UNIFORM MARITAL PROPERTY 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

ANNUAL CONFERENCE
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With Prefatory Note and Comments

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UNIFORM MARITAL PROPERTY ACT

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UNIFORM MARITAL PROPERTY ACT

Prefatory Note

> "The institution of property is the embodiment of accidents, events, and the wisdom of the past. It is before us as clay into which we can introduce the coloration and configuration representing our wisdom. How great, how useful this new ingredient may be will largely determine the future happiness, and perhaps the continued existence of our society."
> Powell, *The Law of Real Property* (Rohan, 4th ed. 1977).

Marriages have beginnings and endings. For their participants, the period between these points *is* the marriage. This Act is a property law. It functions to recognize the respective contributions made by men and women during a marriage. It discharges that function by raising those contributions to the level of defined, shared and enforceable property rights at the time the contributions are defined.

The challenge to create such a framework is not new. Basic differences in approaches to marital economics go back for many centuries. *See* Donahue, *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 Mich. L. Rev. 59 (1979); Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 Cornell L. Rev. 45 (1981). In modern times the challenge was well articulated twenty years ago by the Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women. In 1963 that Report said:

> Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind. Accordingly, the Committee concludes that during marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property. Such right should survive the marriage and be legally recognized in the event of its termination by annulment, divorce, or death. This policy should be appropriately implemented by legislation which would safeguard either spouse against improper alienation of property by the other.

In the twenty years after those words much has changed regarding the institution of marriage, even though the challenge has not been fully met.

A prime example is the very demography of marriage and its terminal events. In 1963,

66.31% of all terminated marriages ended by death and 33.69% by divorce. By 1979, only 42.77% terminated by death, while 57.23% ended by dissolution. For half a decade the ratio of marriages to dissolution has been about two to one. The latest figures were 2,438,000 marriages and 1,219,000 divorces in 1981. The two to one ratio contrasts with 1930, when there were six marriages to every dissolution.

Statistics are not the only evidence of dramatic change. Statehouses have reflected it. Beginning with California at the end of the 60's and promulgation of the Uniform Marriage and Divorce Act in the early 70's, no-fault divorce has swept the statute books. In 1983 Illinois and South Dakota stand alone in adhering to fault-based divorce, and efforts to change to no-fault continue in Illinois. "Equitable distribution" of property became the handmaiden of no-fault divorce in the Uniform Marriage and Divorce Act and in most other reforms. Forty-one traditional common law jurisdictions now use some form of *property division* as a principal means of resolving economic dilemmas on dissolution. Adding the eight community property jurisdictions in which such a division is an inherent aspect of spousal property rights yields a total of 49. The one state missing on the property division roster is Mississippi. These property division developments address and typically adopt sharing concepts and bring many common law jurisdictions close to a deferred community property approach to divorce. Cheadle, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. Rev. 1269 (1981); *see also* Younger, *op. cit., supra*.

The ferment of change has not been limited to dissolution. The Uniform Probate Code was promulgated in 1969. Fourteen states are now listed as Code states or substantially conforming states. Article II of the Code contains the concept of an augmented estate. It borrows heavily from New York's 1966 version of the idea. It is an advance on traditional forced-share procedures, operating by the creation of a larger universe of property against which a spousal right of election is exercisable. It accomplishes by penetrating the veil of title and other techniques which have developed to insulate assets from the reach of forced-share statutes. In the official comment to the Code the augmented estate provisions are described as preventing arrangements by the owner of wealth which would transmit property to others than a surviving spouse by means other than probate for the deliberate purpose of defeating the rights of a surviving spouse.

It is worth noting that the Code's provisions, as well as conventional forced-share provisions in common law states, leave a gap. They transform assets into a sharing mode in a meaningful way only when the "have-not" spouse survives. If the sequence of death is the opposite, the have-not spouse has no power to dispose of assets over which he or she has no title in any common law jurisdiction.

The long-arm augmented estate provisions of the Uniform Probate Code may not go far enough to accommodate the perception of most laymen. A significant empirical study published in 1978 indicates a widespread public preference for a distribution of an *entire* intestate estate to a surviving spouse, whether or not there are surviving children. Fellows, Simon and Rau, *Public*

Attitudes About Distribution At Death And Intestate Succession Laws In The United States, 1978 Am. B. Found. Research J. 319.

