Uniform Community Property Disposition at Death Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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Uniform Community Property Disposition at Death Act

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Uniform Community Property Disposition at Death Act

Prefatory Note

The Uniform Disposition of Community Property Rights at Death Act (UDCPRDA) was approved by the Uniform Law Commission in 1971. The UDCPRDA established a system for non-community property states to address the treatment of community property acquired by spouses before they moved from a community property state to a non-community property state. According to the UDCPRDA, its purpose was "to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their 'community' rights." Unif. Disp. Comm. Prop. Rights Death Act, Pref. Note, at 3 (1971). As of 2020, sixteen states had enacted the UDCPRDA. Five states enacted the UDCPRDA in the 1970s, shortly after its approval. Or. Rev. Stat. § 112.705; Hawaii Rev. Stat. § 510-21; Colo. Rev. Stat. Ann. § 15-20-101; Ky. Rev. Stat. § 391.210; Mich. Comp. L. Ann. § 557.261. Another eight estates enacted the UDCPRDA in the 1980s. N.C. Gen. Stat. § 31C-1; N.Y. Est. Powers & Trusts Law § 6-6.1; Ark. Code. Ann. § 28-12-101; Va. Code § 64.2-315; Alaska Stat. § 13.41.005; Wyo. Stat. § 2-7-720; Conn. Gen. Stat. Ann. § 45a-458; Mont. Code Ann. § 72-9-101. One state enacted it in the 1992, (Fla. Stat. Ann. § 732.216), and two states – Utah and Minnesota – enacted the UDCPRDA in 2012 and 2013, respectively. Utah Code § 75-2b-101; Minn. Stat. § 519A.01.

In its original form, the UDCPRDA offered substantial benefits for citizens in non-community property states that adopted the act, namely the recognition and protection of property rights acquired in a community property state in which citizens were formerly domiciled. Today, this is more important than ever, as Americans are more mobile than ever before. It is estimated that 7.5 million people moved from one state to another in 2016. *State-to-State Migration Flows: 2016*, *available at* https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html. Undoubtedly, a significant subset of that 7.5 million involves Americans moving from one of the nine community or marital property states to one of the forty-one non-community property states. As Americans migrate, the property previously acquired in a community property state "does not lose its character by virtue of a move to a common law state." *In re Marriage of Moore & Ferrie*, 18 Cal. Rptr. 2d 543 (Ct. App. 1993); *In re Kessler*, 203 N.E.2d 221 (Ohio 1964); *Commonwealth v. Terjen*, 90 S.E.2d 801 (Va. 1956). As some commentators have noted, "[O]nce [property] rights are fixed, they cannot be constitutionally changed during the lifetime of the owner merely by moving the personalty across one or more state lines, regardless of whether there is or is not a change of domiciles." William Q. De Funiak, *Conflict of Laws in the Community Property Field*, 7 ARIZ. L. REV. 50, 51 (1966). The Prefatory Note to the UDCPRDA observes that this is both a matter of policy "and probably a matter of constitutional law." Unif. Disp. Comm. Prop. Rights Death Act, Pref. Note (1971).

Under traditional conflict-of-laws principles, the result is the same: a move from a community property state to a non-community property state does not change the nature of the property. Sarah N. Welling, *The Uniform Disposition of Community Property at Death Act*, 65 KY. L. J. 541, 545 (1977). The Restatement (Second) of Conflict of Laws counsels that "[a] marital property interest in a chattel, or right embodied in a document, which has been acquired

by either or both of the spouses, is not affected by the mere removal of the chattel or document to a second state, whether or not this removal is accompanied by a change of domicile to the other state on the part of one or both of the spouses." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259 (1971). Nevertheless, the existing law in non-community property states is often uncertain. The UDCPRDA provided a relatively simple solution that served to clarify an otherwise murky area of law.

Since its original promulgation in 1971, however, many changes in the law of marital property and in estate planning practice have occurred. The rise of the popularity of nonprobate transfers and the recognition of same-sex marriage throughout the United State are just some of the significant changes in the law that could not have been foreseen or accounted for in the original UDCPRDA. Consequently, an update of the act is needed to accommodate these changes and others, as well as to reexamine some underlying policy choices made in the original act some fifty years ago.

This Uniform Community Property Disposition at Death Act (UCPDDA) revises and updates UDCPRDA. Like its predecessor, the UCPDDA preserves the community property character of property acquired by spouses while domiciled in a community property jurisdiction, even after their move to a non-community property state. Unlike its predecessor, however, the UCPDDA broadens the applicability of the act. The UCPDDA preserves some rights that spouses would have had in the community property jurisdiction for some reimbursement claims and for certain bad faith acts or acts of mismanagement of community property by a spouse, whereas the predecessor UDCPRDA "only define[d] the dispositive rights, at death, of a married person as to his interests at death in property" subject to the act.

In addition, the UCPDDA has the potential to benefit a larger number of individuals than the UDCPRDA, insofar as a greater number of states now allow for the creation of community property between spouses than at the time of the UDCPRDA. In addition to spouses in foreign civil law jurisdictions, spouses in Arizona, California, Guam, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and now Wisconsin can accumulate community property during marriage. Although Wisconsin classifies such property as "marital property," rather than "community property," such a terminological distinction should not serve as a barrier to the application of the UCPDDA to a spouse moving from Wisconsin to a non-community property state. *See, e.g.*, IRS Pub. 555 (treating Wisconsin "marital property" the same as "community property"). Furthermore, registered domestic partners in California, Nevada, and Washington may also now accumulate community property, and the UCPDDA would also apply to those relationships when a registered domestic partner moves to and dies in an adopting state. Finally, spouses in Alaska, Tennessee, Kentucky, South Dakota, and Florida may elect by agreement to acquire community property. When such an election is properly made, those spouses may also benefit from the application of the UCPDDA. Although the term "community property" is not defined in either the UDCPRDA or the UCPDDA, it can be broadly and generally explained as property created or acquired during marriage that is owned jointly and concurrently by the spouses from the time of its acquisition. The above jurisdictions all allow for the creation of community property, although others may be added to the list over time.

Summary of Act

Sections 1 and 2 provide the title of the act and definitions of terms used throughout the act. The term "community-property spouse" is defined in Section 2 to include both spouses and those in other relationships, such as registered domestic partnerships, under which community property may be acquired.

Section 3 sets forth the applicability of the UCPDDA and the property to which it applies, namely, only the community property acquired by community-property spouses while domiciled in a community property jurisdiction, as well as any rents, profits, appreciations, increases, or traceable mutations of that property. Once community-property spouses move to a non-community property state, their newly acquired marital property is governed by the law in that state, unless it is traceable to property that was community property or treated as such.

Section 3 also makes clear that if the community-property spouses have partitioned or reclassified their community property or waived rights under the act, the UCPDDA no longer applies to that property, as the community-property spouses themselves have ended the community property classification of the property and mutually allocated to each other separate property interests that were previously held as community.

Section 4 provides the required form for a partition, reclassification, or waiver, as the laws of a state adopting this act are not likely to provide rules outside of the act for such matters.

Section 5 assists courts and the parties in evidentiary matters of proof in applying the UCPDDA. Specifically, even if two community-property spouses are married under a community regime in a community property state, they may still acquire separate property that is owned individually and is not part of their community regime. Traditional "opt out" community property states generally impose a presumption that all property acquired by either spouse during the existence of their community is presumed to be community, unless a spouse can demonstrate to the contrary. Section 5 adopts the same type of rebuttable presumption, such that a party asserting the applicability of the act would need to prove only that the property was acquired while domiciled in a community property jurisdiction under a community property regime. It was thought that any other rule might make proof of application of the act too difficult, given the passage of time, the absence of records, and the fading of memories between the time when the property was originally acquired and the time of death of the decedent.

