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# Migrants from Community Property States Filling the Legislative Gap

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# MIGRANTS FROM COMMUNITY PROPERTY STATES—FILLING THE LEGISLATIVE GAP*

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## I

### FRAMING THE PROBLEM

Americans are extremely mobile, and the migrant client is not novel to the American bar.[1] Out of the vast number of persons who move, many change their domicile from one of the eight community property jurisdictions[2] to one of the forty-two states that base property ownership on common law concepts. Many are married[3] and bring with them property acquired while residing in the community state. Much of this property is characterized as community property by the law of their former domicile.[4] After changing their domicile, the spouses are frequently forced to deal with the property in a divorce proceeding, a

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1 In a recent one-year period approximately 35.2 million persons one year of age and older, or 19.6% of the nation's population, changed their residence. Over 5.5 million, or 3.1% of the total population, moved from one state to another. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, POPULATION CHARACTERISTICS 1-2 (Current Population Rep., ser. P-20, No. 127, Jan. 15, 1964) [hereinafter cited as POPULATION CHARACTERISTICS].

2 Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. For discussions of the origin of the community system, its introduction into particular states in this country, and some of the variations found from state to state, see Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisana*, 16 TUL. L. REV. 319 (1942); Hill, *Early Washington Marital Property Statutes*, 14 WASH L. REV. 118 (1939); Huie, *The Community Property Law of Texas* § 1, in 13 TEX. REV. CIV. STAT. ANN. at 2 (1960); Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1 (1936); Lobingier, *The History of the Conjugal Partnership*, 63 AM. L. REV. 250 (1929); Lobingier, *The Marital Community: Its Origin and Diffusion*, 14 A.B.A.J. 211 (1928); McMurray, *The Beginnings of the Community Property System in California and the Adoption of the Common Law*, 3 CALIF. L. REV. 359 (1915). For a comparative analysis of the community regimes in all eight states, see H. DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 159-99 (1931).

3 Approximately 18.4% of the movers are married. POPULATION CHARACTERISTICS, *supra* note 1, at 3.

4 Community property is typically defined as including all property acquired by either spouse after their marriage except that received by gift, devise, or inheritance. For illustrations of the distinction between separate and community property, see CAL. CIV. CODE §§ 163 (West 1954), 164 (West Supp. 1967), and TEX. REV. CIV. STAT. ANN. arts. 4613-14, 4619 (1960).

property settlement, or an estate plan. Thus, attorneys or courts in the common law jurisdiction will have to ascertain the respective interests of each marital partner.[5]

Perhaps some of the property, such as stocks and bonds, will retain the identity it possessed when introduced into the common law state. On the other hand, the actual property transported from the community property jurisdiction may have been reinvested either in personal property or in real estate located in the common law state. A third possibility occurs when the husband has contributed certain amounts to an employer annuity, pension, or profit-sharing plan, both before and after moving, and is residing in the common law state when he begins to receive benefits. Although this property would have been characterized as community if the parties had maintained their former domicile, its treatment by the courts in the common law state is in considerable doubt.

The first step in analysis is ascertaining what interests each spouse had when the property was acquired. This is governed by the law of the former domicile.[6] Interests acquired in a community jurisdiction are fixed neither by the principles of common law nor the doctrines of equity, but rather by the constitution and statutes of the particular state involved.[7] The sole function of the courts is to protect and enforce the rights and obligations created by that law.[8] Only after one fully and intelligently understands the rights and interests of each spouse in the community property can he gauge the effect of the interstate change of domicile.

It would be simple to say that what was community property before the change of domicile should remain so afterwards. Simplicity is certainly desirable, but the community property concept is alien to both attorneys and courts in the common law states.[9] Few courts in common law jurisdictions have considered the problem, and the few existing cases concern limited facets of the general problem. Interestingly, not a single common law court has treated property presently located in the state as community.[10] The courts have, however, pro-

5 Some of the problems that may be encountered are discussed in Lay, *Community Property, Its Origin and Importance to the Common Law Attorney*, 5 J. FAMILY L. 51 (1965).

6 For a general discussion of community property concepts designed primarily for attorneys in noncommunity states, see Lay, *A Survey of Community Property*, 51 IOWA L. REV. 625 (1966).

7 Maclay v. Love, 25 Cal. 367, 374 (1864).

8 *Id.* at 375.

9 Lay, *supra* note 5, at 52.

10 In *In re* Estate of Warburg, 38 Misc. 2d 997, 998, 237 N.Y.S.2d 557, 558 (Sup. Ct.

tected the property interests of each party, although in some instances it is difficult to say what principle was relied upon.[11] Usually the courts resort to a resulting or constructive trust, whether the property involved is that originally transported into the common law state,[12] or that for which the community property has been exchanged.[13]

In *Depas v. Mayo*,[14] for example, the court employed a constructive trust theory. The spouses were former domicilaries of Louisiana, where they accumulated a considerable community estate. They subsequently moved to Missouri where the husband invested part of their assets in real estate, taking title in his own name. The wife subsequently obtained a divorce and claimed half the property, including the realty, as her own. Since the realty was situated in Missouri, the court found the law of that state controlling. The law of Louisiana was used only to ascertain the rights of each spouse in the property originally acquired there.

In awarding half the realty to the wife, the court held that "if A. purchases land with the money of B., and takes legal title to himself, a court of equity will regard him as a trustee, unless there was something in the circumstances of the transaction, or the relation of the parties, to rebut such a presumption."[15] If the wife has separate personal property and if "the husband invest it in land, taking the title in his own name, can it be doubted, that the equitable rights of the parties are not

1963), the New York court stated that the decisions of that state "have recognized that community property rights of a spouse continue after the removal of both spouses to a different jurisdiction . . . ." That community property rights continue, however, does not mean that they will subsequently be treated as community. In any event, the two cases cited by the court in support of its statement, *In re* James, 172 App. Div. 800, 159 N.Y.S. 140 (3d Dep't 1916), *rev'd*, 221 N.Y. 242, 116 N.E. 1010 (1917), and *In re* Estate of Mesa y Hernandez, 172 App. Div. 467, 159 N.Y.S. 59 (1st Dep't 1916), are not really on point, since neither involved an actual change of domicile. In both cases the spouses remained domiciled in the community property jurisdiction.

11 *See, e.g.*, Doss v. Campbell, 19 Ala. 590 (1851); Beard's Ex'r v. Basye, 46 B. Mon. 133 (Ky. 1846). In both cases the courts were dealing with the separate property of the wife, but the issue was the same. Neither Kentucky nor Alabama, prior to the enactment of the so-called Married Womens Act, permitted a wife to have fee simple title to various properties during coverture. The Kentucky Court of Appeals stated that, "if [the] husband became invested with the legal title by virtue of our laws, he took it in trust for the benefit of his wife, or the joint benefit of both." *Id.* at 146. Although this was the *most* that the husband took, the court never really held that he had that much of an interest. The Alabama court took the position that the wife did not lose her rights in property by moving to a common law state.

12 *E.g.*, Beard's Ex'r v. Basye, 46 B. Mon. 133 (Ky. 1846).

13 Depas v. Mayo, 11 Mo. 202 (1848); Edwards v. Edwards, 108 Okla. 93, 103, 233 P. 477, 486-87 (1924).

14 11 Mo. 202 (1848).

15 *Id* at 205.

changed by the change of property and legal ownership?"[16] Answering its own question, the court concluded that the change from personalty to realty was immaterial. The wife's interests were not lost by the change of domicile, nor were they destroyed by the transmutation.

The reference to the wife's interest as "her separate property" has led one commentator to suggest that the court was rationalizing according to the principles of tenancy in common,[17] *i.e.*, that each spouse owned an undivided one-half interest in the property after the change of domicile. Yet, it is just as logical to assume that the court was using the "separate property" idea as indicative of the wife's ownership interest in the community property. If the court had intended to treat the spouses as tenants in common, it could easily have said so. Instead, it spoke of the husband as a trustee.

The general problem can be further complicated by the involvement of third parties. Although, as between the spouses, a trust theory might be used to trace the community funds into any new acquisitions, it may be unacceptable when the property is found in the hands "of a bona fide purchaser for value, without notice of the trust character of the funds that paid therefor . . . ."[18] Thus, if the husband were to sell some securities to an innocent third party, the wife would be barred from recovering them from the vendee even though they were acquired and owned by the spouses as community property. This does not prevent the injured and defrauded wife from maintaining a cause of action against her husband for damages arising out of his interference with her property rights. Her cause of action may be of little value, however, if he has dissipated the money received in exchange for the securities and is now judgment-proof. Thus, the trust theory is not a panacea.

While the courts have always recognized and protected the interests of each spouse as against the other, they have not always been so generous or so quick to comprehend the ramifications of the community concepts when the question concerns state tax law.[19] In *Commonwealth v. Terjen*,[20] the Virginia Supreme Court of Appeals permitted the state to obtain a larger amount of inheritance and gift taxes by holding that the wife had less than a vested interest in community property brought

16 *Id.*

17 H. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 241 (1952).

18 Edwards v. Edwards, 108 Okla. 93, 103, 233 P. 477, 487 (1924).

19 *See In re* Hunter's Estate, 125 Mont. 315, 236 P.2d 94 (1951); *noted in* 3 HASTINGS L.J. 151 (1952); 27 TUL. L. REV. 116 (1952); 4 STAN. L. REV. 440 (1952).

20 197 Va. 596, 600-01, 90 S.E.2d 801, 804 (1956). For a critical discussion of this case, see de Funiak, *Commonwealth v. Terjen: Common Law Mutilates Community Property*, 43 VA. L. REV. 49 (1957).

into the common law state. Ostensibly, the court interpreted the community property statute of the state from which the spouses had moved. But the statute declared that the interests of each spouse were "present, existing and equal."[21] Of course, if the wife had no vested interest, neither could the husband, since the statute declares them to be equal. But the court did not seem bothered by the problem.

In *In re Estate of Kessler*,[22] the Ohio Supreme Court conceded that the interest of each spouse is a vested one, but determined that certain valuable rights pass to the survivor on the death of one of the parties. Thus, the entire value of the property was subjected to the succession tax. The valuable property right alluded to by the court was the ability of the husband to manage and control the community property.[23] Although the wife's interest was vested, she lacked the ability to manage her share until the death of her husband, who had the power to control and invest community property.[24] The husband cannot use the property for his own benefit, but must manage it for and on behalf of the community.[25] Using this rationale to justify imposition of the state inheritance tax on all the property seems an egregious error. Nevertheless, the decision exists and its implications deserve consideration.

