ct. App. 2005).

respective governmental interests. First, are we more concerned about the creditor's right to collect or the couple's right to rely on the law of their domicile in protecting their property? The expectations of the parties may sometimes lean toward the creditors, as in the *Pacific Gamble* case, where the transaction was all in Colorado and Washington law only came into play when the couple later moved to Washington. If the couple was domiciled in Washington when the transaction took place, then arguably the creditor who knowingly deals with a community property resident does so at their own risk. The multitude of factual variations that shift the equities illustrate that a rule-based approach in the choice of law will not achieve consistent fairness.

A case involving another twist of community property law, *Martin v. Martin*,[216] demonstrates the potential for creating forum shopping incentives. The Martins had been domiciled in Wyoming, moved around for Mr. Martin's job, and then moved to California before Mrs. Martin changed her domicile to Arizona. Three years later, she filed for divorce in Arizona. During their three-year separation, the husband continued to work in California. California has a rule terminating accumulation of community property once the marriage is defunct,[217] but Arizona does not. The husband argued that his post-separation earnings were separate as provided by California law. Mrs. Martin argued that such earnings would be community property in Arizona and that, furthermore, Arizona's quasi-community property statute would deem his California earnings to be community property, even if California would not, because this would have been community property if acquired in Arizona. The Arizona court applied its own law, rather than that of the husband's domicile (and the last domicile of the marital community). It held that it was constitutional to apply its quasi-community property statute when only one spouse was domiciled in the state[218] and that "uniformity of result and judicial economy favor application of our quasi-community property law to all dissolution actions filed in this state."[219] The court noted that the alternative of applying the traditional Second Restatement rule, that when spouses are domiciled in different states, the domicile of the spouse at

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216. *See generally* 752 P.2d 1026 (Ariz. Ct. App. 1986) (lacking an acknowledgement that applying Arizona law could promote spouses forum shopping to avoid their state's separate and apart rule).

217. CAL. FAM. CODE § 771(a) (West 2017).

218. *See supra* text accompanying notes 174-179 (discussing California's formulation of a constitutional quasi-community property statute).

219. *Martin*, 752 P.2d at 1031.

time of acquisition controls,[220] was "anachronistic" and "unworkable in modern mobile America,"[221] and concluded that these post-separation earnings should be considered community property. The court did not acknowledge that its holding could encourage forum shopping by California or Washington spouses looking to avoid their state's separate and apart rule.[222]

VI. OBSERVATIONS

This review merely scratches the surface of the myriad permutations of choice-of-law issues with respect to U.S. marital property, and the varying solutions that courts have applied to these issues. It is difficult to draw any definitive conclusions, particularly since conflict of laws is notoriously slippery.[223] However, the cases reveal that the rule-based choice-of-law approach fails to help courts make these decisions and achieve consistency, because the facts can easily flip the protection of interests that the rules intend to achieve.

Courts have too often grasped at the straw of the traditional rules of *situs* and domicile, but those rules often add confusion by using the mismatched labels of separate property, which covers different property in the two different systems, and ignore the competing interests and policies at stake. Those rules are not equipped to sort out the multiple levels of decisions presented by most fact patterns in this area. The real property law of the *situs* rule is an easy shortcut but particularly problematic, as pointed out by Professor Weintraub.[224] One of the many flaws of the rule Professor Weintraub identified is that domicile of the parties in a divorce action is more pertinent than the location of their out-of-state property. Professor Weintraub advocated for moving away from the *situs* rule to a broader application of the most significant relationship approach.

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220. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258 cmt. c (AM. L. INST. 1971).

221. *Martin*, 752 P.2d at 1031 (quoting Ismail v. Ismail, 702 S.W.2d 216, 222 (Tex. App. 1985); then quoting John J. Sampson, *Interstate Spouses, Interstate Property, and Divorce*, 13 TEX. TECH. L. REV. 1285, 1344 (1982) (referring to the use of conflict-of-laws principles at death or divorce to borrow from the common law state and indicating that the switch to quasi-community property legislation was the better approach)).

222. Washington is the only other community property state that stops the accumulation of community property before final dissolution, when the marriage has become defunct. WASH. REV. CODE. § 26.16.140 (2008).