Section 6 is the heart of the act. It provides that upon the death of one community-property spouse, half the property to which the act applies belongs to the decedent and the other half to the surviving community-property spouse. This is the same result that would be achieved at the death of one community-property spouse in a community property jurisdiction.

Section 7 is new and has no analogue in the UDCPRDA. It expands the scope of the act to allow a court to recognize reimbursement rights and rights of redress for certain bad faith actions by one community-property spouse that might impair the rights of the other community-property spouse. One such example could be the unauthorized transfer of property during life or at death by means of a nonprobate transfer to the prejudice of the other community-property spouse. This section allows for a damage or equitable claim to be brought at the death of one community-property spouse by the other or by the community-property spouse's personal

representative, provided a community-property spouse's interest in property was prejudiced by the actions of the other community-property spouse.

Sections 8 and 9 provide limitation periods within which a party must act to preserve rights under the act. These sections recognize that the periods may differ depending upon whether a claim is brought in a probate proceeding or in a separate judicial proceeding asserting a right in or to property.

Section 10 protects third persons transacting in good faith and for value. Otherwise, third persons could be subject to claims under Section 7 if one community-property spouse had engaged in acts of bad faith management of community property while alive. Section 10 ensures that in most instances, a third person will be protected from these claims.

Sections 11 through 17 concern principles of law and equity, uniform application of the act, transitional and savings provisions, severability, repeal of inconsistent laws, and the effective date of the act. Notably, Section 14 makes the act applicable – within permissible constitutional limitations – to any judicial proceeding commenced after the effective date of the act, even to an individual who has moved from a community property jurisdiction and died before enactment of the act.

Uniform Community Property Disposition at Death Act

Section 1. Title

This [act] may be cited as the Uniform Community Property Disposition at Death Act.

Section 2. Definitions

In this [act]:

(1) "Community-property spouse" means an individual in a marriage or other relationship:

(A) under which community property could be acquired during the existence of the relationship; and

(B) that remains in existence at the time of death of either party to the relationship.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Jurisdiction" means the United States, a state, a foreign country, or a political subdivision of a foreign country.

(4) "Partition" means voluntarily divide property to which this [act] otherwise would apply.

(5) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(6) "Personal representative" includes an executor, administrator, successor personal representative, special administrator, and other person that performs substantially the same function.

(7) "Property" means anything that may be the subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein.

(8) "Reclassify" means change the characterization or treatment of community property to property owned separately by community-property spouses.

(9) "Record" means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(10) "Sign" means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound, or process.

(11) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

Comment

(1) *Community-property spouse*. The term "community-property spouse" is defined expansively to include not only married persons, of either sex, but also partners in other arrangements, such as domestic or registered partnerships, under which community property may be acquired. *See, e.g.*, Cal. Fam Code § 297.5 (stating that domestic partners "have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses"); Nev. Rev. Stat. § 122A.200(a)("Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses."); Wash. Rev. Code Ann. §26.16.030 ("Property … acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property."). The reason for employing a broad

definition in this act is not to expand or alter the definition of a spouse in an enacting state but rather to preserve the vested property rights of each person in a relationship that allowed for the acquisition of community property prior to moving to a non-community property state. The term "community-property spouse," may also encompass putative spouses and spouses under common law or informal marriages. The putative spouse doctrine is a remedial doctrine recognized in many states that allows a person in good faith to enjoy community property and other civil effects of marriage, despite not being a party to a legally valid marriage. *See, e.g.*, Model Marriage & Div. Act § 209. Although few, if any, community property states recognize common law marriage, Texas does recognize "informal marriages," and thus parties to such an arrangement could also be included in the definition of a "community-property spouse" under this act. *See, e.g.,* Tex. Fam. Code § 2.401. Although Washington law allows individuals in a "committed intimate relationship" to receive an equitable distribution of property upon the termination of the relationship, it is not the intent of this act to include such relationships within its ambit. Under Washington law, "committed intimate relationships" are given recognition under Washington courts' equitable power and are not treated as legal arrangements that give rise to a marriage relationship. *See, e.g.*, *Oliver v. Fowler*, 168 P.3d 348, 355 (Wash. 2007) ("Washington common law has evolved to look beyond how property is titled, requiring equitable distribution of property that would have been community property had the partners been married. But equity is limited; *only* jointly acquired property, but not separate property, can be equitably distributed.").

(2) *Electronic*. The definition of "electronic" is the standard Uniform Law Commission definition.

(3) *Jurisdiction*. The term "jurisdiction" is included in this act in order to ensure the applicability of this act to individuals who acquired community property in a foreign country. For example, if a couple were married in Cuba, a community property jurisdiction, and acquired stock while domiciled there but sold the stock after moving to Florida, a non-community jurisdiction, the widow of the community-property spouse in whose name the stock was registered would have a one-half interest in the property. *See, e.g., Quintana v. Ordono*, 195 So. 2d 577 (Dist. Ct. Fla. 3d Cir. 1967); *see also Estate of Bach*, 548 N.Y.S.2d 871 (Sur. Ct. 1989) (applying the New York version of the UDCPRDA to a decedent who died in New York in 1987, after having moved with his wife from Bolivia in 1957).

(4) *Partition*. The term "partition" is defined to mean a severance or division by community-property spouses of property that was community property or treated as community property. A partition may occur while the parties are domiciled in a community property state or after they move to a non-community property state. In the latter case, a partition can still occur irrespective of whether the property retains its community property character in the new state or is merely treated as community property for purposes of application of this act.

(5) *Person*. The definition of "person" is the standard Uniform Law Commission definition.

(6) *Personal representative*. The definition of "personal representative" is based upon a similar definition in the Uniform Probate Code. *See* Unif. Prob. Code § 1-201(35).

(7) *Property*. The definition of "property" is based upon a similar definition in the Uniform Trust Code. *See* Unif. Trust Code § 103(12).

(8) *Reclassify*. The definition of "reclassify" is necessary to recognize that community-property spouses may "transmute" or change the treatment of property from community to separate after they move from a community property jurisdiction to a non-community property jurisdiction. Although community property jurisdictions also have rules in effect for changing separate property to community property, such a change would be outside the scope of this act, which seeks only to maintain the treatment of community property acquired by community-property spouses after moving to a non-community property jurisdiction.

(9) *Record*. The definition of "record" is the standard Uniform Law Commission definition.

(10) *Sign*. The definition of "sign" is the standard Uniform Law Commission definition.

(11) *State*. The definition of "state" is the standard Uniform Law Commission definition.

Section 3. Included and Excluded Property

(a) Subject to subsection (b), this [act] applies to the following property of a community-property spouse, without regard to how the property is titled or held:

(1) if a decedent was domiciled in this state at the time of death:

(A) all or a proportionate part of each item of personal property, wherever located, that was community property under the law of the jurisdiction where the decedent or the surviving community-property spouse was domiciled when the property:

(i) was acquired; or

(ii) after acquisition, became community property;

(B) income, rent, profit, appreciation, or other increase derived from or traceable to property described in subparagraph (A); and

(C) personal property traceable to property described in subparagraph (A) or (B); and

(2) regardless whether a decedent was domiciled in this state at the time of death:

(A) all or a proportionate part of each item of real property located in this state traceable to community property or acquired with community property under the law of the jurisdiction where the decedent or the surviving community-property spouse was domiciled when the property:

(i) was acquired; or

(ii) after acquisition, became community property; and

(B) income, rent, profit, appreciation, or other increase, derived from or traceable to property described in subparagraph (A).