There is also some authority for the proposition that realty received in exchange for community property can be completely subjected to the state inheritance tax because title thereto is protected by the recording system of the common law state.[26] Thus, the title holder has been deemed the sole owner for the purpose of taxation, although he might not have been so treated if the issue had been one of marital property rights as between the spouses. Only one court has treated a tax case in the same way as it would a dispute between the spouses.[27]

Even if the attorney succeeds in tracing all the assets that were brought from the community state or that have since been received

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21 CAL. CIV. CODE § 161a (West 1954). For opposing views on the purpose and effect of this statute, *compare* Cahn, *Federal Taxation and Private Law*, 44 COLUM. L. REV. 669, 676 (1944), *with* Simmons, *The Interest of a Wife in California Community Property*, 22 CALIF. L. REV. 404, 417-18 (1934), *and* Kirkwood, *The Ownership of Community Property in California*, 7 S. CAL. L. REV. 1, 10-12 (1933).

22 177 Ohio St. 136, 140, 144, 203 N.E.2d 221, 224, 226 (1964), *noted in* 64 MICH. L. REV. 150 (1965).

23 CAL. CIV. CODE § 161a (West 1954).

24 *Id.* For some restrictions on the husband's powers, see *id.* §§ 172-72a (Supp. 1967).

25 *Cf.* Coe. v. Winchester, 43 Ariz. 500, 503-04, 33 P.2d 286, 287-88 (1934).

26 40 OP. MD. ATT'Y GEN. 526 (1955).

27 People v. Bejarano, 145 Colo. 304, 358 P.2d 866 (1961); *see* 33 ROCKY MT. L. REV. 432 (1961).

in exchange therefor, many insoluble problems remain. For example, in a standard request for an estate plan,[28] what property will be included in the estate of each spouse for succession purposes? Will half be included in each estate? On what basis? If so, will the surviving spouse be entitled to his or her statutory share in addition to the half that he or she already owned as his or her portion of the community? Will the survivor's one-half interest in this property, if it is recognized, be treated as passing from the decedent, or will it be deemed to have belonged to the survivor from the date of acquisition? Will the answers to any of these questions differ depending on which spouse dies first? Will the state inheritance or gift tax statutes apply to all or only half of the property? How will the court's characterization of the property as separate, community, joint tenancy, tenancy by the entirety, or tenancy in common affect the estate plan? Will the court's characterization differ if the property involved is what was originally brought from the community state rather than what has subsequently been acquired in exchange therefor? Will the categorization, treatment, or protection vary if some of the property is protected by record title? These are only a few of the questions having no satisfactory solutions.[29]

Realizing that even the most carefully drafted estate plan might be reduced to naught if he should err in his attempt to second-guess a court's resolution of these questions, the attorney may begin to think in terms of a different approach. He might decide to have the spouses voluntarily destroy all the community aspects of their property, and thereby hope to avoid many of the above pitfalls. The resulting form of ownership would be familiar to the courts in the common law state, and since the recharacterization is accomplished by the acts of the spouses, the court would be relieved of the determination.

If he decides upon this course of action, however, the attorney will be faced with many perplexing new problems. Which state's law should determine the ability of the spouses to sever their community interests? If both states would permit it, what formalities are required? Should the severance be characterized as a property or a contract transaction? May the couple sever their community interests so that each spouse will receive an absolute interest in half the property as his or

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28 For a panel discussion on some of the problems, see Polasky, Mullin & Pigman, *Estate Planning for Migrating Clients: Problems When Couple Moves from Community Property State to Common Law State*, 101 TRUSTS & ESTATES 876 (1962).

29 For an analysis of the cases involving a change of domicile from a community property to a common law state, see Lay, *Property Rights Following Migration from a Community Property State*, 19 ALA. L. REV. 298 (1967).

her separate share? May they exchange it for another form of joint ownership? What would be the tax significance of such a severance? Is a partition permitted even though it is forbidden by the community property state where the spouses were domiciled when the property was acquired? Should a severance be attempted if the attorney believes the courts will grant more tax advantages if the partitioning contract is not entered? Unfortunately, not only are there no readily available answers to these questions, but also some very important issues have not even been considered by appropriate authorities. At present an attorney has little to rely on.

The attorney's task may be complicated by the fact that several states enacted community property laws primarily to grant their domiciliaries the same federal income tax benefits once enjoyed only by spouses in community property states.[30] Each spouse was permitted to report half the community income separately because each had a vested interest under state law.[31] The inequity[32] was alleviated to a great extent in 1948, when Congress authorized the joint income tax return.[33] Thereafter, spouses in all states could make a single return of their total income even though one of them had neither income nor deductions. With the motivating factor gone, these would-be community property states repealed their community statutes.[34] The repeal, however, did not necessarily restore the status quo. In a few states some of the property accumulated during this period was allowed to remain characterized as community.[35] Various amounts of this property may still exist and could create tremendous difficulties for the unwary migrant client and his attorney.[36]

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30 Act No. 273, ch. 301A, [1945] Hawaii Laws 312; Pub. Act No. 317, [1947] Mich. Laws 517; Ch. 156, [1947] Neb. Laws 426; Tit. 32, § 3, [1945] Okla. Laws 118; Ch. 525, [1947] Ore. Laws 910; Act No. 550, [1947] Pa. Laws 1423.

31 *See* United States v. Malcolm, 282 U.S. 792 (1931) (California); Bender v. Pfaff, 282 U.S. 127 (1930) (Louisiana); Hopkins v. Bacon, 282 U.S. 122 (1930) (Texas); Goodel v. Koch, 282 U.S. 118 (1930) (Arizona); Poe v. Seaborn, 282 U.S. 101 (1930) (Washington). *But see* United States v. Robbins, 269 U.S. 315 (1926), holding that such income splitting was not permissible where the interest of the wife was not vested.

32 This inequity is illustrated by Ervin, *Federal Taxes and the Family: A Plan for Optional Joint Returns for Husband and Wife with Equal Division of Their Combined Incomes for Federal Income Tax Purposes*, 20 S. CAL. L. REV. 243, 261 (1947).

33 Now contained in INT. REV. CODE OF 1954, § 6013.

34 HAWAII REV. LAWS § 326-1 (1955); MICH. STAT. ANN. §§ 26.216(21)-(25) (1957); NEB. REV. STAT. §§ 42-604 to -616 (1960); OKLA. STAT. ANN. tit. 32, §§ 51-82 (1958); ORE. REV. STAT. §§ 108.510-.550 (1953). The Pennsylvania statute had been declared unconstitutional. Willcox v. Penn. Mut. Life Ins. Co., 357 Pa. 581, 55 A.2d 521 (1947).

35 *E.g.*, NEB. REV. STAT. §§ 42-617, -619 (1960).

36 *See* Cudlip, *Repeal of Michigan Community Property Act*, 27 MICH. ST. B.J., July,

## II

## THE NEED FOR LEGISLATION

Notwithstanding the perplexity and recurrence of these problems, no common law state has yet promulgated any remedial legislation. The dearth of judicial decisions in the area does not mean that it is inconsequential or that few problems ever arise. More likely, many cases are being settled out of court or are disposed of prior to the appellate level. In many other instances the problems are probably going unrecognized. If the attorney fails to see the issue at its inception or if he has no guideposts to steer him along the course, the client will probably suffer. Legislation is needed to eradicate the confusion that may well prevent attorneys from rendering sound advice to migrant clients.

### A. *Constitutional Considerations*

Since no common law state has ever promulgated any legislation attacking the problem, there are no precedents squarely revealing the constitutional bounds. The common law jurisdictions, however, are not the only ones that have encountered the problem of the migrant client. There are several reported cases involving change of domicile from a common law to a community property state.

In spite of these cases, the community states have not avidly adopted remedial legislation. Unlike the treatment accorded community property in common law states, however, community jurisdictions allow their domiciliaries to own separate as well as community property.[37] Thus, the courts have generally held that a change of domicile has no effect on the separate property of either spouse,[38] or upon property held by tenancy in common or joint tenancy.[39]

1948, at 13; Moshofsky, *Repeal of the Community-Property Law*, 28 ORE. L. REV. 311 (1949); Thompson, Gray & Wallace, *The Constitutionality and Effect of the Repeal of the Community Property Law*, 21 OKLA. B.A.J. 76 (1950).

37 For the statutory definitions of separate property in the community states, see ARIZ. REV. STAT. ANN. § 25-213 (1956); CAL. CIV. CODE §§ 162-63 (West 1954); IDAHO CODE ANN. § 32-903 (1963); LA. CIV. CODE ANN. art. 2334 (West Supp. 1967); NEV. REV. STAT. § 123.130 (Supp. 1959); N. M. STAT. ANN. §§ 57-3-4, 57-3-5 (1962); TEX. REV. STAT. ANN. arts. 4613-14 (Supp. 1967); WASH. REV. CODE ANN. §§ 26.16.010, 26.16.020 (1961).

38 *See, e.g.*, Stephen v. Stephen, 36 Ariz. 235, 284 P. 158 (1930); Douglas v. Douglas, 22 Idaho 336, 125 P. 796 (1912); Tanner v. Robert, 8 Mart. 508 (La. 1826); *In re* Faulkner's Estate, 35 N.M. 125, 290 P. 801 (1930); McDaniel v. Harley, 42 S.W. 323 (Tex. Civ. App. 1897); Brookman v. Durkee, 46 Wash. 578, 90 P. 914 (1907). Nevada apparently has never faced the problem.

39 Community property jurisdictions specifically recognize holding of property in joint

Though simple, these rules can produce undesirable results. For example, if the husband earned all the property while the spouses were domiciled in the common law state, it remains so classified after the interstate move.[40] Since the owner of separate property may, in the community states, dispose of it at his death in any way he desires,[41] the surviving wife apparently will take nothing if the husband decides to leave all the property to someone else. The law of the new domicile gives her no interest in her husband's separate property, and she will not receive the statutory share under the law of the old domicile because its law does not apply.[42]

Concerned about such possible injustices, California has enacted legislation in an attempt to alleviate the unfair treatment of the marital property rights of their migrant domiciliaries. Since California is the only state, community or otherwise, that has made any concentrated effort to remedy some of these problems, its legislation and judicial interpretations should be carefully examined.[43]

### 1. *In re Estate of Thornton*

In 1917 California expanded its Civil Code definition of community property to include all real property located in California and all personal property, wherever situated, that would have been community property if the spouses had been domiciled in that state when it was acquired.[44] The Code thereby treated all property owned by California domicilaries, except foreign realty, as community property, regardless of where the spouses were domiciled at the date of acquisition, if it otherwise would have been community property under the law of California.