Obviously the "everything to each other" mode is confined to dispositions at death. An imposing body of case law testifies to a paradigm shift in this view when the question of "Who should get what and when" is asked at a dissolution! And it is the equitable distribution court's demanding role in the judicial process to monitor and referee the ensuing contests in the divorce courts. Burgeoning advance sheets clearly indicate just how difficult the referee's job is when it must be done well over a million times a year!

In 1981 yet another shift was added to the catalog of change. After years of debate, tax-free interspousal transfers entered the stage under the auspices of the Economic Recovery Act of 1981. *Wall Street Journal* columnist Vermont Royster furnished a characteristically succinct summary of it all:

> "The marriage ceremony may say you two are now one and even include that phrase about with all my worldly goods I thee endow. The Internal Revenue Service has always taken a different view. It's wanted its share. ... Wait until January 1, 1982, and ... after that magic date you can share with your spouse as much as you please of those worldly goods ... without so much as a by-your-leave from the federal tax man. In 1982 no more gift and estate taxes between spouses." Wall St. J., Sept. 2 1981.

Heavy economic responsibilities of married couples and methods of coping with them point to yet another trendline of the last few decades. It is that of the two-worker households in which sharing the burden of producing family income is becoming routine. In more than half of American marriages with two spouses present there is a working wife and the number is growing. When there are children, the ratio is even higher. In more than two-thirds of current upper income marriages ($24,000 or more) there are two wage earners. Sharing of responsibility for wages from *outside* the home is altering traditional spousal roles and particularly economic roles, rights and responsibilities.

Thus the stage is set by substantial social and legislative change in the duration of marriages and in the economics of the termination of marriages by dissolution and death.

The Uniform Marital Property Act makes its appearance on that stage to offer a means of establishing present shared property rights of spouses *during* the marriage. This approach is bottomed on two propositions. The first is creation of an immediate sharing mode of ownership. The second proposition is that the sharing mode during marriage is an ownership right already in existence at the end of a marriage. Thus recognition and perfection of shared and vested ownership rights in marital property are in place at divorce or death. They do not have to come to fruition as a result of a court-ordained and possibly adversary "division" or by a statutorily-sanctioned "transfer."

Is the Uniform Marital Property Act a panacea for the malaise of marriage? Will it lower the divorce rate? Save the family? Eliminate marital violence? Be fully comprehensible? Be welcomed by all? Lower the cost of the family house? Create better parents? Solve child abuse? Avoid probate? Lower the cost of death or divorce?

Perhaps some but certainly not all of the above. If it does affect any of those considerations, it will take time and the process will be subtle. The disintegrating forces operating on marriages and families are many and complex. It would be a bold claim to suggest that any legislation could fully identify and rectify the problems in such an area. But the obvious and apparent existence of problems in the economic area of marriage certainly justifies an effort to identify and rectify them. The Uniform Marital Property Act is precisely such an effort.

What are the root concepts?

FIRST: Property acquired during marriage by the effort of spouses is shared and is something the couple can truly style as "ours." Rather than an evanescent hope, the idea of sharing implicit in viewing property as "ours" becomes reality as a result of present, vested ownership right which each spouse has in all property acquired by the personal efforts of either during the marriage. That property is "marital property." (Section 4).

Except for its income, property brought into the marriage or acquired afterward by gift or devise is not marital but "individual property." Its *appreciation* remains individual property. However, the *income* of that property becomes marital property, so that *all* income of a couple is marital property. (Section 4).

Property already owned when the Act becomes effective or owned by couples moving into an adopting state will take on the characteristics of marital property only at death or marital dissolution and then only if it would have been marital property under the Act had the Act been in effect when and where the property was acquired. Prior to death or dissolution the Act ordains no change in the classification of property of a couple acquired at a time when the Act did not apply. (Sections 4(h), 17 and 18).

SECOND: The system which the Act creates to manage and control marital property accords a considerable measure of individual option. "Management and control" is a phrase of art in the Act. Basically management and control rights flow from the form in which title to property is held. If only one spouse holds property there is no requirement for the other spouse to participate in management and control functions. If both spouses hold property they must both participate in management and control unless the holding is in an alternative ("A *or* B") form. Couples can select their own options as they deem appropriate. (Sections 3, 5, 10 and 11). Management and control is different from ownership. Ownership rights are not lost by relinquishing or even neglecting management and control rights. In essence, the Act's management and control system is substantially similar to the existing procedures of title based management in common law states. (Section 5).