(b) If community-property spouses acquired community property by complying with the law of a jurisdiction that allows for creation of community property by transfer of property to a trust, this [act] applies to the property only to the extent the property is held in the trust or characterized as community property by the terms of the trust or the law of the jurisdiction under which the trust was created.

(c) This [act] does not apply to property that:

(1) community-property spouses have partitioned or reclassified; or

(2) is the subject of a waiver of rights granted by this [act].

Comment

This section makes the act applicable to community-property spouses who were formerly domiciled in a community property jurisdiction. The term "jurisdiction" is used, rather than the narrower term "state," to be clear that this act would apply to a community-property spouse who was domiciled in foreign jurisdictions where community property may be acquired. *See, e.g., Quintana v. Ordono*, 195 So. 2d 577 (Dist. Ct. Fla. 3d Cir. 1967); *see also Estate of Bach*, 548 N.Y.S.2d 871 (Sur. Ct. 1989). Moreover, this act is applicable whenever a community-property spouse was domiciled at any time in the past in a community property jurisdiction, has acquired property there, and has moved to another jurisdiction. Thus, if A and B were married in state X (a community property state) and acquired personal property there, but then moved to state Y (a non-community property state) prior to moving again to state Z (also a non-community property state) where they acquired real property before A eventually died, state Z should apply this act to the property acquired by A and B in state X and state Z.

Under subsection (a)(1)(A), this act applies to all personal property that was originally classified as community property by the state at the time at which it was acquired. The current location of the personal property is not relevant for application of this act. Thus, if A and B were married in state X (a community property state), acquired a car there, and eventually moved to state Z (a non-community property state) where A eventually died, then the car would be subject to this act, even if the car was left in storage in state Y.

Under subsection (a)(1)(B), this act applies to "income, rent, profit, appreciation, or other increase" derived from or traceable to community property under (a)(1)(A) after moving to a non-community property jurisdiction. In some community property jurisdictions, income from separate property is community property. Although not included in subsection (a)(1)(B), "income, rent, profit, appreciation, and other increase" from separate property in those states where such income is considered community property is included under subsection (a)(1)(A), as that property would be "community property under the law of the jurisdiction where the decedent or the surviving community-property spouse was domiciled" prior to moving to the non-community property state. In addition, subsection (a)(1)(A) applies to appreciations or other increases in separate property that result from community effort or expenditures of time, toil, or talent of a community-property spouse in community, provided that the appreciation or other increase would be characterized as community property by the relevant community property jurisdiction. *See, e.g.*, *Pereira v. Pereira*, 103 P. 488 (Cal. 1909). This result would not obtain, however, when a couple moves from one of the community property states where such an appreciation or other increase would not give rise to a community property interest in separate property but would instead give rise to a claim for reimbursement by one community-property spouse against the other. *See, e.g.*, *Jensen v. Jensen*, 665 S.W. 2d 107 (Tex. 1984); La. Civ. Code. art. 2368. Reimbursement claims of this nature are governed by Section 7 of this act rather than this section.

Subsection (a)(1)(B) includes "income," "rent," and "profit," from community property, as well as things produced from community property (i.e., appreciations and other increases), even if not technically revenue producing. Thus, if a $500,000 house were purchased completely with community funds and increased in value to $700,000 after the community-property spouses moved to a non-community property state, then the entire house, not merely $500,000 in value, is classified as community property. Upon sale of the house, the entire $700,000 in proceeds would be classified as community property and would be subject to this act. Similarly, crops produced from a community property farm and a foal produced from a horse that is owned as community property are also treated as community property.

Subsection (a)(1)(B) applies to "income, rent, profit, appreciation, or other increase" from community property produced after moving to a non-community property jurisdiction. Indeed, prior to a move, such a rule is unnecessary as all community property states already characterize "income, rent, profit, appreciation, or other increase" derived from community property as community property, and thus such "income, rent, profit, appreciation, or other increase" is already included under subsection (a)(1)(A). The rule in subsection (a)(1)(B), however, is necessary to be clear that even after community-property spouses move to a non-community property state, the "income, rent, profit, appreciation, or other increase" produced by community property acquired prior to the move is treated as community property after the move

to a non-community property state. Thus, interest produced from a community property savings account after A and B move from state X (a community property state) to state Z (a non-community property state) is still treated as community property, irrespective of the location of the account.

Under subsection (a)(2), this act adopts the traditional situs rule for real estate and is made applicable to all real estate located in a state where this act has been adopted, irrespective of whether the party to whom the act applies is domiciled in the enacting state. Thus, if A and B, while domiciled in a state X (a community property state) acquired real estate with community funds in state Y (a non-community property state), but then move to state Z (also a non-community property state) where A eventually died, then this act will apply to the real estate in state Y, assuming state Y has enacted this act. Whether or not state Z has enacted this act will be important in ascertaining how the personal property of A is distributed, but not in the disposition of the real estate located in state Y.

Similarly, if A and B while domiciled in state X (a community property state) acquired real estate with community property in state Y (a non-community property state that has not adopted this act) and in state Z (a non-community property state that has adopted this act) but then moved to state Q (a non-community property state that has not adopted this act) where A eventually died, then the real estate in state Z would be subject to this act, but the real estate in state Y would not be. Nevertheless, under the law of state Y, the former community property rights of the community-property spouses may be subject to a constructive or resulting trust under traditional equity and conflict-of-laws principles. *See, e.g., Quintana v. Ordono*, 195 So. 2d 577 (Fla. App. 1967); *Edwards v. Edwards*, 233 P. 477 (Okla. 1924); *Depas v. Mayo*, 11 Mo. 314 (1848)

Under both subsections (a)(1) and (a)(2), this act applies to "all or a proportionate part" of property that was acquired with community property. In other words, when an asset is acquired partly with community property and partly with separate property, at least some portion of the property should be characterized as community property. The issue of apportionment and commingling, however, is a complex one with many state variations applicable to different types of assets.

In some community property states, an "inception of title" theory is used, such that the characterization of the property is dependent upon the characterization of the right at the time of acquisition. For example, a house acquired in a credit sale before marriage would remain separate property under an "inception of title" theory even if the vast majority of the payments were made after marriage and with community funds. In this instance, the community would have a claim for reimbursement for the amount of funds expended for the separate property of the acquiring community-property spouse. Section 7 of this act accommodates reimbursement claims, if such a claim would be appropriate under the law of the relevant jurisdiction. In other jurisdictions, a "pro rata" approach is employed, which provides for a combination of community and separate ownership based in proportion to the payments contributed by either the community or the community-property spouses separately. The act accommodates this approach by not requiring an "all or nothing" classification of community property. Rather, the act is applicable when "all or the proportionate part" of property would be community property

according to the law of a jurisdiction in which the community-property spouse was formerly domiciled at the time of acquisition.

Even among states that employ a "pro rata" approach, there is considerable variation in how the apportionment is made. As the comments in the UDCPRDA stated, "Attempts at defining the various types of situations which could arise and the varying approaches which could be taken, depending upon the state, suggest that the matter simply be left to court decision as to what portion would, under applicable choice of law rules, be treated as community property." The UCPDDA follows the same approach. Thus, if A acquires $100,000 of life insurance, pays five of the monthly $1000 premiums from funds prior to marriage, pays ten of the premiums with community property after marrying B, and pays ten more premiums (before dying) from earnings acquired by B after A and B move to a non-community property state, then some portion of the life insurance policy should be considered community property, if the law of the community property state so treated it. This act leaves to the courts how the determination of the apportionment is to be made.