When viewed in conjunction with other sections of the California property law, this expansion of the community property definition is not as harmless as it first appears. For example, the husband has the power of management and control over the community assets.[45] Hence,

tenancy or tenancy in common. *See* Munson v. Haye, 29 Wash. 2d 733, 743-44, 189 P.2d 464, 470 (1948); ARIZ. REV. STAT. ANN. § 33-431 (1956); CAL. CIV. CODE § 161 (West 1954); NEV. REV. STAT. § 123.030 (Supp. 1959); N.M. STAT. ANN. § 57-4-1 (1962).

40 *See* cases cited note 38 *supra*.

41 *E.g.*, CAL. PROB. CODE § 20 (West 1956).

42 *In re* Estate of O'Connor, 218 Cal. 518, 526, 23 P.2d 1031, 1034 (1933).

43 For a history of the California legislation and court decisions, together with a discussion of the cases from other community states, see Lay, *Marital Property Rights of the Non-Native in a Community Property State*, 18 HASTINGS L.J. 295 (1967).

44 Ch. 581, § 1, [1917] Cal. Stat. 827, *as amended*, ch. 360, § 1, [1923] Cal. Stat. 746.

45 CAL. CIV. CODE § 161a (West 1954).

if the property belonged to the wife in the common law state as a part of her separate estate, the managerial privilege would suddenly become the husband's right upon the move to California. The wife could no longer invest, manage, and control her own property. Furthermore, the community property in California, with the exception of the wife's earnings,[46] may be used to satisfy the husband's debts.[47] Thus, the wife's interests in her separate common law property would be considerably lessened by treating it as community property.

If the property transported from the common law state was part of the husband's separate estate, his rights and interests therein would also be affected by the statutory recharacterization. If it is deemed community, he may not dispose of it unless he receives valuable and adequate consideration.[48] Finally, he may not sell, encumber, or lease any community realty for a period longer than one year unless his wife joins him in executing the requisite instruments.[49] These limitations did not exist prior to the change of domicile, and his rights have, to this extent, been diminished. Each spouse, therefore, may have lost various property interests by the statutory recharacterization.

The constitutionality of this enactment was questioned in *In re Estate of Thornton*.[50] Upon the death of her husband, the wife claimed half of his estate, on the theory that it was community property by virtue of the expanded definition contained in the new legislation. All the property had been acquired separately by the husband while the spouses were domiciled in a common law state. The California court held the statute unconstitutional on fourteenth amendment privileges and immunities and due process grounds.

The California cases had consistently held that the legislature was powerless to diminish the husband's rights in any existing community property, even though the spouses had always resided there. Thus, the court noted, to declare the legislation valid would result in the use of two standards, one for native Californians and one for spouses who subsequently moved there. Such discrimination would abridge the privileges and immunities of citizens from sister states:

> [Where] the right of a husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, who chances to

46 *Id.* § 168.

47 Grolemund v. Cafferata, 17 Cal. 2d 679, 689, 111 P.2d 641, 646 (1941).

48 CAL. CIV. CODE § 172 (West Supp. 1967).

49 *Id.* § 172a.

50 1 Cal. 2d 1, 33 P.2d 1 (1934).

> transfer his domicile to this state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen.[51]

The court added that to take the property of one individual and transfer it to another "because of his citizenship and domicile, is also to take his property without due process of law."[52] This is true irrespective of the place of acquisition or the state of his residence. The court believed the result was dictated by previous decisions "holding that to limit the right of one spouse by increasing the right of the other in property acquired by their united labors, is the disturbance of a vested right . . . ."[53] It would be an even greater disturbance if the property were acquired through the effort of one spouse only.

The privileges and immunities theory is weak. By recharacterizing this property as community, California was in effect trying to equate the property rights of migrant spouses with those of native domiciliaries. After the change of domicile, would not the property rights of the newly arrived residents be given the same treatment and protection? The statute made no attempt to discriminate against the migrants. On the contrary, by legislative fiat the state was endeavoring to accord treatment equal to that enjoyed by natives.

Despite its benevolent motives, however, the legislature went too far. Attempting to equate the marital property rights of the two groups, the statute called for a general recharacterization of all property acquired after marriage (except foreign realty) that would have been community property if the marital partners had been domiciled in California on the date of acquisition. This broad recharacterization led directly to the constitutional difficulties: since the rights were vested under the law of the state where the spouses were residing at the date of acquisition, the recharacterization appears as a taking, occurring at the moment the spouses moved to California. Thus, while the privileges and immunities clause cannot be ignored, the due process clause appears more directly in point.

Besides eminent domain proceedings and police power regulation, a constitutional taking can be accomplished through consent of the property owner. He can voluntarily agree to an alteration or a complete obliteration of his property interests without creating due process issues. Arguably, then, the change of domicile by the decedent in *Thornton*, accompanied by an importation of the property into California, amounted to an implied consent on the part of the spouses to

51 *Id.* at 5, 33 P.2d at 3.

52 *Id.*

53 *Id.*

submit to the requirements of the California statute. But the court was unwilling to apply this theory to the particular facts in *Thornton*, holding that "to do so would be to give effect to a restriction prohibited by the Constitution."[54] It was unreasonable to presuppose that the spouses agreed to a rearrangement of their property rights. There clearly was no actual consent. Also, there was no showing that they were aware of the existence or effect of the statute; thus, consent could not be implied.

Under some circumstances, however, the consent theory might appropriately be used. If, instead of merely bringing the property into California, the spouses subsequently invested it in California real estate or exchanged it for other personalty, then one might reasonably infer that they had consented to a divestiture of their old interests in return for the acquisition of the new property in accordance with the law of their new domicile. Implied consent might then be a legitimate inference, because the domicile has the right to govern the transactions of its residents concerning local property.[55]

Though many critics have disagreed with *Thornton*,[56] it must be conceded that, once the court interpreted the statute to mean that the change of domicile produced a recharacterization of the property and a shift of the interests in it, there was no alternative but to declare the statute unconstitutional. The dissenting justice agreed "with the proposition that absolutely owned personal property brought into this state by the husband cannot be taken from him, nor can his ownership or control over it be diminished or impaired by our statute."[57] He also conceded that any deprivation or impairment of a vested property right as a condition of entrance into California would undoubtedly be unconstitutional. But to hold the statute invalid "in so far as it attempts to diminish the husband's property rights during his lifetime does not solve the problem of the instant case."[58] Property interests were not realigned between living spouses in this case. The husband was dead, and no longer had *any* property rights. The true issue, as seen by the dissent, was "whether the state of California may require that upon the death of a decedent, certain property owned by him

54 *Id.*

55 *See generally* H. GOODRICH, CONFLICT OF LAWS § 153 (4th ed. 1964); R. LEFLAR, CONFLICT OF LAWS §§ 150, 154 (1959); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 332-332b (Tent. Draft No. 6, 1960).

56 *See, e.g.*, Armstrong, *"Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?*, 33 CALIF. L. REV. 476, 501-05 (1945).

57 1 Cal. 2d at 5-6, 33 P.2d at 3 (dissenting opinion).

58 *Id.* at 6, 33 P.2d at 3.

and brought into this state shall be subject to the same rules of testamentary disposition and succession as community property acquired in this state."[59] Thus, the statute merely operated upon the rights of succession and testamentary disposition.

If this was the actual import of the statute, then the domiciliary state had the power to enact it, for "[i]t is a rule of almost universal acceptance that the rights of testamentary disposition and of succession are wholly subject to statutory control, and may be enlarged, limited or abolished without infringing upon the constitutional guaranty of due process of law."[60] The dissent believed the new definition of community property should not be voided entirely. Instead, it should be applied to other statutes as a separate and distinct law in each instance. Accordingly, "the legislative power may be upheld where properly exercised, and denied where constitutional objections are present."[61] The dissenting opinion suggested examining each factual situation on a case-by-case basis and, where possible, giving "the statute a construction which will give it effect to the extent that it is constitutional."[62]

Two factors may have influenced the court's refusal to adopt the approach of the dissent. First, the statute was not a part of the Probate Code, and thus seemed intended to be generally applicable.[63] Second, a piecemeal, case-by-case approach to the statute could only encourage litigation and protract resolution of the problems. The legislature was the appropriate body for making the statute constitutional and workable.

Shortly after the court's decision, the California legislature, apparently heeding the admonition of the dissenting justice, added a new section to the Probate Code. It provided that upon the death of either spouse, the survivor is entitled to "one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired

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59 *Id.*

60 *Id.* at 7, 33 P.2d at 3.

61 *Id.* at 7, 33 P.2d at 4.

62 *Id.*

63 The majority opinion made the following comment:

> Neither can we hurdle these barriers by holding the amendments in question to be part of our succession laws and hence valid as a statute of succession. For we are met with plain holdings of our own court that such is not the effect of said statute.

1 Cal. 2d at 5, 33 P.2d at 3. The cases referred to by the court were *In re* Estate of Frees, 187 Cal. 150, 201 P. 112 (1921) and *In re* Estate of Drishaus, 199 Cal. 369, 249 P. 515 (1926).

while domiciled in this state . . . ."[64] The remaining "one-half is subject to the testamentary disposition of the decedent . . . ."[65]

Despite certain deficiencies not here relevant,[66] the court, citing the *Thornton* dissent, considered the statute constitutional in *In re Miller*.[67] Unlike the legislation declared invalid in *Thornton*, this enactment did "not purport to rearrange property rights between living husbands and wives in marital property brought into this state upon their change of domicile to California."[68] On the contrary, it was a succession statute, governing the manner of distribution of such property upon the death of one of the spouses. The right of a deceased spouse to dispose of his property, with the exception of foreign realty, as well as the right of the surviving spouse to receive a share of it, is constitutionally subject to the law of the state where the decedent is domiciled at the time of his death.[69]

### 2. *Addison v. Addison: Quasi-Community Property*

Since the California succession statute did not apply during the joint lives of the marital partners, it failed to safeguard the wife's inter-

64 CAL. PROB. CODE § 201.5 (West 1956). The effect of this enactment is discussed in Abel, *Estate Planning for the Non-Native Son*, 41 CALIF. L. REV. 230 (1953). *See also* 19 S. CAL. L. REV. 39 (1945).