To guard against possible abuses by a spouse with sole title, a court can implement the addition of the name of the other spouse to marital property so that it is held, managed and controlled by both spouses. (Section 15).

The rule on gifts of marital property to third parties provides a safe harbor for smaller gifts. Unless aggregate gifts of marital property by one spouse to a third party in a calendar year are less than a specified dollar amount or are reasonable in amount with respect to the economic position of the spouses when made, both spouses must join in making the gift. A failure to procure that joinder renders the gift voidable at the option of the non-participating spouse. (Section 6).

THIRD: The varying patterns of today's marriages are accommodated by an opportunity to create custom systems by "marital property agreements." Full freedom to contract with respect to virtually all property matters is possible under the Act. By a marital property agreement a couple could opt out of the provisions of the Act in whole or in part. Conversely, they could opt in by agreeing that the Act's provisions will apply to all or a party of the property they own before they became subject to its terms.

As a protection and to ease matters of proof, the Act requires that marital property agreements be made in writing and signed by both spouses. (Section 10). Marital property agreements are enforceable without consideration.

FOURTH: On dissolution the structure of the Act as a *property statute* comes into full play. The Act takes the parties "to the door of the divorce court" only. It leaves to existing dissolution procedures in the several states the selection of the appropriate procedures for dividing property. On the other hand the Act has the function of confirming the *ownership* of property as the couple enters the process. Thus reallocation of property derived from the effort of both spouses during the marriage starts from a basis of the equal undivided ownership that the spouses share in their marital property. A given state's equitable distribution or other property division procedures could mean that the ownership will end that way, or that iw could be substantially altered, but that will depend on other applicable state law and judicial determinations. An analogous situation obtains at death, with the Act operating primarily as a property statute rather than a probate statute.

At divorce and death special provisions will apply to property of a couple acquired before the Act applied to that couple. If any of that property would have been marital property under the Act, had the Act been in effect when and where it was acquired, then such property will be treated as if it were marital property at divorce. Property of the deceased spouse having that characteristic will be treated in that manner at death. This represents a deferred approach to reclassification of the property of spouses which does not otherwise have the characteristics of marital property due to the time or place of its acquisition. The deferral is to the time of marital termination at divorce or death. Those are events at which states have long altered the classification of their citizens' property by equitable distribution provisions or by forced share

and augmented estate provisions. The Act builds on those established patterns already followed by the states by creating the deferred classification with respect to property owned by couples before the Act applied to them. A provision effecting automatic reclassification of such property with the passage of the Act would amount to retroactive legislation and would risk constitutional attack. *See* Irish, *A Common Law State Considers A Shift to Community Property*, 5 Community Prop. J. 227 (1978). On the other hand, the deferred approach of the Act operates only prospectively, tracking the procedure of the bulk of existing state legislation that prescribes forms of marital sharing effective only at divorce or death. (Sections 17 and 18).

FIFTH: Creditors may have claims that arise before marriage and after marriage. The premarital creditor is denied a bonanza by a marriage. (Section 8(b)(iii)). That creditor can only reach what would have been reached had there been no marriage. Postmarital obligations may subject both marital and individual property to claims. Obligations incurred by a spouse during marriage are presumed to be incurred in the interest of the marriage and the family and those obligations may be satisfied from all marital property and the other property of the incurring spouse. (Section 8(a) and (b)(ii)).

SIXTH: Bona fide purchasers of property for value are protected in their transactions with spouses by reliance on the manner in which property is held. They are under no duty to look "underneath" the manner of holding and are fully protected for not doing so. (Section 9).

In addition to those root concepts, a series of enabling provisions offer convenient support for the system. These include special methods of holding property, including a survivorship form of ownership (Section 11); dispositions by a probate avoidance feature in marital property agreements (Section 10(c)(6)); and remedies for disputes between the spouses affecting their property, including interspousal property accountings (Section 15). There are procedures to deal with marital and individual property which becomes intermixed. (Section 14). Special rules deal with complex property rights in life insurance and deferred employee benefits. (Sections 12 and 13). Conventional concurrent and survivorship forms may be used for marital property. (Section 11(d)). As an option for use in states that recognize tenancy by the entireties, existing tenancy by the entireties property continues to be available to perpetuate the creditor protection it affords (Section 19).