Under subsection (a)(1)(C), this act applies not only to property that was community property under the law of the community property state but also to any property that is traceable to property that was community property or treated as community property. Simply stated, property is "traceable" to community property if the property changes form without changing character. WILLIAM A. REPPY, CYNTHIA A. SAMUEL, AND SALLY BROWN RICHARDSON, COMMUNITY PROPERTY IN THE UNITED STATES 161 (8th ed. 2015) (quoting W. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 134 (1964)). By way of illustration, if after moving from state X (a community property state) to state Z (a non-community property state), A and B transfer money from a community property bank account opened in state X to a bank in their new domicile, state Z, then the bank account in state Z is subject to this act because it is traceable to community property. Similarly, if A and B are married in state X (a community property state), open a bank account there funded solely with community property and buy a car with that money after moving to state Y (a non-community property state), then the car would still be subject to this act because it is traceable to community property. The same result would obtain even if A and B moved again from state Y to state Z (another non-community property state) and exchanged their prior car for a new one in state Z. The new car would still be subject to this act because it is traceable to the community property originally acquired in state X.

Subsection (b) of this section applies to so-called "opt-in" states where community-property spouses can elect community property by establishing a community property trust. *See, e.g.*, Alaska Stat. § 34.77.100; Fla. Stat. § 736.1501; Ky. Rev. Stat. Ann. § 386.620; S.D. Codified Laws § 55-17-3; Tenn. Code Ann. § 35-17-101. The intent of this act is not to override the terms of a community property trust but rather to treat as community property only that property held in a community property trust or characterized as community property by the terms of the trust or the relevant state law. Different community property trust provisions and different state laws may offer different rules for what constitutes community property. Alaska law, for example, provides that "appreciation and income of property transferred to a community property trust is community property if declared in the trust to be community property." Alaska Stat. § 34.77.030(i). Most other community property trust statutes are silent on the treatment of income from community property. Kentucky law, however, provides that "[a]ll property owned

by a community property trust shall be considered community property," but "[w]hen property is distributed from a community property trust, it shall no longer constitute community property." Ky. Rev. Stat. Ann. § 386.622(7) & (8). The intent of this act is to apply only to the property held in trust or treated as community property by the law of the jurisdiction where the trust was created. Once it is ascertained what is characterized or treated as community property, then this act would apply to that property and to property traceable to it under subsection (a). It is notable, however, that Section 6 of this act generally does not govern the disposition on death of property that has been transferred by the decedent to the decedent's surviving community-property spouse by "nonprobate transfer instrument," which would include property transferred on death pursuant to the provisions of a community property trust.

At least one state allows for the acquisition of community property by spouses pursuant to an agreement, including an agreement that provides "that all property acquired by either or both spouses during the marriage is community property." Alaska Stat. §34.77.100. In such a case, subsection (a) of this section, rather than subsection (b), is applicable.

Subsection (c) of this section makes clear that this act does not apply in cases where community-property spouses have themselves divided former community property by means of a partition or when community-property spouses have changed the classification of their property from community to separate. Such a division or change in classification could occur either before or after the community-property spouses move from the community property jurisdiction to a non-community property jurisdiction. Similarly, this act does not apply to property as to which rights have been waived. Section 4 of this act prescribes the necessary form and procedures for partition, reclassification, or waiver of rights.

Section 4. Form of Partition, Reclassification, or Waiver

(a) Community-property spouses domiciled in this state may partition or reclassify property to which this [act] otherwise would apply. The partition or reclassification must be in a record signed by both community-property spouses.

(b) A community-property spouse domiciled in this state may waive a right granted by this [act] only by complying with the law of this state, including this state's choice-of-law rules, applicable to waiver of a spousal property right.

Comment

This section specifies the necessary form or procedure for a partition or reclassification of property or waiver of rights under the act once the community-property spouses have moved to the enacting state. This section requires that both community-property spouses sign a record agreeing to any partition or reclassification. Both the terms "sign" and "record" are defined in Section 2 of this act. In community property jurisdictions, the change or reclassification of

property acquired during marriage is known as "transmutation." As noted by scholars, "[t]he law in many community property states has moved toward requiring married couples to spell out their intentions regarding their property in writing." CHARLOTTE GOLDBERG, COMMUNITY PROPERTY 239 (2014). *See, e.g.*, Cal. Fam Code § 852(a) ("A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."); Idaho Code § 32-917 ("All contracts for marriage settlements must be in writing and executed and acknowledged or proved in like manner as conveyances of land are required to be exercised and acknowledged or proved."); *Hoskinson v. Hoskinson*, 80 P.3d 1049 (Idaho 2003).

For a waiver of rights under this act, the parties must comply with the standards for enforceability of a waiver of spousal property rights under the law of this state. *See, e.g.*, Unif. Prob. Code § 2-213. Under the law of many states, a waiver of spousal rights is governed by the Uniform Premarital Agreement Act (1983). Florida, for example, requires that such a waiver be "in writing and signed by both parties." Fla. Stat. § 61.079(3). More recently, the Uniform Law Commission has promulgated the Uniform Premarital and Marital Agreement Act (2012). Section 9 of that act requires, among other things, that a waiver not be involuntary or executed under duress, that a party have access to independent legal representation, and that a party have had adequate financial disclosure. Unif. Premarital & Marital Agr. Act § 9.

Failure to comply with the requirements of this section will preclude partition, reclassification, or waiver under this section but may give rise to an equitable claim under Section 7 of this act.

A mere unilateral act by a community-property spouse of holding property in a form, including a revocable trust, that has paid or has transferred property on death to a third person is not a partition of the property or an agreement waiving rights granted under this act. The mere taking of title to property that was previously acquired as community property in the form of a transfer-on-death deed does not operate as a partition, reclassification, or waiver. For example, if after moving from a community property state to a non-community property state, A retitles a community property bank account owned with B into a bank account in A's name exclusively with a pay-on-death designation to C, the retitling of former community property in the exclusive name of "A, pay-on-death, C" does not constitute a partition. For a partition or reclassification to occur, both community-property spouses must agree to the severance of their community property interests and comply with the necessary form requirements imposed by this section.

This section does not attempt to specify the requisite form or procedure for a partition prior to moving to the enacting state, which should be governed by the law of the community property state rather than this act. If parties have partitioned or reclassified previously acquired community property after moving to a non-community property state, this act would not apply to any such property owned by the decedent at death. The terms "partition" and "reclassify" are defined in Section 2 of this act. A waiver of rights granted by this act prior to moving to the non-community property state should be evaluated under the choice-of-law rules of the non-community property state.

Section 5. Community Property Presumption

All property acquired by a community-property spouse when domiciled in a jurisdiction where community property then could be acquired by the community-property spouse by operation of law is presumed to be community property. This presumption may be rebutted by a preponderance of the evidence.

Comment

This section applies to so-called "opt out" states that provide for the acquisition of community or marital property by operation of law and as an incident of marriage. Scholars have noted that in the nine "opt out" states, community or marital property is not created by contract, although community-property spouses can "opt out" by contract. Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It and Why Community Property Principles Benefit Women*, 11 U. MD. L.J. RACE RELIG. GENDER & CLASS 1 (2011) (One "characteristic of community property systems is that they arise by operation of law."). This section adopts a blanket presumption in favor of treating all property acquired by a community-property spouse while domiciled in a community property jurisdiction as community property, provided, of course, that the laws of the community property state allowed community property to "then … be acquired" by *that* person. In other words, the presumption applies only to those persons who could acquire community property under the laws of the relevant jurisdiction by virtue of marriage or similar relationship. The term "community-property spouse" is defined in section 2(1) and recognizes that in some jurisdictions domestic or registered partners may acquire community property. The presumption does not apply to non-community-property spouses or to those who have opted out of the community regime even if they acquire property while domiciled in a community property jurisdiction, as those individuals could not then acquire community property in that jurisdiction.