65 CAL. PROB. CODE § 201.5 (West 1956).

66 *See In re* Miller, 31 Cal. 2d 191, 198, 187 P.2d 722, 726 (1947), where the court held that realty purchased in California with separate funds subsequent to a change in domicile was not transformed into community property by the statute. The court reasoned that the statute's failure to specifically mention real property precluded its application to such property. The California appellate courts had taken the opposite view. *In re* Way's Estate, 157 P.2d 46, 50-51 (Cal. Dist. Ct. App. 1945). For other problems, see Paley v. Bank of America Nat'l Ass'n, 159 Cal. App. 2d 500, 324 P.2d 35 (1958).

67 31 Cal. 2d 191, 187 P.2d 722 (1947).

68 *Id.* at 196, 187 P.2d at 725.

69 *See* Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 289 (1898). The California Probate Code has subsequently been amended on two occasions. Ch. 490, § 1, [1957] Cal. Stat. 1521; Ch. 636, § 1, [1961] Cal. Stat. 1844. On the 1957 amendment, see Abel, Barry, Halsted & Marsh, *Rights of a Surviving Spouse in Property Acquired by a Decedent While Domiciled Outside California*, 47 CALIF. L. REV. 211, 214-20 (1959). The provision, as amended in 1961, presently reads:

> Upon the death of any married person domiciled in this State one-half of the following property in his estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse: all personal property wherever situated and all real property situated in this State heretofore or hereafter acquired:
>
> (a) By the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this State at the time of its acquisition; or
>
> (b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere.

CAL. PROB. CODE § 201.5 (West Supp. 1967).

ests if the marriage was terminated prior to death. If the parties obtained a divorce, the court could not award the separate property of one spouse to the other;[70] and the court's power to order division of the community property[71] was unimportant when the only significant property was that transported from the former domicile.

In an effort to give the migrant wife the protection enjoyed by native wives, the legislature amended the Civil Code by creating a new type of property termed "quasi-community property."[72] The amendment applies to all personal property wherever located, and all real property situated in California, that would have been community property if the spouses had been domiciled in California at the date of acquisition.[73] Quasi-community property is divided or distributed whenever a decree for separate maintenance,[74] divorce,[75] or child support[76] is entered by a court. The method of distribution follows a pattern identical to that outlined for community property upon the occurrence of the same events.[77]

The constitutionality of the quasi-community property legislation was challenged in *Addison v. Addison*.[78] The parties were married in Illinois and resided there for ten years, during which time substantial amounts of property were accumulated through the business enterprises of the husband. This was his separate property under the law of Illinois. After the couple moved to California, the wife instituted divorce proceedings, seeking an equitable division of all marital property. She specifically asked the court to apply the new quasi-community legislation, asserting that the property held in her husband's name had been acquired in exchange for the property brought from Illinois, and that such property would have been community if they had been domiciled in California at the original date of acquisition.

Because the quasi-community legislation made "no attempt to

70 Garten v. Garten, 140 Cal. App. 2d 489, 490, 295 P.2d 23, 27 (1956); Barker v. Barker, 139 Cal. App. 2d 206, 210, 293 P.2d 85, 89 (1956).

71 CAL. CIV. CODE §§ 146(a), (b) (West Supp. 1967).

72 *Id.* § 140.5. *See generally* Schreter, *"Quasi-Community Property" in the Conflict of Laws*, 50 CAL. L. REV. 206 (1962).

73 CAL. CIV. CODE § 140.5 (West Supp. 1967).

74 *Id.* § 146.

75 *Id.*

76 *Id.* § 143.

77 *Id.* § 146.

78 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965). For discussion of this case, see Comment, *Marital Property and the Conflict of Laws: The Constitutionality of the "Quasi-Community Property" Legislation*, 54 CALIF. L. REV. 252 (1966); Comment, *Retroactive Application of California's Community Property Statutes*, 18 STAN. L. REV. 514 (1966).

alter property rights merely upon crossing the boundary into California,"[79] the court had little difficulty distinguishing it from the statute considered in *Thornton*. The new statute applies only if, after the acquisition of a California domicile, various acts or events transpire that give rise to a divorce or separate maintenance action.

The husband argued that use of the statute worked an unconstitutional taking of his property. But the court noted that even vested rights may validly be impaired if the requirements of due process are observed. A state has the inherent sovereign power to interfere with property interests whenever it is reasonably necessary to protect the health, safety, or general welfare of its populace. When a marriage is terminated by divorce, the state has a substantial interest in the matrimonial property. The California court quoted the United States Supreme Court:

> Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interest, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state must deal.[80]

If the state were unable to order an equitable division of the property, various inequities might result. The husband could change the family domicile to California for the express purpose of securing a divorce, leaving the wife destitute, a potential charge upon the state. Although the wife could be protected to some extent by an award of alimony,[81] this can be circumvented by the husband more easily than can a division of property. If he failed to obey an order for alimony, he could be held in contempt, or the wife could institute an action for back payments. In either event, the wife would be put to the trouble and expense of enforcing the decree. This would be unfair when the state has a simpler method of protecting her interests.

The *Addison* court added that "where the *innocent party would otherwise be left unprotected* the state has a very substantial interest and one sufficient to provide for a fair and equitable distribution of the marital property without running afoul of the due process clause . . . ."[82] The statement raises two issues concerning the extent of the court's

79 62 Cal. 2d at 566, 399 P.2d at 902, 43 Cal. Rptr. at 102.

80 *Id.* at 567, 399 P.2d at 902, 43 Cal. Rptr. at 102, *quoting* Williams v. North Carolina, 317 U.S. 287, 298 (1942).

81 CAL. CIV. CODE § 139 (West Supp. 1967).

82 62 Cal. 2d at 567, 399 P.2d at 903, 43 Cal. Rptr. at 103 (emphasis added).

holding. First, the wife in *Addison* was the "innocent party;" she had secured the divorce because of her husband's adultery. But should use of the quasi-community property statute benefit only an innocent divorcee? The police power rationale certainly does not require such a limitation, for the interest in saving the wife from destitution exists regardless of her innocence. Second, the court's noting that the wife "would otherwise be left unprotected" suggests that the statute might not apply if both spouses are independently wealthy. At least in cases of adultery, incurable insanity, and extreme cruelty, however, the statute gives the court power to make an equitable distribution of the community and quasi-community property. Thus, there is little need to fear that the statute will unduly benefit a spouse not in need of protection.

The court also might have rebutted the husband's due process contention through use of a consent theory, since the legislation involved in *Addison* differed materially from that in *Thornton*. After moving the family domicile to California, the husband apparently engaged in conduct that entitled his wife to a divorce under the California law. By his conduct the husband had subjected himself to the California court. On this basis, it might be inferred that he had agreed to an equitable division of the marital property. His consent would be implied, not on the theory that he agreed to a realignment of his property rights by changing his domicile and bringing his property to California, but on the basis of his conduct after he moved there. Although the consent theory was not raised in *Addison* and may not have been appropriate, it may yet prove helpful in drafting a statute dealing with these problems.

The second constitutional question raised in *Addison* was whether the new legislation abridged the privileges and immunities clause of the fourteenth amendment. In rebutting this argument the court could have relied on the same reasoning it used to answer the due process claim; instead it simply pointed out the difference between the statute involved in *Thornton* and the quasi-community property statute. The court admitted that *Thornton* could be read as holding that the legislation there involved "impinged upon the right of a citizen of the United States to maintain a domicile in any state of his choosing without the loss of valuable property rights."[83] Unlike the previous statutory attempt to remedy the problem of the migrant spouse, however, "the quasi-community property legislation does not cause a loss of valuable rights through change of domicile."[84] The new concept ap-

83 *Id.* at 568, 399 P.2d at 903, 43 Cal. Rptr. at 103.

84 *Id.*

plied only when a divorce or separate maintenance decree was entered by a court after the spouses had acquired a California domicile.

The third constitutional issue raised in *Addison* was whether the legislation violated the privileges and immunities clause of article IV, section 2. The court noted that the clause is not necessarily absolute under all circumstances. It prohibits discrimination against citizens of other states if the only reason for it is the mere fact that they are citizens of other states. But it does not prohibit discrimination for which there are valid and independent reasons. Furthermore, the inquiry into the validity of the discrimination should "be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."[85]

The quasi-community property statute satisfies these requirements. A wife who has lost the protection of the equitable property settlement afforded by her former domicile needs protection from her new domicile, in this case California. Thus, any discrimination against the husband is justified by the state's interest in protecting his wife upon a divorce.

The *Addison* court never resolved the question whether the legislation could be applied retroactively.[86] It avoided the problem by holding that, in the particular case, the judgment for divorce had been granted after the enactment of the quasi-community legislation and, as such, it has prospective application only. This begged the question, since the quasi-community classification came into existence after the property had been acquired by the husband and after the spouses had moved to California. In *Thornton,* of course, the court refused to apply the enactment retrospectively. The refusal to meet the issue squarely in *Addison* might be attributed to the court's desire to procrastinate on this often troublesome problem.[87] Whatever the reason, it seems clear that any constitutional obstacles could have been overcome by the same logic used in rebutting the due process and the privileges and immunities arguments.

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85 *Id.* at 569, 399 P.2d at 903, 43 Cal. Rptr. at 103, *quoting* Toomer v. Witsell, 334 U.S. 385, 396 (1948).

86 For criticism of its failure to do so, see Comment, *Marital Property and the Conflict of Laws: The Constitutionality of the "Quasi-Community Property" Legislation,* 54 CALIF. L. REV. 252, 266-68 (1966); Comment, *Retroactive Application of California's Community Property Statutes,* 18 STAN. L. REV. 514, 521 (1966).

87 For the origin of the retroactivity issue in California community property law, see Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228 (1897).

### 3. *Other Constitutional Implications*

It should not be assumed that all constitutional issues have been satisfactorily resolved by the California cases. Their common denominator was the termination of the marital relationship, in *Thorton* by death and in *Addison* by divorce. As long as the spouses are residing together in marital bliss, the problem of property distribution will not arise. But if the husband should begin systematically disposing of the quasi-community property for the sole purpose of preventing his wife from receiving any portion of it at his death or upon divorce, then the wife would need protection, and the police power might be used to assist her. A legitimate interest of the state would be involved, and it would be just as substantial as in the case of divorce or death.