Some of the root concepts can be traced to the sharing ideal which is at the center of the historical community property approach. The fundamental principles that ownership of all of the economic rewards from the personal effort of each spouse during marriage is shared by the spouses in bested, present, and equal interest is the heart of the community property system. It is also the heart of the Uniform Marital Property Act. Common law states have been moving closer and closer to the sharing concept in both divorce and probate legislation, and the Uniform Marital Property Act builds on the direction of that movement. Sharing is seen as a system of elemental fairness and justice so that those who share in the many and diverse forms of work involved in establishing and maintaining a marriage will have a protected share in the material acquisitions of that marriage. The Act creates and protects that share without forcing a spouse to

await the completion of a gift from the other spouse or the garnering of proof of dollar-for-dollar contributions to the purchase price of assets acquired over the years of marriage. Under the Act, the sharing of property is recognized by creation of a present interest simultaneously with acquisition of property by effort during marriage. The interest is legally defined and enforceable. It permeates assets as they are acquired and continues to permeate them as they are invested and reinvested, as they are exchanged and transferred, and as they grow or diminish.

Such a law translates the emotional and perceived concept of "ours" into a verified legal reality. And while that parallels sharing under community property systems, the Act is more accurately characterized as a sui generis approach, and as one which utilizes equally useful ideas developed in common law jurisdictions, such as title based management and control. In addition, it is a response to the twenty-year long challenge of the President's Commission on the Status of Women issued in 1963 to face the reality that each spouse makes a different but equally important contribution in a marriage. Though drafted with an awareness of various community property statutes and cases, the Uniform Marital Property Act is not an image of any of them. It is a statute speaking to the realities and equities of marriages in America in the Eighties.

UNIFORM MARITAL PROPERTY ACT

§ 1. General Definitions

In this [Act]:

(1) "Acquire" in relation to property includes reduction of indebtedness on encumbered property and obtaining a lien on or security interest in property.

(2) "Appreciation" means a realized or unrealized increase in the value of property.

(3) "Decree" means a judgment or other order of a court.

(4) "Deferred employment benefit" means a benefit under a plan, fund, program, or other arrangement under which compensation or benefits from employment are expressly, or as a result of surrounding circumstances, deferred to a later date or the happening of a future event. Such an arrangement includes a pension, profit sharing, or stock-bonus plan; an employee stock-ownership or stock-purchase plan; a savings or thrift plan; an annuity plan; a qualified bond-purchase plan; a self-employed retirement plan; a simplified employee pension; and a deferred compensation agreement or plan. It does not include life, health, accident, or other insurance, or a plan, fund, program, or other arrangement providing benefits comparable to insurance benefits, except to the extent that benefits under the arrangement: (i) have a present value that is immediately realizable in cash at the option of the employee; (ii) constitute an unearned premium for the coverage; (iii) represent a right to compensation for loss of income during disability; or (iv) represent a right to payment of expenses incurred before time of valuation.

(5) "Determination date" means the last to occur of the following: (i) marriage; (ii) 12:01 a.m. on the date of establishment of a marital domicile in this State; or (iii) 12:01 a.m. on the effective date of this [Act].

(6) "Disposition at death" means transfer of property by will, intestate succession, nontestamentary transfer, or other means that take effect at the transferor's death.

(7) "Dissolution" means: (i) termination of a marriage by a decree of dissolution, divorce, annulment, or declaration of invalidity; or (ii) entry of a decree of legal separation or separate maintenance.

(8) "During marriage" means a period that begins at marriage and ends at dissolution or at the death of a spouse.

(9) Property is "held" by a person only if a document of title to the property is registered, recorded, or filed in a public office in the name of the person or a writing that customarily operates as a document of title to the type of property is issued for the property in the person's name.

(10) "Income" means wages, salaries, commissions, bonuses, gratuities, payments in kind, deferred employment benefits, proceeds, other than death benefits, of a health, accident, or disability insurance policy, or of a plan, fund, program, or other arrangement providing benefits comparable to those forms of insurance, other economic benefits having value which are attributable to the effort of a spouse, dividends, interest, income from trusts, and net rents and other net returns attributable to investment, rental, licensing, or other use of property, unless attributable to a return of capital or to appreciation.

(11) "Management and control" means the right to buy, sell, use, transfer, exchange,

abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, institute or defend a civil action regarding, or otherwise deal with, property as if it were property of an unmarried person.

(12) "Marital property agreement" means an agreement that complies with Section 10.