Although stated in various ways, the blanket presumption of this section is common in community property jurisdictions. *See, e.g*., N.M. Stat. Ann. § 40-3-12(A) ("Property acquired during marriage by either husband or wife, or both, is presumed to be community property."); Wisc. Stat. § 766.31(2) ("All property of spouse is presumed to be marital property."); Tex. Fam. Code § 3.003(a) ("Property possessed by either spouse during or on dissolution of marriage is presumed to be community property"); La. Civ. Code art. 2340 ("Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove they are separate property."); Cal. Fam. Code § 760; Model Marital Prop. Act. § 4(a) ("All property of spouses is marital property except that which is classified otherwise by this Act.").

Despite the above presumption, a party may prove that the relevant property was separate, even though acquired during the existence of a community regime, such as by demonstrating that the property was acquired by inheritance. Although different community property states provide different standards for rebutting the presumption of community property, this act adopts a preponderance standard for rebutting the presumption, as have a number of community property states. *See, e.g., Marriage of Ettefagh*, 59 Cal. Rptr. 3rd 419 (Cal. App.

2007); *Talbot v. Talbot*, 864 So. 2d 590 (La. 2003); *Brandt v. Brandt*, 427 N.W. 2d 126 (Wisc. App. 1988); *Sanchez v. Sanchez*, 748 P.2d 21 (N.M. App. 1987); *But see* Tex. Fam. Code § 3.003(b) ("The degree of proof necessary to establish that property is separate property is clear and convincing evidence."); *Reed v. Reed*, 44 P.3d 1108 (Idaho 2002) (requiring "reasonable certainty and particularity" to rebut the presumption).

Unlike Section 2(2) of the UDCPRDA, this act does not impose a presumption against the applicability of this act for property acquired in a non-community property state and held in a form that creates rights of survivorship. *See, e.g.*, *Trenk v. Soheili*, 273 Cal. Rptr. 3d 184 (Ct. App. 2020) (stating that "the manner in which a married couple holds title to real property is not sufficient in itself to rebut the statutory presumption that is community property"). Taking title to property in various forms is often a unilateral act that should not by itself serve as a presumption of partition of interests in a community asset. After all, a community-property spouse may move to a non-community property state and open a bank account with a pay-on-death designation to a friend or a sibling. Such an account should not be presumed to be excluded from the applicability of this act, as the relevant account may have been funded with community property acquired prior to the move. The ultimate treatment of the relevant account will depend upon whether it can be proved that the money in the account was traceable to community property.

Section 6. Disposition of Property at Death

(a) One-half of the property to which this [act] applies belongs to the surviving community-property spouse of a decedent and is not subject to disposition by the decedent at death.

(b) One-half of the property to which this [act] applies belongs to the decedent and is subject to disposition by the decedent at death.

Alternative A

(c) The property that belongs to the decedent under subsection (b) is not subject to the elective-share right of the surviving community-property spouse.

Alternative B

(c) For the purpose of calculating the augmented estate of the decedent and the elective-share right of the surviving community-property spouse:

(1) property under subsection (a) is deemed to be property of the surviving community-property spouse; and

(2) property under subsection (b) is deemed to be property of the decedent.

End of Alternatives

(d) [Except for the purpose of calculating the augmented estate of the decedent and the elective-share right of the surviving community-property spouse, this] [This] section does not apply to property transferred by right of survivorship or under a revocable trust or other nonprobate transfer.

(e) This section does not limit the right of a surviving community-property spouse to [insert statutory allowances].

(f) If at death a decedent purports to transfer to a third person property that, under this section, belongs to the surviving community-property spouse and transfers other property to the surviving community-property spouse, this section does not limit the authority of the court under other law of this state to require that the community-property spouse elect between retaining the property transferred to the community-property spouse or asserting rights under this [act].

Legislative Note: *A traditional elective-share state should adopt Alternative A and adopt the language beginning with "This" in subsection (d).*

An augmented-estate, elective-share state whose statute does not address rights in community property adequately should adopt Alternative B and adopt the language beginning with "Except" in subsection (d). In subsection (e), a state should insert the statutory reference to the applicable allowances, such as homestead, exempt property, or family.

Comment

Under subsection (a), at the death of one community-property spouse, one-half of the property to which this act applies belongs to the surviving community-property spouse. This is the universal approach of community property states. As a result, the decedent cannot dispose of the property belonging to the surviving community-property spouse by will or intestate succession. An attempt to do so would be ineffective.

If, however, the decedent disposes of property subject to this act by nonprobate transfer in favor of the third person, Section 7, rather than this section, applies. In other words, this act, like the law in community property states, provides that reimbursement or equitable claims may be available to a surviving community-property spouse when a decedent improperly alienates the interest of a community-property spouse by means of a nonprobate transfer. *See, e.g., T.L. James*

& Co. v. Montgomery, 332 So. 2d 834 (La. 1975).

Under subsection (b), at the death of one community-property spouse, one-half of the property to which this act applies belongs to the decedent. Again, this is the universal approach of community property states. As a result, the decedent can dispose of that property by any probate or nonprobate mechanism. Elective share rights that are common in non-community property states do not apply in community property states, at least not with respect to community property in those states. With respect to elective shares rights, however, there is great variation among non-community property states. In some states, a surviving community-property spouse's elective share rights are a fractional share (often 1/3) in the decedent's probate property. In such a case, states should elect Alternative A under subsection (c), which precludes further application of elective share rights in the decedent's property under this act. Other states, however, grant elective share rights in an "augmented estate," which is frequently composed of all the decedent's property, all the decedent's nonprobate transfers, and all the surviving community-property spouse's property and nonprobate transfers to others. *See* Unif. Prob. Code § 2-203. In those states, Alternative B under subsection (c) should be elected so that the both the property of the decedent and the surviving community-property spouse are considered part of the augmented estate, but then the surviving community-property spouse's portion of the property is credited in satisfaction of the surviving community-property spouse's elective share rights. *See, e.g.*, Unif. Prob. Code § 2-209(a)(2).

If the decedent dies intestate, then one-half of the property covered by this act is included in the decedent's intestate estate. The intestate law of most states would grant to the surviving community-property spouse a lump sum plus at least one half of the remainder of the decedent's property, which would be in addition to the one-half interest granted to the surviving community-property spouse in property to which this act applies.

By way of illustration of this section, assume A and B were formerly domiciled in state X (a community property jurisdiction) where all their property was community property and have subsequently moved to a state Y (a non-community property state that has adopted this act). Upon moving to state Y, A and B acquired a home in state Y, titled solely in B's name but with funds from the proceeds of the sale of the home in state X. A and B also acquired stock while domiciled in state X, but held it in safety deposit boxes located in states U and V (two other non-community property states). A and B also retained a summer house in state X, which they acquired while domiciled there and which was titled solely in B's name. A and B also acquired real property in state Z (a non-community property state that has not adopted this act) for investment purposes. Finally, B acquired bonds held in B's name issued by the company that employed B and acquired with earnings from B's job in state Y.

At B's death, the home in state Y and the stock located in states U and V would be property subject this act, and consequently, B would have the right under this section to dispose of half. The home retained in state X would be community property under the law of state X, but this act applies only to real property located in the adopting state. The investment property located in state Z would not be subject to this act because state Z has not adopted the act. Finally, the bonds held in B's name would not be subject to this act because they were acquired with property earned and acquired in state Y, a non-community property state.

Subsection (c) provides two alternatives. In states that grant a surviving community-property spouse an elective share only in the probate estate, this section excludes elective share rights in property subject to this act, as the surviving community-property spouse is already provided a one-half interest in the relevant property. In states that have adopted an augmented-estate approach to the elective share, this subsection makes clear that for purposes of calculating the augmented estate, one-half of the property assigned to the decedent is treated as the decedent's property and the other one-half is treated as the property of the surviving community-property spouse.