223. *See* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2449 (1999) ("Choice of law is a mess.").

224. Weintraub, *supra* note 155.

A Washington case that illustrates a court superficially applying its conflicts rule but most likely manipulating its analysis to achieve a preferred result is *Seizer v. Sessions*.[225] In that case, Elmer and Rosalie Sessions were married in Texas. When Rosalie was diagnosed as mentally ill, Elmer moved to New York, and although he visited Rosalie at least once, he never resumed living with her on a permanent basis. He never divorced Rosalie, but began a relationship with Barbara, going through a marriage ceremony in Tijuana in 1984, and staying with Barbara until he died in 1991. At some point during the relationship, Elmer and Barbara moved to Vancouver, Washington, having stayed long enough in Arizona in 1989 to win a $2.5 million lottery. Elmer was listed as the annuitant with Barbara the beneficiary upon Elmer's death. At issue, now that Elmer had died, was Rosalie's and Barbara's respective rights in the lottery winnings. Both Washington and Texas are community property states so both Rosalie and Barbara had potential claims in the lottery proceeds other than just as heirs of Elmer. Rosalie's rights under Washington community property law depended on whether the marriage was defunct. Washington law provides that even if the spouses are still legally married, all property acquired by the spouses after the marriage has become defunct is the separate property of the acquiring spouse.[226] If the marriage was not defunct, the lottery money was community property and owned one-half by Rosalie, the other half owned by Elmer and passing to Barbara under Elmer's beneficiary designation. If the marriage was defunct, the lottery money was separate property, and Elmer could give it all by beneficiary designation to Barbara. Under Texas law, however, there is no provision for the termination of the community upon the demise of the relationship before divorce.[227] If Texas law, as interpreted by the Washington court, applied, Rosalie would be entitled to one-quarter of Elmer's estate, Barbara would be entitled to half the proceeds as an equitable share and Elmer would be entitled to dispose of one-quarter (which he did by making the Barbara the beneficiary). The court relied on Second Restatement Section 258, Comment c, which directs the court to look at the law of the spouse's domicile at the time the asset (the lottery ticket) was acquired.[228] That state was Washington. However, that only

225. *See generally* 940 P.2d 261 (Wash. 1997) (en banc) (applying Washington law to determine that an estranged, mentally ill widow was entitled to half of deceased husband's earnings).

226. WASH. REV. § 26.16.140.

227. *Seizer*, 940 P.2d at 264.

228. *Id.* at 265.

creates a presumption that can be rebutted, depending on which state has the most significant contacts. The court further held that Washington had the more significant contacts and applied Washington law.[229]

The *Seizer* court's conflicts analysis lacked detail, however, and may have been motivated by the fact that Washington law gave more protection to Rosalie, the Texas spouse, than Texas law did. Certainly, the significant contacts test has sufficient flexibility for a court to put a thumb on the scale to help achieve the result it prefers. A comparative governmental interest approach[230] would have been a more straightforward path to the application of Washington law.[231]

The most significant contacts approach of the First Restatement has not created consistent results, as demonstrated by the cases. For example, in *G.W. Equipment*, the Washington court applied significant contacts to conclude that the law of the couple's domicile should apply in determining liability of the community but then applied the law of the transaction in *Pacific Gamble*.[232] If the facts in the Arizona *Morari* case were presented to the Washington court, its holding in *G.W. Equipment*

229. *Id.* at 266-67.

230. *See supra* text accompanying note 82.