(13) A person has "notice" of a fact if the person has knowledge of it, receives a notification of it, or has reason to know that it exists from the facts and circumstances known to the person.

(14) "Presumption" or a "presumed" fact means the imposition on the person against whom the presumption or presumed fact is directed of the burden of proving that the nonexistence of the presumed condition or fact is more probable than its existence.

(15) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property.

(16) "Written consent" means a document signed by a person against whose interests it is sought to be enforced.

COMMENT

(1) The definition of "acquiring" assures the inclusion in the word of all transactions which increase dominion and control over assets. In a typical marital situation, payment on a mortgage will be an important means of building assets. The definition makes it clear that this is a means of acquisition.

(2) "Appreciation" has certain differential consequences, depending on whether it is from individual property or is created or enhanced by the effort of one spouse expended on individual property of the other spouse. The definition makes it clear that a specific realization, such as a sale, is *not* necessary for it to be a factor in marital property economics.

(4) The major provisions of the definition are derived from The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub.L. No. 93-406. In the Act the definition is

intended to cover and include plans of both private and public employers.

(5) The Act will apply to those couples now domiciled in an adopting state as well as those who move to one in the future. It will also apply to couples who marry in an adopting state after the Act is in effect. The definition of "determination date" creates a flexible formula to establish for individual couples in these three separate configurations the specific date as of which the Act is in effect with respect to their property. Use of 12:01 a.m. as the triggering incident of the determination date eliminates the necessity of referring throughout the Act to events occurring "*on or* after" the determination date.

(7) A legal separation or decree of separate maintenance is a dissolution. Specific authority to deal with the consequences of a legal separation is included as bracketed Subsection (4) of Section 17 for states in which this procedure is still in use. It is suggested that the term should remain in the definition even if this subsection is not enacted in order to deal with possible multi-state problems that could involve a state still using the procedure.

(8) The Act concerns the property of married persons. If a man and a woman are not married, the property they own is *not* marital property. It may have been marital property if their marriage has been dissolved, or if one of them is deceased, but on the occurrence of such an event it loses its classification as marital property. Consequently the term "during marriage" applies throughout the Act and describes a particular status. The period when certain property will be marital is during marriage and the Act's provisions addressed to "spouses" will apply then as well. Without marriage, a man and a woman are not spouses. When they are referred to as spouses, the connotation is that the event or relationship referred to takes place during marriage.

(9) The word "title" is often viewed as the equivalent of "ownership." In the Act the method of referring to property to which there is a typical and usual form of documentation of title is that of identifying it as being "held" by a person named in the documentation, since title is <u>not</u> synonymous with ownership in the Act. The concept of holding is used to avoid a continued reference to title and a construction that might encourage overlooking the separate legal status of title and ownership, which is a fundamental aspect of the Act. The result of the definition is that there will be some types of property that will not be held by either spouse. This is obviously true with respect to classic forms of bearer property without the Act, and the Act does not disturb that circumstance.

(10) Section 4 classifies all income earned or accrued during marriage and after the determination date from any source as marital property. The "income" definition is a broad one and is intended to cover all forms of income and earnings, but to exclude returns of capital and appreciation.

(11) Management and control issues are faced daily by partners and owners of various concurrent interest. They are solved daily as well. The management and control function is central to the Act, and the way in which the definition is applied is covered in Section 5.

(14) The presumption provisions are derived from Rule 301(a) of the Uniform Rules of Evidence.

(16) There are two types of writings that have special significance under the Act. One is a marital property agreement, fully described in Section 10. The other is the "written consent." This is a writing that states facts or consequences chargeable to and enforceable against a signatory. A written consent may have one or more signatories. It could be a conventional contract signed by two or more persons or it could be a simple memorandum of a type that would satisfy a statute of frauds requirement, signed by only one person. As an example, a creditor can relinquish a right to proceed against marital property by the terms of Section 8(d). This is accomplished by a written consent, and that would be a one-signatory document affirming the relinquishment. As additional examples, Section 12(c)(5) specifies that a written consent of one spouse permits relinquishment of rights in a life insurance policy, while in Section 12(c)(6) the written consents of both spouses are prerequisites to another method of dealing with life insurance.

§ 2. Responsibility Between Spouses

(a) Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. This obligation may not be varied by a marital property agreement.

(b) Management and control by a spouse of that spouse's property that is not marital property in a manner that limits, diminishes, or fails to produce income from that property does not violate subsection (a).