Subsection (d) provides that, with one exception, this section does not apply to any property transferred by means of a nonprobate transfer or a right of survivorship designation. For example, if property is transferred by the decedent to a third person by means of a nonprobate transfer, the surviving community-property spouse may pursue a claim under Section 7 of this act, rather than this section. Moreover, if the property is transferred to a surviving community-property spouse by the decedent, then the surviving community-property spouse should not have further rights to that property or claims against the decedent's estate by virtue of the transfer. The one exception is for purposes of ascertaining elective-share rights in those states that have adopted an augmented-estate approach to the elective share.

Under subsection (e), this act does not limit a surviving community-property spouse's claim for other statutory allowances, such as homestead allowances, allowances for exempt property, and family allowances. *See, e.g.*, Unif. Prob. Code §§ 2-402, 2-403, and 2-404.

Subsection (f) preserves the common law right of election, which provides that if the decedent disposes of the surviving community-property spouse's share of property under this act but transfers other property to the surviving community-property spouse, a court may require the surviving community-property spouse to make an equitable election to retain the disposition from the decedent or to assert rights under this act. In the words of one authority, "th[e] doctrine of election is a broad principle of equity, which holds that one who has acquired inconsistent rights from one or more sources, has his choice or election as to which he will take, but he cannot have both." W.S. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 11.6 (1982). In this context, "the principle [of election] requires that one who accepts a benefit conferred by a will[] must accept all the terms of a will so far as they concern him, renouncing any rights which he may have which are inconsistent with the will; or if he elects to stand on his rights which are inconsistent with those under the will, he thereby renounces his rights conferred by the will." *Id*. *See also* J. THOMAS OLDHAM, TEXAS MARITAL PROPERTY RIGHTS 481 (5th ed. 2011) ("If a spouse attempts to devise more than one-half of any item of community property, and the other spouse is devised something under the will, the spouse is put to an 'election' whether to take the benefits under the will (and to permit the devise of more than 50% of the item of community property), or whether to reject the benefit under the will and take 50% of each item of community property.").

Section 7. Other Remedies Available at Death

(a) At the death of a community-property spouse, the surviving community-property

spouse or a personal representative, heir, or nonprobate transferee of the decedent may assert a right based on an act of:

(1) the surviving community-property spouse or decedent during the marriage or other relationship under which community property then could be acquired; or

(2) the decedent that takes effect at the death of the decedent.

(b) In determining a right under subsection (a) and corresponding remedy, the court:

(1) shall apply equitable principles; and

(2) may consider the community property law of the jurisdiction where the decedent or surviving community-property spouse was domiciled when property was acquired or enhanced.

Comment

Subsection (a) confirms that comparable rights that would be available to protect a community-property spouse in a community property jurisdiction remain available at death in a non-community property state under this act. The term "community-property spouse" is defined in section 2(1) and recognizes that in some jurisdictions domestic or registered partners may acquire community property and thus should have remedies available to protect vested property rights under this section. It is not intended to grant rights to cohabitants or to individuals in relationships other than those in which community property could be acquired under the law of the state in which the community-property spouses are domiciled. Two rights often provided to community-property spouses by community property jurisdictions are rights of reimbursement and rights associated with monetary claims against a community-property spouse for marital waste, fraud, or bad faith management. These rights should be available to a community-property spouse without regard to whether the act of the other community-property spouse giving rise to the claim occurred in the community property jurisdiction, prior to a move, or in the non-community property jurisdiction, after a move. Furthermore, nonprobate transfers of community property to a third person without the consent of the surviving community-property spouse may also give rise to claims by the surviving community-property spouse under this section.

Claims for reimbursement are commonly available when community property has been used to satisfy a separate obligation or when separate property has been used to improve community property or vice versa, *see, e.g*., La. Civ. Code art. 2364, 2366, and 2367; Cal. Fam. Code § 2640; Tex. Fam. Code §§ 3.401-3.410. Different community property states calculate the amount of reimbursement differently. *See, e.g., Hiatt v. Hiatt*, 487 P.2d 1121 (Idaho 1971) (awarding reimbursement based upon the enhanced value of the property even if it exceeds the amount spent); *Portillo v. Shappie*, 636 P.2d 878 (N.M. 1981) (assessing reimbursement based

upon the enhanced value of the improved property even if it exceeds the amount of money expended); La. Civ. Code art. 2366 (providing for reimbursement based upon the amount expended); *Marriage of Sedlock*, 849 P.2d 1243 (Wash. App. 1993) (awarding reimbursement based upon the amount spent); Estate of *Kobyliski v. Hellstern*, 503 N.W.2d 369 (Wis. App. 1993) (assessing reimbursement based upon the greater of the amount spent or the value added). This section grants courts flexibility in assessing the amount of the reimbursement.

The rights granted by this section are operable at the death of an individual and may not be asserted during the existence of the marriage. This approach is consistent with the law of various community property jurisdictions. *See, e.g.*, La. Civ. Code art. 2358 ("A claim for reimbursement may be asserted only after termination of the community property regime, unless otherwise provided by law."). *But see* Model Marital Property Act § 15 (allowing claims for breach of the duty of good faith and for an accounting to be brought by spouses during an ongoing marriage). The relief sought under this section may, however, be for actions of a community-property spouse taken either during life or that take effect at death. For instance, during life, a community-property spouse may use community funds to augment a separate property asset. Moreover, a community-property spouse during the marriage may have inappropriately donated property to a third person. Similarly, at the death of the decedent, the decedent may have inappropriately transferred property belonging to the surviving community-property spouse to a third person by nonprobate transfer. Although community property states generally enforce such transfers, they correspondingly grant a right to claim damages, a right to recover the property, or a right to reimbursement by the surviving community-property spouse. Again, this section grants a court broad authority to craft legal or equitable remedies to protect a community-property spouse. Of course, the application of this section must yield when appropriate to federal law. *See, e.g.*, Employment Retirement Income Security Act, 29 U.S.C. § 1001 et seq.; *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding that ERISA preempted state community property law and remedies, even though the relevant ERISA-governed retirement plan was funded with community property).

Subsection (b) provides that a court in evaluating a claim under subsection (a) should apply "equitable principles" to craft rights and remedies and "may consider" the law of the community property jurisdiction where the decedent or the surviving community-property spouse was formerly domiciled at the time the property was acquired or enhanced in deciding what rights to recognize and what remedies to provide to a community-property spouse. A court, however, is not limited by this section to proceed only in the manner or exactly as the court in a community property jurisdiction would proceed. Often ascertaining the existence and scope of a right that could have been asserted in a community property jurisdiction is an exceedingly difficult task and could involve difficult investigations of the law of different states or foreign jurisdictions from years or even decades in the past. Such laws might not be readily available to or ascertainable by a court under this act, given barriers in publication and language. For example, ascertaining the nuances of French community property law for a couple that has moved from Paris to New York in the 1960s would be a daunting task indeed. Thus, subsection (b) is intended to provide flexibility to a court to consider the laws of the community property jurisdiction but not necessarily proceed as a court would in that jurisdiction.

Similarly, in ascertaining the remedies associated with the right under this section, a court

should look to but not be bound by the law of the community property jurisdiction. Even among community property jurisdictions, the remedies associated with various rights often vary significantly when one community-property spouse's interest has been unduly impaired by another community-property spouse with authority to manage or alienate community property. Although most instances of application of this section will involve monetary claims by one community-property spouse against another, this section does not limit a court's power to grant other equitable relief, which may involve recognition of rights against third persons to whom property has been transferred by one community-property spouse without authorization of the other.