231. The indication of result-oriented legal analysis is common in community property putative spouse cases where there is a legal spouse and a putative spouse claiming interests. The specific facts can play a determinative role in an equitable split among the spouses, leading courts to shape the legal rule to fit the facts for an equitable resolution. Generally, the court will divide the property among the legal spouse, the putative spouse and the decedent in the middle. The critical variant is how the decedent spouse's community share of the property will be distributed—either via intestacy or through a will or nontestamentary direction. In *Seizer*, Elmer had designated Barbara to get his share, so Rosalie's share had to come from an allocation to her of a community property interest. 940 P.2d at 263. In *Estate of Hafner*, Charles had left his spouse Joan back in New York and "married" Helen in California. 229 Cal. Rptr. 676, 678 (Cal. Ct. App. 1986). He then died intestate, leaving property that would have been community with Helen if they had been married in California. The court applied California law and gave Charles's community half to his intestate heirs (Joan and their children) and the other half to Helen. In *Sousa v. Freitas*, Manuel had a legal spouse, Maria, and a putative spouse, Catherine, and property accumulated during his relationship with Catherine. 89 Cal. Rptr. 485, 487 (Cal. Ct. App. 1970). Manuel's will left his estate to Catherine. The court gave one-half of the property to Catherine, and the other one-half was treated as the community of Manuel and Maria. So, Maria got one-fourth and Manuel's one-fourth went to Catherine under his will. In *Estate of Vargas*, Juan had a legal wife, Mildred, and a putative wife, Josephine, and maintained both relationships at the same time, until his death. 111 Cal. Rptr. 779, 779-80 (Cal. Ct. App. 1974). The court "cut the Gordian knot" and just split the property between the two women. *See also* REPPY ET AL., *supra* note 31, at 408-409 (describing the various approaches to splitting acquisitions during marriages).

232. *See also* Shanghai Com. Bank Ltd. v. Chang, 404 P.3d 62, 66-69 (Wash. 2017) (applying a Hong Kong choice-of-law clause in a lending contract and allowing the creditor to reach the debtor's community property, which would not have been available under Washington law).

would result in less rather than more protection for the couple's community property. That result may be consistent with Washington's policies, but the language of the opinion does not clarify whether Washington intended to be as protective to spouses as the Arizona court pronounced in *Phoenix Arbor Plaza, Ltd. v. Dauderman*.[233]

If the court intends to protect parties' expectations, then, depending on the specific facts, the court would do better to follow the lead of community property state courts who apply a conflicts approach for divorcing couples who have migrated to the state[234] or the Washington court in *Pacific Gamble*, which both approximated what would have happened if the controversy stayed in one place. At the very least, particularly in cases addressing third-party rights, courts should look beyond traditional labels to determine what property, and what part of property, was expected to be exposed to the other party's claims in the original transaction. The more conventional approaches to resolving choice of law has muddied the marital property law waters. Because those rules have not given reliable results, courts should use a more flexible, functional approach in these cases, identifying the interests at stake, the reasonable expectations of the various parties, and the interests that the state chooses to favor. Such an approach would at least give an indication of the court's decision on the state's underlying policies and what the court might do in the future.

VII. CONCLUSION

The cases described in this Article are a mere sampling of the cacophony of conflicts cases involving marital property. The "morass of confusion"[235] that is conflicts law, when intertwined with the polar opposite approaches of common law and community property, and then

233. 785 P.2d 1215, 1216 (Ariz. Ct. App. 1989). Other case law may give an indication, however. *See generally* Colorado Nat'l Bank v. Merlino, 668 P.2d 1304 (Wash. Ct. App. 1983) (applying Washington law, which favored the Washington couple, when the Washington spouse did business in Colorado). In *Merlino*, Washington law would only hold the spouse's separate property liable and the community property was exempt. *Id.* at 1309; *cf.* Pacific States Cut Stone Co. v. Goble, 425 P.2d 631, 634 (Wash. 1967) (applying an approximation of Oregon law when the Washington spouse did business in Oregon). In that case, under Washington law the couple's community would be liable but the court only gave the creditor what it would have received under Oregon law (which was less than all the community property). *Id.* Comparison of these two cases indicates an underlying goal of protecting the couple over their creditors.

234. *See generally* Rau v. Rau, 432 P.2d 910 (Ariz. Ct. App. 1967); Berle v. Berle, 546 P.2d 407 (Idaho 1976); Hughes v. Hughes, 573 P.2d 1194 (N.M. 1978) (each applying a conflicts approach for couples that have migrated to a community property state).

235. *See* Kermit Roosevelt III, *supra* note 223.

sprinkled with the community property variations and the sometimes maddeningly complex fact patterns, results in a frightening specter for judges. Courts will look for shelter in simplistic rules, but the better approach would be a flexible case-by-case functional approach that considers all interests, expectations, and applications of the potential choices of law.

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