COMMENT

Spouses are not trustees or guarantors toward each other. Neither are they simple parties to a contract endeavoring to further their individual interests. The duty is between, and is one of good faith. A spouse is not bound always to succeed in matters involving marital property ventures, but while endeavoring to succeed in a venture, must proceed with an appropriate regard for the property interests of the other spouse and without taking unfair advantage of the other spouse. *See* Cal.Civ. Code § 5125(e) (Supp.1980) for a similar provision in use in that state. *See also* Reppy, *Community Property in California*, pp. 174-75, 177 (1980). This is one of four provisions in the Act that cannot be varied by a marital property agreement. (Section 10(c)).

Subsection (b) clarifies the right of a spouse to regulate the income stream of property of

that spouse that is not marital property without violating the Section . Since all income of that property during marriage and after the determination date is marital property, a question might arise regarding the application of Subsection (a) to the income stream. Subsection (b) resolves that question.

§ 3. Variation by Marital Property Agreement

Except as provided in Sections 2, 8(e), 9(c) and 10(b), a marital property agreement may vary the effect of this [Act].

COMMENT

This section is modeled on UCC Section 1-102(3). It is placed at this point in the chronology in the Act in order that its message be conveyed early and emphatically. The Act's property system applies if it is not changed. However, with four very limited exceptions (those of the good faith duty of Section 2, the protection of third parties under Sections 8(e) and 9(c), and the support of dependent children under Section 10(b)), there is freedom to change the Act by a marital property agreement. Thus a couple may opt-out, opt-in, or do both in part. Custom-tailored marital property regimes are possible. The Act permits a couple to move its marital economics from status to contract and encourages a type of interspousal contractual freedom little known in common law states. It is important to the operation of the Act that the significance of this section be carried through to the use and application of its various provisions. For example, it is clearly intended that contractual variance is possible with respect to Section 4 (classification generally), Section 5 (management and control), Section 12 (life insurance classification), Section 13 (classification of employee benefits), Section 17 (marital dissolution), and Section 18 (disposition at death), although these are only examples. The provisions of this Section and Section 10 should always be read as a part of every other provision of the Act.

§ 4. Classification of Property of Spouses

(a) All property of spouses is marital property except that which is classified otherwise by this [Act].

(b) All property of spouses is presumed to be marital property.

(c) Each spouse has a present undivided one-half interest in marital property.

(d) Income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property.

(e) Marital property transferred to a trust remains marital property.

(f) Property owned by a spouse at a marriage after the determination date is individual property.

(g) Property acquired by a spouse during marriage and after the determination date is individual property if acquired:

(1) by gift or a disposition at death made by a third person to the spouse and not to both spouses;

(2) in exchange for or with the proceeds of other individual property of the spouse;

(3) from appreciation of the spouse's individual property except to the extent that the appreciation is classified as marital property under Section 14;

(4) by a decree, marital property agreement, written consent, or reclassification under Section 7(b) designating it as the individual property of the spouse;

(5) as a recovery for damage to property under Section 15, except as specifically provided otherwise in a decree, marital property agreement, or written consent; or

(6) as a recovery for personal injury except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property.

(h) Except as provided otherwise in this [Act] the enactment of this [Act] does not alter the classification and ownership rights of property acquired before the determination date.

(i) Except as provided otherwise in this [Act] and to the extent it would affect the ownership rights of the spouse that existed in the property before the determination date, during marriage the interest of a spouse in property owned immediately before the determination date is

treated as if it were individual property.

COMMENT

The Section creates the heart of the Act. It contains a general presumption, a series of property rules, an income rule, classification rules, and transition rules.

Classification: "Classification" is an essential process in applying the Act. In classification the essential sorting process is taking place: What is a given item or aggregation of property? Marital property? Individual property? Property owner before the determination date which had a wholly different set of ownership incidents not established by the Act at all? All property has a classification-a generic and basic set of characteristics-and the process is devoted to establishing those precise characteristics and answering those questions. The most important parts of the answer depend on *source* and *time of acquisition*. Title is *not* an answer since title functions under the Act principally to establish management and control rights and the facilitation of third party transactions flowing from the exercise of management and control rights. Under the Act title does *not* function as a classification index. Reclassification is just what the word implies-it is a change in classification, generally from marital to individual or vice versa.