Equitable doctrines, such as a "constructive trust," are common remedies used by courts to protect the interest of a spouse. In California, for example, a court may award a defrauded spouse a percentage interest or an amount equal to a percentage interest in any asset transferred in breach of a spouse's fiduciary duty. Cal. Fam. Code § 1101. In Texas, the doctrine of "fraud on the community" protects one spouse when the other wrongfully depletes community property through actual or constructive fraud by allowing a court to allocate other property to the defrauded spouse through any legal or equitable remedy necessary, including a money judgment or a constructive trust. *See, e.g.*, Tex. Fam. Code § 7.009; *see also Osuna v. Quintana*, 993 S.W.2d 201 (Tex. Ct. App. Corpus Christi 1999) ("The breach of a legal or equitable duty which violates the fiduciary relationship existing between spouses is termed 'fraud on the community,' a judicially created concept based on the theory of constructive fraud."). In Louisiana, a spouse may be awarded damages when the other spouse acted fraudulently or in bad faith. *See* La. Civ. Code art. 2354 ("A spouse is liable for any loss or damage caused by fraud or bad faith in the management of the community property."). In addition to damages and equitable relief, some community property states statutorily grant courts authority to add the name of a spouse to a community asset titled solely in the name of the other spouse in order to protect the interest of the previously unnamed spouse. *See, e.g*., Cal. Fam. Code § 1101 (c); Wisc. Stat. § 766.70(3). This section provides the court with broad authority to grant damages or to craft any other appropriate equitable remedy necessary to protect a community-property spouse. Available legal and equitable remedies available in courts of this state may not be co-extensive with the legal and equitable remedies available in the relevant community property jurisdiction.

Because the grant of authority to courts under subsection (b)(2) is a discretionary one, a higher court should review a trial court's application of this subsection only under an "abuse of discretion" standard.

This section must be read in conjunction with Section 10 of this act, which protects good faith transferees of property who give value. Thus, good faith transferees for value will be protected by Section 10 of this act, such that a community-property spouse's claim for bad faith management would solely be cognizable against the other community-property spouse. If, however, one community-property spouse improperly donates or transfers property to which this act applies to a third person who is not acting in good faith, equitable relief against a third person may, in the discretion of the court, be available to the community-property spouse whose rights are impaired. After all, improper gifts of community property by one community-property spouse are generally voidable as against a third person in community property jurisdictions. *See, e.g., Polk v. Polk*, 39 Cal. Rptr. 824 (Ct. App. 1964); Wisc. Stat. § 766.70; La. Civ. Code art.

2353; *Mezey v. Fioramonti*, 65 P.3d 980 (Ariz. App. 2003); Model Marital Property Act § 6(b).

Section 8. Right of Surviving Community-Property Spouse

(a) The surviving community-property spouse of the decedent may assert a claim for relief with respect to a right under this [act] in accordance with the following rules:

(1) In an action asserting a right in or to property, the surviving community-property spouse must:

(A) not later than [three years] after the death of the decedent, commence an action against an heir, devisee, or nonprobate transferee of the decedent that is in possession of the property; or

(B) not later than [six months] after appointment of the personal representative of the decedent, send a demand in a record to the personal representative.

(2) In an action other than an action under paragraph (1), the surviving community-property spouse must:

(A) not later than [six months] after appointment of the personal representative of the decedent, send a demand in a record to the personal representative; or

(B) if a personal representative is not appointed, commence the action not later than [three years] after the death of the decedent.

(b) Unless a timely demand is made under subsection (a)(1)(B) or (2)(A), the personal representative may distribute the assets of the decedent's estate without personal liability for a community-property spouse's claim under this [act].

Legislative Note: *A state should insert in subsection (a)(1)(A) and (2)(B) and Section 9(1)(A) and (2)(B) the time for asserting a claim to a nonprobate asset, probating a will, or challenging a revocable trust and in subsection (a)(1)(B) and (2)(A) and Section 9(1)(B) and (2)(A) the time for asserting a claim in a probate proceeding.*

Comment

The time periods suggested in this section are borrowed from other areas of law. Specifically, a six-month period is a typical period for a non-claim statute for creditors, and the three-year period is adapted from statutes of limitations on claims challenging revocable trusts and for actions against distributees of an estate. *See* Unif. Trust Code § 604; Unif. Prob. Code § 3-1006. This section fills a gap that existed in the UDCPRDA, which did not provide for specific statute of limitations periods for bringing claims under the act. Thus, courts were left to speculate as to what time periods applied. *See, e.g.*, *Johnson v. Townsend*, 259 So. 3d 851 (Fla. Ct. App. 2018) (holding that in the absence of a specific statute of limitations in the Florida version of the UDCPRDA, the general statute of limitation for asserting a claim or cause of action against the decedent applied).

Subsection (a)(1) of this section allows a surviving community-property spouse to protect rights in or to specific assets under this act and provides a statute of limitation for doing so. It provides time frames for a surviving community-property spouse to assert a right under this act either directly against an heir, devisee, or nonprobate transferee of the decedent who is in possession of property that belongs to the surviving community-property spouse under this act (see (a)(1)(A)) or in a probate proceeding by sending a demand to the court-appointed personal representative of the decedent (see (a)(1)(B)). For example, if after the death of B, B's community-property spouse, A, asserts a claim to personal property subject to this act that has been given by B in a will to C, then A, whose claim is an action in or to property, may assert that claim directly against C under subsection (a)(1)(A) or in the probate proceeding under subsection (a)(1)(B)). A surviving community-property spouse, however, is not foreclosed from pursuing the option in (a)(1)(A) if a claim under subsection (a)(1)(B) is first brought and is unsuccessful.

Subsection (a)(2) of this section provides a procedure and statute of limitation for all other claims of the surviving community-property spouse under this act that are not claims in or to specific assets. For example, if A's claim is one for reimbursement of community funds under Section 7, then A's claim is a claim as a creditor and not one in or to specific property. As a result, A would have to assert the claim under subsection (a)(2).

Subsection (b) allows the personal representative of the decedent to distribute assets of the decedent's estate without risk of personal liability if the surviving community-property spouse fails to make a timely demand under subsection (a)(1)(B) or (a)(2)(A).

Section 9. Right of Heir, Devisee, or Nonprobate Transferee

An heir, devisee, or nonprobate transferee of a deceased community-property spouse may assert a claim for relief with respect to a right under this [act] in accordance with the following rules:

(1) In an action asserting a right in or to property, the heir, devisee, or nonprobate transferee must:

(A) not later than [three years] after the death of the decedent, commence an action against the surviving community-property spouse of the decedent who is in possession of the property; or

(B) not later than [six months] after appointment of the personal representative of the decedent, send a demand in a record to the personal representative.

(2) In an action other than an action under paragraph (1), the heir, devisee, or nonprobate transferee must:

(A) not later than [six months] after the appointment of the personal representative of the decedent, send a demand in a record to the personal representative; or

(B) if a personal representative is not appointed, commence the action not later than [three years] after the death of the decedent.

Comment

The time periods suggested in this section are borrowed from other areas of law. Specifically, a six-month period is a typical period for a non-claim statute for creditors, and the three-year period is adapted from statutes of limitations on claims challenging revocable trusts and for actions against the distributees of an estate. *See* Unif. Trust Code § 604; Unif. Prob. Code § 3-1006. This section fills a gap that existed in the UDCPRDA, which did not provide for specific statute of limitations periods for bringing claims under the act. Thus, courts were left to speculate as to what time periods applied. *See, e.g.*, *Johnson v. Townsend*, 259 So. 3d 851 (Fla. Ct. App. 2018) (holding that in the absence of a specific statute of limitations in the Florida version of the UDCPRDA, the general statute of limitation for asserting a claim or cause of action against the decedent applied).