One form of mandatory realignment that common law states might contemplate is an automatic, equal division of the community property when the family moves into a noncommunity state. Although at first blush this appears to be a rational transformation of the property into an ownership familiar to the common law, the concomitant loss of the husband's managerial rights presents due process difficulties.[88]

Rather than using an outright recharacterization upon the change of domicile, perhaps the due process problem can be avoided by a statutory requirement that the spouses register their respective community interests. Failure to do so would result in half of the property being considered as the separate property of each spouse. Any alteration or divesting of interests might then be attributed to the spouses' own lack of diligence in failing to protect their rights. The constitutionality of such an act would be questionable, since the spouses would be forced to itemize every community asset in order to preserve its community character. This may well be considered an undue hardship imposed merely because they moved to the common law jurisdiction.

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88 Although no cases have dealt specifically with managerial rights after the change of domicile, a Louisiana court referred to the husband's continuing right to manage and control the community while protecting the wife's interests therein. Succession of Packwood, 12 Rob. 334, 362 (La. 1845); Succession of Packwood, 9 Rob. 438, 4 (La. 1845). Even where the courts used an equitable or resulting trust doctrine in giving the wife protection, none has intimated that the change of domicile caused the husband to lose his managerial rights. *See* Depas v. Mayo, 11 Mo. 202 (1848); Edwards v. Edwards, 108 Okla. 93, 233 P. 477 (1925). The most vivid illustrations of the continuation of this power is found in the tax cases where the managerial right has served as the basis for applying a state gift or succession tax statute to the total value of the property. *In re* Hunter's Estate, 125 Mont. 315, 236 P.2d 94 (1951); *In re* Estate of Kessler, 177 Ohio St. 136, 203 N.E.2d 221 (1964); Commonwealth v. Terjen, 197 Va. 596, 90 S.E.2d 801 (1956). These cases are all discussed in detail in Lay, *supra* note 29.

A less drastic, but less satisfactory, statutory solution would set up a rebuttable presumption that half of all property transported from the community state is owned separately by each spouse. This solution would be somewhat analogous to the presumption in the community states that all property acquired by either spouse after marriage is community property.[89] The difficulty with this approach, however, is that, if the spouses can rebut the presumption, the common law state will still have the problem of how to deal with community property.

Another possibility arises when there has been a subsequent transmutation or reinvestment of the community property after the change of domicile. Such conduct might give rise to a valid inference that the spouses have consented to a divestiture of their community interests in exchange for the newly acquired property. Their respective interests would then be governed exclusively by the law of their new domicile. This solution places the wife in a very unfavorable position, when considered in connection with the husband's power of management and control over the community personalty.[90] If the husband should invest the community property in new acquisitions and take title in his own name, his wife would always be left with the burden of tracing her community interests into the newly acquired property.

Still another possibility is a presumption that the commingling of the community property with other property accumulated after the change of domicile results in its being classified as separate property, one half belonging to each spouse, or record title being determinative of the ownership interests. The law of the community states contains a similar presumption in favor of the community when commingling has occurred.[91] If funds are so commingled that they lose their identity, they all become community in nature.[92] While the common

89 Garten v. Garten, 140 Cal. App. 2d 489, 495, 295 P.2d 23, 26 (1956); Estate of Kane v. Kane, 80 Cal. App. 2d 256, 264, 181 P.2d 751, 757 (1947); CAL. CIV. CODE § 164 (West Supp. 1967). The presumption is not conclusive, Estate of Adams v. Ayers, 132 Cal. App. 2d 190, 198, 282 P.2d 190, 196-97 (1955), except perhaps when an innocent third party is involved. DeBoer v. DeBoer, 111 Cal. App. 2d 500, 504, 244 P.2d 953, 956 (1952); Attebury v. Wayland, 73 Cal. App. 2d 1, 5, 165 P.2d 524, 526 (1946); CAL. CIV. CODE § 164 (West Supp. 1967).

90 CAL. CIV. CODE § 161a (West 1954).

91 Austin v. Austin, 190 Cal. App. 2d 45, 48-49, 11 Cal. Rptr. 593, 595 (1961); Mueller v. Mueller, 144 Cal. App. 2d 245, 250, 301 P.2d 90, 94 (1956). The party seeking to establish the separate property has the burden of proof. Mears v. Mears, 180 Cal. App. 2d 484, 499, 4 Cal. Rptr. 618, 627 (1960); Kenney v. Kenney, 128 Cal. App. 2d 128, 135, 274 P.2d 951, 956 (1954).

92 All community states apparently agree with this proposition. *E.g.*, Lawson v. Ridgeway, 72 Ariz. 253, 261, 233 P.2d 459, 464 (1951); Austin v. Austin, 190 Cal. App. 2d 45, 48-49, 11 Cal. Rptr. 593, 595 (1961); Giamanco v. Giamanco, 131 So. 2d 159, 164 (La. App.

law states might constitutionally enact like presumptions, they could not resolve all problems. If the spouses successfully trace the property to its community antecedents, the issue of how it should be characterized and treated would still be present.

Up to this point, the problem has been approached from the standpoint of what mandatory readjustments the common law states might constitutionally enact. Mandatory readjustments, however, will not cover all the potentially troublesome areas. The spouses may wish to make inter vivos transfers or to change their respective interests in the property while they are both living. They may wish to divest themselves of their community interests by a severance, each spouse thereafter owning one-half as his or her separate property, or to exchange their community assets for other property to be owned as joint tenants or tenants in common. If this can be accomplished by a partitioning contract or by an exchange of an undivided one-half interest in the community for an undivided one-half interest in the tenancy in common or joint tenancy property, then apparently there would be no recognizable gain on the transaction for income tax purposes.[93] On the other hand, if the state required severance through mutual gifts, a gift tax might result.[94] Thus, the question is whether the common law states may permit the spouses to sever their community interests and may set forth the formalities necessary for such partitioning.

If the property was acquired in a community state where the marital partners might also own property as joint tenants or tenants in common,[95] and if they might there freely agree to an alteration of their community interests,[96] the only problem for the common law

1961); Ormachea v. Ormachea, 67 Nev. 273, 296, 217 P.2d 355, 367 (1950); Gifford v. Gabbard, 305 S.W.2d 668, 671 (Tex. Civ. App. 1957); *In re* Estate of Allen, 54 Wash. 2d 616, 622, 343 P.2d 867, 870 (1959).

93 Walz v. Commissioner, 32 B.T.A. 718 (1935). On the other hand, the Tax Court has held that an unequal division of the community property may "result in the transfer of property rights or interests for a consideration, and there is no sufficient reason to distinguish them from any other transactions fundamentally similar." Rouse v. Commissioner, 6 T.C. 908, 913 (1946). Therefore, an unequal division would be considered tantamount to a taxable sale or exchange and a gain would be recognized to the extent that the fair market value of the property received exceeds the basis of the property given in exchange. Gordon R. Edwards, 23 P-H Tax Ct. Mem. 400 (1954); Maurice D. Brown, 22 P-H Tax Ct. Mem. 855 (1953); INT. REV. CODE OF 1954, §§ 1001, 1002.

94 *See generally* INT. REV. CODE OF 1954, §§ 2501-24.

95 *E.g.*, Munson v. Haye, 29 Wash. 2d 733, 189 P.2d 464 (1948); ARIZ. REV. STAT. ANN. § 33-431 (1956); CAL. CIV. CODE § 161 (West 1954); NEV. REV. STAT. § 123.030 (Supp. 1959); N.M. STAT. ANN. § 57-4-1 (1962).

96 *See, e.g., In re* Estate of Baldwin, 50 Ariz. 265, 71 P.2d 791 (1937) (no statute specifically permits or forbids marital partners to alter the status of their community prop-

states would be to determine appropriate formalities. But the problem sometimes will be more complex. Consider the possible confusion on the part of spouses who move from Louisiana. Persons contemplating marriage in that state may, by contract executed with certain formalities,[97] modify or limit the applicability of the community property system with regard to any property that they may thereafter acquire.[98] They may even agree that no property shall be owned by them as community.[99] The agreement will then determine what property belongs to the community and what is the separate property of each spouse. If they marry without entering into any such agreement, they may not thereafter voluntarily sever or partition their community property.[100] Though either spouse may make a gift of his or her interest in the community to the other,[101] he may not do so by "any mutual or reciprocal donation by one and the same act."[102] Hence, the restriction against a voluntary severance may not be circumvented by joint and mutual gifts in the same transaction. Under these circumstances, whether the common law state may permit a voluntary partition is unclear.

Assuming that a voluntary transmutation involves property and not contract law and that tangible personalty is involved, the general conflicts rule provides that an inter vivos transfer of an interest is governed by the law of the situs.[103] While a few of the older cases adhered to the view that the law of the owner's domicile is determinative,[104] that rule appears to have fallen into disuse. Under either view, the law of the common law jurisdiction would apply, since the spouses reside there and the property is situated there at the time of transfer.

If the problem is categorized as one of contracts, the same result follows. Regarding the validity of a contract, three main conflicts rules

erty); CAL. CIV. CODE § 158 (West 1954); IDAHO CODE ANN. § 32-906 (1963); NEV. REV. STAT. §§ 123.070, 123.080(1) (1957); N.M. STAT. ANN. §§ 57-2-6, 57-2-12 (1953); TEX. CONST. art. 16, § 15; TEX. REV. CIV. STAT. ANN. art. 4624a (Supp. 1967); WASH. REV. CODE §§ 27.16.050, 26.16.120 (1951).

97 LA. CIV. CODE ANN. art 2328 (West 1952).

98 *Id.* art. 2424.

99 *Id.* art. 2332.

100 *Id.* art. 2329.

101 *Id.* art. 1746.

102 *Id.* art. 1751.

103 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 254b-258 (Teut. Draft No. 5, 1959). *See generally* H. GOODRICH, *supra* note 55, § 153; R. LEFLAR, *supra* note 55, §§ 150, 154.