Paragraph (1)(A) of this section allows an heir, devisee, or nonprobate transferee of the decedent to protect rights in or to specific assets under this act and provides a statute of limitation for doing so. It provides time frames for an heir, devisee, or nonprobate transferee to assert a right under this act either directly against a surviving community-property spouse of the decedent who is in possession of property that belongs to an heir, devisee, or nonprobate transferee under this act (see (1)(A)) or in a probate proceeding by sending a demand to the court-appointed personal representative of the decedent (see (1)(B)). For example, if after the death of B, B's heir, C, asserts a claim to personal property subject to this act that is in the possession of A (B's community-property spouse), then C, whose claim is an action in or to property, may assert that claim directly against A under paragraph (1)(A) or in the probate

proceeding under paragraph (1)(B)). An heir, however, is not foreclosed from pursuing the option in (1)(A) if a claim under paragraph (1)(B) is first brought and is unsuccessful. Unlike in Section 8, the personal representative of the decedent has an obligation to attempt to ascertain whether the decedent has property rights that should be protected under this act, even if no claim is asserted by an heir, devisee, or nonprobate transferee. *See, e.g.*, Unif. Prob. Code §§ 3-703 (general duties) & 3-706 (duty to prepare an inventory).

Paragraph (2) of this section provides a procedure and statute of limitation for all other claims of an heir, devisee, or nonprobate transferee of the decedent under this act that are not claims in or to specific assets. For example, if C's claim is one for reimbursement of community funds under Section 7, then C's claim is a claim as a creditor and not one in or to specific property. As a result, C would have to assert the claim under paragraph (2).

Section 10. Protection of Third Person

(a) With respect to property to which this [act] applies, a person is not liable under this [act] to the extent the person:

(1) transacts in good faith and for value:

(A) with a community-property spouse; or

(B) after the death of the decedent, with a surviving community-property spouse, personal representative, heir, devisee, or nonprobate transferee of the decedent; and

(2) does not know or have reason to know that the other party to the transaction is exceeding or improperly exercising the party's authority.

(b) Good faith under subsection (a)(1) does not require the person to inquire into the extent or propriety of the exercise of authority by the other party to the transaction.

Comment

This section is based upon Section 1012 of the Uniform Trust Code. Like the Uniform Trust Code, this section does not define "good faith." It does, however, require that a third person be without knowledge or a reason to know that the other party to the transaction is acting without authority with respect to property to which this act applies. For a definition of knowledge, see Unif. Trust Code § 104. Moreover, this section provides that a person dealing with another party is not charged with a duty to inquire as to the extent or the propriety of the exercise of the purported power or authority of that party. This section, like the Uniform Trust Code, acknowledges that a definition of good faith that is consistent with a state's commercial statutes, such as Section 1-201 of the Uniform Commercial Code, would be consistent with the

purpose of this section. This section should be read in conjunction with Section 7 of this act, which provides that courts retain the ability at the death of one community-property spouse to grant equitable relief to the other for actions that have impaired rights granted by this act.

This section protects third persons in two different situations. First, during life, both community-property spouses may engage in a variety of transactions with third parties concerning the property to which this act applies. This section protects third persons who deal with either community-property spouse concerning property to which this act applies, provided the third person gives value, acts in good faith, and does not have knowledge or reason to know that the community-property spouse who is a party to the transaction is improperly exercising authority over the property. Although third persons in community property jurisdictions are ordinarily allowed to deal with a spouse who has apparent title concerning a martial asset during the existence of the marriage, no good reason could be found for protecting bad faith third persons with knowledge or reason to know of the commission of fraud on the rights of the other community-property spouse. For example, if A retitles community property belonging partly to B solely in A's name and sells it to C, C is protected from any claim by B with respect to the property, provided C gave value, acted in good faith, and did not know that A improperly transferred property belonging to B. To the extent B has a cognizable claim under Section 7 of this act, it will be solely against A, not C. On the other hand, if A donated a community asset to C, C would not be protected by this section, and B's claim under Section 7 of this act could be cognizable against A or C or both.

Second, this section also applies after the death of a decedent. Section 8 of this act provides relevant time periods within which a surviving community-property spouse may assert rights against a personal representative of the decedent, as well as heirs, devisees, or nonprobate transferees of the decedent. Similarly, Section 9 provides relevant time periods within which the heirs, devisees, or nonprobate transferees of the decedent may assert rights against the surviving community-property spouse or the personal representative of the decedent. This section protects third persons who transact with those relevant parties in possession of apparent title to property, provided the third person gives value, acts in good faith, and is without knowledge that the other party to the transaction is improperly exercising authority. For example, if after A's death, A's surviving community-property spouse, B, sells Blackacre, which is titled solely in B's name, to C, C will be protected from liability under this section, even if Blackacre was subject to this act because it was traceable to community property, provided, of course, C gave value, acted in good faith, and did not have knowledge or reason to know that B was exceeding his authority.

Section 11. Principles of Law and Equity

The principles of law and equity supplement this [act] except to the extent inconsistent with this [act].

Comment

This act is intended to provide a uniform process for recognition at death of community property rights acquired in another state. As a result, this act necessarily provides new rules for

recognition of rights and remedies that may be unconventional in non-community property states. The elaboration of such rules, however, is not intended to displace traditional common-law and equitable rights, remedies, and procedures that may be available in a non-community property state, except to the extent that they would be inconsistent with the provisions of this act. For example, care has been taken not to delineate an exhaustive list of legal or equitable remedies that a court may fashion in applying Section 7 of this act. Rather, Section 7 provides that a court shall employ general equitable principles available in the enacting state in evaluating a claim brought under that section. Similarly, Sections 8 and 9 provide limitation periods within which certain claims must be brought by a community-property spouse, heir, devisee, or nonprobate beneficiary of the decedent. Those sections, however, do not attempt to comprehensively catalogue all possible claims for relief that may be brought by those or other parties. For instance, this act does not provide for limitation periods for creditors of the decedent to assert claims and instead resorts to general principles of law and equity in the enacting jurisdiction.

Section 12. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Section 13. Saving Provision

If a right with respect to property to which this [act] applies is acquired, extinguished, or barred on the expiration of a limitation period that began to run under another statute before [the effective date of this [act]], that statute continues to apply to the right even if the statute has been repealed or superseded by this [act].

Section 14. Transitional Provision

Except as provided in Section 13, this [act] applies to a judicial proceeding with respect to property to which this [act] applies commenced on or after [the effective date of this [act]], regardless of the date of death of the decedent.

Comment

This act is intended to have the widest possible effect within constitutional limitations. Specifically, this act applies to the property of a decedent who dies before the enactment of this act. This act cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter vested property rights. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or

more liberal rule under this act. Nor is an act done before the effective date of this act affected by the act's enactment.

The language of this section is generally based upon Section 8-101 of the Uniform Probate Code and Section 1106 of the Uniform Trust Code.

[Section 15. Severability

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.*

[Section 16. Repeal; Conforming Amendments

[(a)]The [Uniform Disposition of Community Property Rights at Death Act] is repealed.]

[(b) . . .]

Legislative Note: *A state should repeal its existing Uniform Disposition of Community Property Rights at Death Act, or comparable legislation, to be replaced by this act.*

A state should examine its statutes to determine whether conforming amendments are required by provisions of this act.

Comment

This section repeals the adopting state's present Uniform Disposition of Community Property Rights at Death Act. The effective date of this section should be the same date selected by the state in Section 17 for the application of this act.

Section 17. Effective Date

This [act] takes effect . . .