104 Whitney v. Dodge, 105 Cal. 192, 38 P. 636 (1894); Loftus v. Farmers & Mech. Nat'l Bank, 133 Pa. 97, 19 A. 347 (1890). For a critical discussion of this rule, see Lees v. Harding, Whitman & Co., 68 N.J. Eq. 622, 60 A. 352 (Ct. Err. & App. 1905).

are in vogue. The applicable law will be that of the state where the contract is executed or entered into, the state where it is to be performed, or the state that the parties designate as, or intend to be, controlling, provided that the jurisdiction so named has substantial connections with the contract.[105] Under any of these rules, the law of the spouses' domicile would or could be made applicable to the partitioning transaction.

A more recent approach is the so-called "grouping of contacts" or "center of gravity" theory, under which the validity and effect of the contract is governed by the law of the jurisdiction that has the most significant contacts with it.[106] In the partitioning situation the only event that takes place outside the common law state is the acquisition of the property. Hence, the spouses' domicile could determine the validity of the severance under this view. The Restatement position is somewhat analogous. It provides that the law of the state with which the contract has its most significant relationship should control its validity.[107] This would be the state designated by the contracting parties, unless the selection resulted from a mistake or was chosen unfairly by one party, or unless the state selected had no substantial contacts with the contract, or unless application of the law of the chosen state would contravene the public policy of the state whose law would have been determinative in the absence of a designation.[108] If no state is specified by the parties, the Restatement favors the law of the state where the contract is entered and is to be performed, if both events occur within the same jurisdiction.[109]

The more usual type of property with which the spouses will be concerned is intangible personalty, such as stocks and bonds, which differs materially from tangible personalty because ordinarily it has no actual situs. For example, corporate stock is a form of property that can be said to be embodied in or represented by the stock certificate. The general position taken by the courts has been that the law of the state of incorporation determines such matters as how a transfer of shares may be effected, even though the actual stock certificate may be located elsewhere.[110]

105 H. GOODRICH, *supra* note 55, §§ 108-10; R. LEFLAR, *supra* note 55, §§ 122, 123.

106 The first case to follow this view was W.H. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945). *See also* Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954), probably the leading case in the area.

107 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332 (Tent. Draft No. 6, 1960).

108 *Id.* § 332a.

109 *Id.* § 332b.

110 Petri v. Rhein, 162 F. Supp. 834 (N.D. Ill. 1957); Mills v. Jacobs, 333 Pa. 231, 4

Many problems have been resolved by the Uniform Stock Transfer Act and its successor, Article 8 of the Uniform Commercial Code.[111] Under these statutes transfer of the shares, as between the parties, occurs when a properly endorsed certificate is delivered to the transferee by the transferor.[112] Thus, by complying with this simple requirement, the spouses would be able to divest themselves of any community aspects of corporate stock and retake title in another fashion.[113]

The validity of a transfer of any other intangible personalty embodied in a document is determined by the law of the state where the instrument is located at the date of the conveyance.[114] Thus, if the document is in the common law state where the spouses now reside, the law of that jurisdiction is binding upon their ability to sever or partition their community interest by mutual agreement.

If the spouses use their community assets to acquire real estate situated in the common law jurisdiction and if they agree to take title in some common law form of ownership, they should be permitted to do so. The interests acquired would be determined by the law of the common law state, for it is universally accepted that the law of the situs governs transfers of real estate located within its borders.[115] The severance would be accomplished as a result of the parties' consensual arrangement and not by virtue of a change of domicile.

Since the spouses are now domiciled in the common law state and the property is situated there, no constitutional barriers should exist to prevent their mutually agreeing to a severance or partition of their community interests.[116] A simple statute allowing such a transmutation

A.2d 152 (1939). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 182 (Tent. Draft No. 7, 1962).

111 The Code has now been enacted in all states except Louisiana. *See* 6 UNIFORM LAWS ANN. 10-12 (Supp. 1967).

112 UNIFORM COMMERCIAL CODE §§ 8-105, -301, -302, 307-309.

113 Some problems might arise, however, concerning the ownership of distributions made after the transfer but before the new owner of the shares is registered on the corporation's books. *See* UNIFORM COMMERCIAL CODE § 8-207.

114 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 262 (Tent. Draft No. 5, 1959).

115 *E.g.*, Sunderland v. United States, 266 U.S. 226, 233 (1924); United States v. Fox, 94 U.S. 315 (1876); Irving Trust Co. v. Maryland Cas. Co., 83 F.2d 168, 171 (2d Cir. 1936); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 217, 219, 221 (Tent. Draft No. 5, 1959).

116 *See* Wyatt v. Fulrath, 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965), in which the New York Court of Appeals permitted alteration of the community aspects of money deposited in a New York bank because the parties intended such a transmutation when the money was placed in a survivorship account. The New York law was applied even though the parties did not move to New York, did not specifically contract with each other, and were prohibited by the law of the community jurisdiction where they resided from entering into a survivorship contract.

or alteration is not only permissible but also in order. No fourteenth amendment hurdles need be cleared, since the alteration would not result from the statute, but from the contractual agreement between the spouses.

B. *Some Practical Considerations*

The argument can be made that a change of domicile should have no effect on existing property rights, whether they are vested or not. The parties, of course, are not forced to move to the common law state, although their presence in that jurisdiction may not be entirely by choice. Frequently the husband, much to his own dismay, is transferred by his employer. Likewise, the husband may have decided to move, and the wife accompanies him only because of her wish to preserve the marriage. Thus, if the desires of the spouses are followed, the interests of each spouse in the property owned at the time of the change of domicile, together with any they might subsequently acquire by its exchange or investment and the income derived therefrom, should remain unchanged. Carried to its logical extreme, the ability of each spouse to dispose of his or her share of this property, and the determination of the actual property interests of each spouse, would be governed by the law of their former domicile, *i.e.*, the community property state. Legislation could certainly be enacted by the states to preserve existing property rights.

Though this concept has the virtue of maintaining the status quo, it is capable of producing chaotic results. Every issue concerning such property would have to be resolved by resorting to foreign law. This difficulty may be compounded if the spouses have resided in two or more community property states before coming to the common law jurisdiction. Aside from the unfavorable implication that the domiciliary law is being relegated to an inferior position, this places an undue burden upon the attorneys and courts in the common law states. Any additional property acquired by the spouses after the change of domicile would be governed by the law of their new domiciliary state. Even if there were no problems in tracing each asset back to the date of its acquisition, the laws of both states would be so intertwined that the task of either the attorney or the court would be close to impossible.

It can be contended that the need for uniformity with respect to property transfers and administration proceedings should outweigh all other considerations. Under this approach the right of either spouse to dispose of his or her share of the property brought from the commu-

nity state, including the determination of the rights of the surviving marital partner, would be totally dependent upon the law of their new domicile. The attorneys and the courts would be benefited, since they would then be dealing with familiar legal principles.

Any proposal for new legislation should consider that under community property law only half of the property is included in the estate of the deceased spouse, the remainder going to the survivor as his or her share of the community.[117] Unless statutory precautions are taken, the survivor also receives a portion of the decedent's one-half interest as his or her statutory share by virtue of the succession laws of the common law state. This result is not necessarily offensive, but it is clearly not what the legislature of the common law state intended when it enacted its survivor statute. The statutory share was designed primarily to give the survivor, and in particular the wife, an interest in the decedent's property upon his or her death and to prevent the decedent from disposing of all his estate to another, leaving the survivor without any means of support. In the case suggested, however, the survivor apparently would receive much more than the legislature has deemed necessary for these goals.

Although the precise issue has never been raised in American courts, it has been considered in Canada. In *Beaudoin v. Trudel*,[118] the spouses were married in Quebec, a community property jurisdiction.[119] They subsequently moved to Ontario, where property ownership is based predominantly upon the common law system. They continued to reside in the common law province until the wife died intestate. There were no children, and so her brothers and sisters alleged that they were entitled to all her property under the law of Quebec. The husband agreed that the law of Quebec demanded this result, but contended that the change of domicile had not "destroyed or had any effect upon the community of property itself, but that it [had] brought the matter of succession under the law of Ontario instead of that of Quebec."[120] Deciding the controversy in favor of the husband, the Ontario court held that half the community property should be included in the estate of the deceased wife and that the remainder belonged to the surviving husband, not by virtue of the succession laws of Ontario but because of the community property law

117 CAL. CIV. CODE § 161a (West 1954).

118 [1937] 1 D.L.R. 216 (Ont. C.A. 1936).

119 *See* QUEBEC CIV. CODE arts. 1257, 1260, 1262, 1270-71 (Johnson 1923) for a description of some of the aspects of the community property system of that province.

120 [1937] 1 D.L.R. at 222.

of Quebec. Approaching the problem as one of marital property rights, the court looked to the law of Quebec to ascertain the respective interests of each spouse in the community property. Once it was known what property to include in the decedent's estate, the emphasis shifted from the law of marital property to the issue of succession. Here the law of Ontario became applicable, since the wife was a domiciliary of that province at the date of her death. The court held:

> No law of the Province of Quebec can . . . affect the application of the law of this Province to the estate of a wife domiciled here, which she left undisposed of by will and which was unaffected by any written marriage contract.[121]

Though the court's separate characterization of the two issues of marital property rights and succession is logical, the result was that the surviving husband obtained the best of the laws of both provinces. He received half the property as his share of the community and half his deceased wife's share by way of succession. The same anomalous result is likely to occur in the common law states unless they modify the law of intestate distribution.

Alternatively, the common law states could take the position that property brought from the community state is community property but that any subsequent dealing with such property would be treated as a severance of the community interests. The right of the state to enact such a policy is not open to serious question, since both spouses are domiciled there and the property is situated within its territorial limits. Unlike the first California legislation, the action or conduct of the marital partners under this proposal could be construed to be a submission to the law of the common law jurisdiction. Consent would be premised upon the voluntary exchange of community property rather than upon the change of domicile. This implied consent theory could be used to defeat any claim that the protections afforded by the due process or privileges and immunities clauses have been abridged.

The recharacterization-upon-exchange approach has difficulties, because not all transactions involving the community property constitute real exchanges. This is particularly true with respect to such items as stock options that were acquired prior to the change of domicile but exercised afterwards, or interests in pension plans to which contributions have been made both before and after the move. If the asset is an expected return from a pension plan, will the continued contribution after the change of domicile have the effect of destroying

121 *Id.* at 218.

all of the community interests, or will the proceeds have to be apportioned to the community to the extent that the contributions represented community funds? Concerning the stock option example, to distinguish between the options and the stock received in exchange for their exercise, an argument must be made that the community interests existed only in the options and that the exercise was a subsequent transaction that rendered the newly acquired stock subject to the law of the common law jurisdiction. Alternatively, one could trace the community character of the option to the extent that it is embodied in the stock. Thus, if a share of stock with a present fair market value of seventy-five dollars can be acquired for fifty dollars and the option, twenty-five dollars of the value of the new share would belong to the community. While these distinctions may seem technical, without them the interests of each spouse might be deemed altered by the change of domicile. This would again raise the constitutional issues that must be avoided.

Another problem arises if a stock split occurs after the change of domicile. Is this a subsequent transaction that affects the interests of each party in the newly acquired stock certificates, or are the same interests returned to the spouses in the form of additional certificates? The shareholder's equity in the corporate entity has neither increased nor diminished as a consequence of the split; only the value of each share has been affected. The theory of implied consent does not really apply to such a transaction, because the spouses had absolutely no control over it.

Another available solution is to give the spouses a period of time, from the date they move to the common law state, in which to record their interests in the property transported from the community state. Failure to do so would result in loss of the community aspects of the property. Aside from the constitutional difficulties raised by this approach,[122] other problems are apparent. Assuming they fail to record, how will their interests be treated? In some cases, ownership might be deemed to be in the spouse who holds record title. But when record title is not available, the common law state will have to determine whether each spouse owns half the property as his or her separate property, or whether they hold it as tenants in common or as joint tenants.

If the spouses choose to file with the appropriate recording office, they will have to itemize every community asset in order to protect their respective interests. Consideration must also be given to the effect

122 *See* pp. 839-56 *supra.*

of a sale of the property. Should the disposition or exchange produce a severance or transmutation of the community interests on the theory of implied consent? This alteration of the community interests might be conditioned on giving the spouses another period of time, dating from the sale or disposition, in which to list or record their new acquisitions. Any such system of recordation would soon become cumbersome, time consuming, and costly, particularly for the spouses.

These problems primarily relate to testamentary disposition and succession. Among those relevant to divorce situations, tracing property acquired in a community state or received in exchange for such property is predominant. The easiest and perhaps best solution in this area is to give the court power to order an equitable division of all property owned by the spouses regardless of where it was acquired. Applying the *Addison* rationale, no constitutional barriers should arise, provided this treatment does not differ materially from that afforded native domiciliaries.

Finally, the rights of third parties should be protected. The likelihood of an innocent third party's becoming involved without knowledge of the community nature of the property is relatively great because of the husband's freedom in managing community personalty.[123] He may decide to sell it for valuable consideration, and then deliberately dissipate the money received in exchange. Who should bear the loss as between the wife and the purchaser, both of whom may be equally innocent? Even if the third party knows that he is dealing with community property, should he be placed under any obligation to insure that each party receives half the purchase price? Such a requirement seems unreasonably harsh where the husband is the grantor, since he has the power to sell community personalty for a valuable consideration without the wife's consent. On the other hand, what if the property is in the name of the wife and she sells it without any right to do so? How can the rights of the innocent husband and the innocent third party be reconciled and protected against the wrongful conduct of the wife?

Two different solutions have found support in Europe. Since the countries are relatively small and migration between them is fairly common, it is only natural that they have frequently encountered the problem. This is accentuated by the fact that most of the continental European countries have adhered to the nationality principle in the marital property field, *i.e.*, the property interests of each spouse are

123 *See* CAL. CIV. CODE §§ 172-172a (West Supp. 1967).

governed by the law of their nationality notwithstanding a subsequent change of domicile.[124]

In this setting the French courts have taken the position that it is the duty of third parties who have business relations with married individuals to inform themselves of the background of the spouses. The law of the spouses' nationality will govern the transaction regardless of whether the third person knows that their property rights are not subject to the law of France.[125] Thus, the burden of ascertaining all the facts is placed upon the third party. The opposite approach has been adopted by Germany:

> [A] person may rely on the results of German matrimonial law when he contracts with a married foreigner domiciled in Germany, if he is ignorant of the fact that the spouses are governed by some foreign regime and this fact is not recorded in Germany in the proper public register . . . .[126]

The German view more nearly approximates the position traditionally taken in this country.[127] If the third party is innocent, he should prevail. To hold otherwise unduly hampers routine commercial transactions and provides the spouses with the opportunity to take advantage of third parties. Protection of the third party creates fewer difficulties.

## III

### A Suggested Approach

To be fair to the parties and avoid constitutional attack, the community property interests of each spouse should be recognized to the greatest possible extent. This can be done in several areas without creating additional hardships on either the marital partners or attorneys and courts. First, the husband's power of management and control over the property can be continued. In fact, because of the constitutional

124 Italian Civil Code (Preliminary Dispositions) art. 19 (1942); 1 E. Rabel, The Conflict of Laws: A Comparative Study 349-51, 357-59 (1945). For a discussion of the Italian Code as it relates to marital property rights, see McCusker, *The Italian Rules of Conflict of Laws*, 25 Tul. L. Rev. 70 (1950).

125 1 E. Rabel, *supra* note 124, at 37-73.

126 *Id.* at 372.

127 *See* Edwards v. Edwards, 108 Okla. 93, 100, 233 P. 477, 484 (1925); Depas v. Mayo, 11 Mo. 202, 205 (1848); Beard's Ex'r v. Basye, 46 Ky. 133, 147 (1846). In *Beard's Executor* the court, while protecting the interests of the wife in the property transported from the community property state, suggested that there may have been a different result if innocent third parties had been involved.

implications this may well be essential. Second, upon the death of one of the spouses the survivor could be entitled to one-half the property. This survivorship right would not be by virtue of any succession law of the common law jurisdiction, but would follow from the new domicile's recognition of the community interests of each spouse. Thus, only half the property need be subject to the state's succession or gift tax law. Third, the remaining half could be included in the estate of the deceased spouse. Fourth, community property could be made subject to an equitable division if a decree of divorce, separate maintenance, or child support is entered by a court of competent jurisdiction in the common law state. Fifth, half of any income received from the property could be treated as belonging to each spouse.

The method of treating subsequently acquired property presents greater difficulties. If it is received in exchange for community property, should it be recognized as community or should an implied consent theory be used to produce a divestiture of the community interests in return for other ownership rights? The common law states have held that the interests of each spouse in community property are not lost upon a reinvestment subsequent to the change of domicile, regardless of whether the community property was invested in realty or personalty.[128] Prior to enactment of the joint income tax return provision,[129] an analogous position was taken by the federal courts with respect to the taxability of income received from the property after the change of domicile.[130] Each spouse was permitted to report half the income received not only from the original property, but also from any assets acquired with the income from, increment of, or sale of the original property.[131] The interests of each spouse in any subsequently acquired property should thus be recognized if they are able to show that it was acquired in exchange for, or from the proceeds of, other property owned by them as community at the time of the interstate move. As between the spouses, these interests should be recognized and treated as community interests. The statute should not be drafted in terms of any equitable trust doctrine, nor should it analogize to common law forms of ownership.

This approach will avoid the need to determine what types of transactions are sufficient to produce a divesture of the community

128 Edwards v. Edwards, 108 Okla. 93, 100, 233 P. 477, 483 (1925); Depas v. Mayo, 11 Mo. 202, 205 (1848).

129 INT. REV. CODE OF 1954, § 6013.

130 Phillips v. Commissioner, 9 B.T.A. 153 (1927).

131 Hammonds v. Commissioner, 106 F.2d 420 (10th Cir. 1939); Johnson v. Commissioner, 88 F.2d 952 (8th Cir. 1937).

interests, since no such destruction will result from any subsequent dealings with the property. Naturally, there will be a problem in tracing the community interests into the subsequently acquired property, and it will be particularly evident where the property has been purchased with both community funds and money earned by one of the spouses after the change of domicile. In this situation the common law states may wish to include a presumption to the effect that the community interests will be lost by the commingling unless they can be clearly traced. There is no constitutional prohibition against such a presumption, since the spouses themselves would have caused the loss or alteration, and they still have the opportunity to rebut the presumption. The burden of establishing the community interests in any of the subsequently acquired property should be upon the party seeking to take advantage of the special provisions enacted for the benefit of migrants.

The proposal that the property be treated as community wherever possible has been made for the sole purpose of allowing the spouses to get full benefit from their ownership interests. For example, a distinct advantage would be that, upon the death of one spouse, the entire value of the property would be entitled to a stepped-up basis for federal income tax purposes.[132] This would not be possible if ownership were treated in any other fashion, since only half would be included in the decedent's gross estate for federal estate tax purposes,[133] and only that half would receive a stepped-up basis.[134] This should not be considered as giving the spouses an undue tax advantage, since they would have obtained the same benefit if they had remained in the community property state. It is just another result of attempting to have their property interests affected as little as possible by the move. There is no justification for deliberately denying them such benefits, whether in the field of taxation or elsewhere, when it can be avoided without creating additional complications.

Any property acquired after the change of domicile with income earned in the common law state will be governed by the law of the new domicile. This applies to the determination of the interests of each spouse, the power of disposition, both testamentary and inter vivos, and the rights of the surviving spouse. There is no basis for using the law of the community state in ascertaining any of these rights and inter-

132 INT. REV. CODE OF 1954, § 1014.

133 The remaining half belongs to the survivor and is never acquired from the decedent for less than adequate consideration. *Id.* §§ 2040, 2033.

134 *Id.* § 1014.

ests, since this property has no connection whatsoever with that state. The law of the community property jurisdiction is not intended to create a perpetually binding agreement between the spouses that all their future accumulations should belong to the community. Once the spouses move from the community property state, its law has no relationship to future acquisitions unless they are received in exchange for community property.

Finally, some consideration must be given to interests in pensions, profit sharing plans, and insurance policies. Since the final values to be derived from these investments will ordinarily represent contributions made both before and after the change of domicile, these interests are really hybrid and should be treated accordingly. If the funds invested before the move belonged to the community, they should remain unaffected by the change of domicile.[135] But investments of money earned after the spouses came to the common law jurisdiction would represent the interest of the person who earned the money. Hence, any proceeds or benefits derived from this type of investment should be apportioned.

The community interest of each spouse should be recognized and treated as such to the extent that it represents a return on an investment of community funds. The remainder should be governed exclusively by the law of the new domicile. Naturally, there will be problems in tracing the community investment and in ascertaining the expected return, but these computations are not unlike those required of a taxpayer reporting income received from an annuity.[136] Though they are sometimes difficult, they are never impossible. Again, the burden would be on the owners of such property interests to establish these factors. If they are successful, they would then know how their interests will be treated. Certainty is a legitimate goal.

To minimize dependence upon foreign law, the common law states should incorporate the above reasoning into statutes. The only time there would be any need to consult the law of a foreign jurisdiction would be in making the original determination of whether certain property was community when it was acquired.

The common law states must determine what interests in the community property may be disposed of by testamentary instrument and what portion of the decedent's share will go to the survivor upon intestacy. One solution would be to use the ordinary succession statute of the common law jurisdiction. The survivor would then be entitled

135 People v. Bejarano, 145 Colo. 304, 358 P.2d 866 (1961).

136 INT. REV. CODE OF 1954, § 72.

to receive the common law statutory share in addition to a one-half community interest. If this is considered undesirable, it could easily be prevented by a provision allowing the decedent to dispose of his or her one-half interest by will. This would permit the decedent to dispose of his one-half interest as he wishes, but if he declines to do so, the survivor would be entitled to the statutory share.

A second method would be to provide for the distribution of the decedent's share as if there were no surviving spouse. This would prevent the survivor from ever receiving more than half the community property. One major objection to this approach is that, in case of intestacy, the survivor would never receive a share of the decedent's interest, regardless of whether there were other close relatives. Instead, it would pass to more remote kindred, or it might escheat to the state if no relatives claimed it. Even if this could be avoided by the execution of a will, there would inevitably be instances when this unfortunate result would materialize.

A third possibility would be to create an entirely new order of intestate distribution for community property. Under this scheme, provision could be made for the surviving spouse if there were no other persons having some claim to share in the decedent's estate by reason of consanguinity.

Recognition of the spouses' community interests should not prevent them from altering this method of ownership if they so desire. They should be given the same right and authority as is presently enjoyed by other spouses with respect to their property. In order to forestall subsequent controversy, a severence or conversion of the community interests should be required to be in writing and signed by both spouses.

If deemed desirable, a provision could be included by which the right of a decedent to dispose of his or her one-half interest by will is lost if the spouses use the community property to purchase other property, title to which is held under circumstances that create a right of survivorship. This would not be an encroachment upon the rights of the decedent, since he or she has voluntarily agreed that the survivor is entitled to it by virtue of the method of ownership. This could be phrased in the form of a rebuttable or conclusive presumption. The former would permit evidence to be heard concerning whether the parties actually intended to sever their community interests and create any rights of survivorship. The conclusive presumption would have the advantage of preventing increased litigation.

Either type of presumption could be made applicable to all prop-

erty held in such manner as to create a right of survivorship, or could be limited to real property situated within the common law state. This should not present a formidable obstacle to the attorney, since he may, if necessary, have the parties reconvey their interests in such a fashion as to negate the survivorship rights.

Up to this point the problem has been approached from the standpoint of the spouses' interests and the possible solutions have been designed for their convenience and protection. Some provision should also be considered for the protection of third parties who may purchase or extend credit on the assumption that the titleholder possesses all of the ownership interests in such property. For example, if the spouses use community funds to purchase stock, placing record title solely in the husband's name, a bona fide purchaser or a creditor who has obtained a mortgage, lien, or other security interest without any notice of the specific nature of the wife's interest should be protected. The third party is in no way culpable. Notice could have been given him by placing title in the names of both spouses. Hence, the wife should have no recourse against him. Her only remedy should be to seek restitution from her husband if he disposes of her interest with the intention of defrauding her. This does not place the spouses under a disadvantage, since the same rule applies when any property owner allows another to deal with the property so as to induce an innocent third party to acquire an interest in it.

This provision naturally would not apply to the wife's contingent interests in any real property to which record title is in her husband's name. In this situation the third party would have constructive notice of her statutory share and the marital status of the parties just as if they were native domiciliaries of the common law state. Therefore, if he accepted the husband's signature on a deed for real property he would be outside the scope of protection. Even here a distinction can be drawn between the wife's interests in her half, and her dower or statutory rights in her husband's half. The third party should prevail as to the former. It is only in the case of the latter that he has any reason to know that the husband, acting alone, cannot convey the entire interest.

## IV

## A Proposed Statute

The following proposed statute embodies the suggestions discussed above. It is designed to be workable, to satisfy constitutional requirements, and to reflect the public policy of the state.

(A) Upon the death of any married person domiciled in this state, one-half of the following property shall belong to the surviving spouse, and the other one-half of such property shall be subject to the testamentary disposition of the decedent, and in the absence thereof shall be distributed according to the law of intestate succession as contained in Section —— (Reference should here be made to intestacy and statutory share legislation. Alternatively, an entirely new order of distribution may be enacted.):

(1) All personal property or interests therein, wherever situated, which were acquired by the decedent or the surviving spouse while domiciled in another jurisdiction under whose laws it was community property, or which were acquired from the rents, issues, or income of such property, or which were received in exchange for such property;

(2) All real property situated in this state, which was acquired by either the decedent or the surviving spouse, or both, with the rents, issues, or income of, or in exchange for, property acquired while domiciled in another jurisdiction under whose laws it was community property: *Provided,* however, that this subsection shall not apply to any real estate situated in this state, title to which is held by the spouses in such a form of ownership as to create any rights of survivorship under the laws of this state.

(B) (1) Whenever either spouse obtains a judgment for a divorce because of adultery, extreme physical cruelty, or incurable insanity, the court shall order an equitable division of the property, defined in Subsections A (1) and (2) of this Act, equally between the court may deem just after having considered all the facts of the case together with the physical, mental, and financial condition of both parties.

(2) Whenever either spouse obtains a judgment for a divorce for any other reason, the court shall divide the property, defined in Subsections A (1) and (2) of this Act, equally between the parties.

(C) Whenever either spouse obtains a judgment for separate maintenance, the court shall divide the property, defined in Subsections A (1) and (2) of this Act, equally between the parties.

(D) Whenever an order for child support is entered, the court shall have the power to reach any or all of the property, defined in Subsections A (1) and (2) of this Act, as is necessary for the comfort, maintenance, health, and education of the child or children.

(E) Only one-half of the property, defined in Subsections A (1) and (2) of this Act, shall be included in the decedent's estate for purposes of the estate tax statute of this state, nor shall more than one-half thereof be subject to the inheritance tax statute of this state.

(F) One-half of the income, rents, or issues received or derived from the property, defined in Subsections A (1) and (2) of this

Act, shall be the income of each spouse for purposes of the income tax laws of this state.

(G) For purposes of this Act, the interests of the decedent and the surviving spouse in any property, defined in Subsections A (1) and (2) of this Act, shall be recognized as community interests except as otherwise provided in this Act.

(H) If any property or interest therein was partially acquired from the rents, issues, or income of, or in exchange for, property, defined in Subsections A (1) and (2) of this Act, and partially from or with other property, this Act shall apply to that amount which bears the same relationship to the total value, benefit, or expected return as the amount of the purchase price received or derived from the rents, issues, or income of, or in exchange for, such property, defined in Subsections A (1) and (2) of this Act, bears to the total purchase price or investment.

(I) The burden of establishing that any property owned by the spouses meets the requirements of, or is included in, the definitions contained in Subsections A (1), (2) or Section H, shall be upon the party seeking to avail himself of the provisions of this Act.

(J) Nothing contained in this Act shall be construed so as to prevent any married persons domiciled in this state from freely contracting with each other concerning any property, defined in Subsections A (1) and (2) of this Act, or any interest therein, or from altering their respective interests therein in such a manner as to create any other form of property ownership permitted under the laws of this state: *Provided,* that any severance or alteration, however accomplished, shall be accompanied by a written agreement, containing the terms thereof, which shall be signed by both spouses; and *Provided* further, that, if the severance or alteration affects title to any real estate situated in this state, the writing shall be executed with the formalities now required under the laws of this state for a conveyance of an interest in real estate, or the instrument of title shall contain a notation to the effect that there has been a severance or alteration.

(K) Nothing contained in this Act shall prevent a bona fide purchaser, or a holder of a mortgage, lien, or other security interest, from asserting and enforcing his right or interest in the property, defined in Subsections A (1) and (2) of this Act, provided that he purchased, extended credit, or secured a lien or other security interest without having knowledge or constructive notice of the fact that both spouses had an interest in the property.

## CONCLUSION

While the problem of tracing and isolating the community aspects of the original property is not eliminated by the suggested statute, the burden is placed upon the party seeking to avail himself of the benefits

to be derived from a community classification. Moreover, very little additional work will be thrust upon the courts as a result of its enactment, and any increase will be slight indeed, compared to a system by which subsequent transactions are presumed to produce a recharacterization. It also has the advantage of allowing the spouses to retain their old property interests to the greatest extent possible. At the same time, however, it does not require the continuation of the community interests indefinitely. The parties are permitted to effect a severance by the use of a written instrument, which prevents the unintentional loss of the community interests while giving them an opportunity to establish their intention to sever.

Perhaps one of the better features of the proposed statute is its flexibility: it can easily be modified to accord with the public policy of a particular state. For example, it contains an option to follow the existing method of succession or to establish an entirely new order. Second, the states may adopt the presumption, either rebuttable or conclusive, that the acquisition of new property, whether realty, personalty, or both, in some form of joint ownership with the right of survivorship, produces a severance or transmutation of the community aspects of the purchase price. Likewise, the domicile can place restrictions on the ability of the decedent to dispose of his or her entire share. Even if these changes are made, the overall effectiveness of the statute will not be unduly hampered.

The proposed statute makes no attempt to interfere with application of the law of the new domicile to property acquired with funds earned after the change of domicile. Migrant spouses and native domiciliaries are treated alike with respect to such property. The attorney in the common law state no longer will be forced to second-guess the courts. He can advise his clients with greater confidence, because the statute offers relatively clear answers to common questions regarding property brought from a community state.

Although for convenience the suggested statute is presented above as an entity, it would be preferable to have the various sections enacted along with or as part of previously existing law. For example, the part relating to succession and intestacy should be enacted as a portion of the probate code. This would place each provision in a familiar setting.

Finally, the proposed statute is not offered as the only possible solution. No claim is made that it even covers all of the potential problems. It is merely one approach. Whatever its merits or demerits, it will have served a valuable function if it stimulates an interest in the need for appropriate legislation.