The General Presumption: The first building block in the Act's operation is the general presumption in Subsection (b). The bias of the presumption favors classifying spousal assets as marital property. Thus at the beginning of any process of classifying spousal assets, everything is presumed to be marital property. When there is adequate proof to overcome the general presumption, then the proof will prevail and classification will be otherwise. But the "easy way," when there are no records or proof, will result in the operation of the presumption and in the classification of all spousal property as marital.

The Present Interest: A second building block is the creation of a *present* equal undivided interest for each spouse. This is a distinct departure from existing versions of "marital property" arising out of equitable distribution developments in family law. Those family-law interests set forth in marital property definitions in equitable distribution statutes are delayed-action in nature and come to maturity only during the dissolution process. Marital property under the Act is created *as assets are acquired* by the spouses, whether from income from the effort of either spouse during marriage, as income attributable to passive or investment sources, or as appreciation of or in an exchange for or rollover of existing marital property. When the assets are acquired from such sources, the incidents and attributes of marital property, including the creation of a present legal interest, attach simultaneously with the acquisition. The assets so acquired are instantly classified or characterized as marital property. The classification persists until the marriage terminates by dissolution or death, or until occurrence of a "reclassification" by one or another of the methods provided in the Act.

The Income Rule: The third feature is an income rule, creating an easily comprehended system. By treating all income from any source as marital property, the Act affords a simple and understandable arrangement. In the majority of marriages, most income will be spent sooner or later. In those so affluent that this does not happen, the rule can either be followed or changed by marital property agreement. In the latter group of marriages, some extra record-keeping following an agreed bifurcation of income from marital and individual property should not pose an undue burden.

The income rule poses some "front-end" and "tail-end" problems. The "front-end" problem pertains to income received shortly after the determination date from effort or accrual of rights before the determination date. Actual ownership of such income became fixed before the determination date and it should not be and is not classified as marital property. This is handled by providing that income is marital only if "earned or accrued" after the determination date *and* during marriage.

With a disintegrating marriage in a state which has had the Act for a reasonable period of time, a cash basis or actual receipt rule at dissolution could give rise to significant abuses. This is the potential "tail-end" problem. Receipt of income under the management and the control of one spouse could be delayed voluntarily until the dissolution was complete, to the prejudice of the former spouse who was not in such a position of control. Hence the earned or accrued rule of the Act also addresses this problem. The accounting and classification problems of the accrual or constructive receipt system used in the Act to deal with the tail-end problem obviously could necessitate tracing activities, but the potential for manipulation and diversion with a cash basis rule is such that the difficulty is justified.

Transition to the Income Rule: There is an additional important element in the treatment of income. All property of couples already married when the Act becomes law in an adopting state has a set of characteristics not created by the Act. The Act has been drafted to avoid altering those characteristics during the on-going marriage as far as the *principal* of the pre-adoption property is concerned. However the income rule obviously affects post-adoption income, classifying it as marital property. Post-adopting income is just that. It is not principal, and it is received and regulated by the Act's provisions only when the claim of right to it occurs by virtue of its having been earned of accrued *after* adoption. Hence the Act's income rule is not retroactive.

Trusts: Marital property transferred to a trust remains marital property and does not become "something else" under Subsection (e). A marital property agreement could provide otherwise. The subsection's principal enabling function is to permit the creation of revocable living trusts by one or both spouses without any automatic reclassification of property committed to the trust. If the trust is created by both spouses, or if created by one and consented to by the other, it would itself be a sufficient written form of marital property agreement to effect any reclassification directed by its terms if the other requirements of Section 10 are met. A trust created by one spouse would necessarily be measured by the good faith provisions of Section 2.

The subsection would have no application to testamentary trusts, since marital property is the property of spouses. When a former spouse dies leaving a will that creates a trust, the property funding the trust can no longer be marital property. It could, and ordinarily would, be the decedent's share of *former* marital property.

Appreciation of Individual Property: Individual property definitions for post-determination date acquisitions are furnished in a listed format. In addition to such acquisitions by gift or inheritance, there are other obvious inclusions. One of special importance concerns *appreciation* of individual property. Assume that one spouse comes to a marriage subject to the Act as the owner of a valuable piece of real estate. It is individual property. If it quadruples in value, it is *still* individual property. While its income is marital property, the property itself *and* its appreciation in value is almost always individual property. One exception is the special rule announced in Section 14(b). That rule is concerned with the application to the individual property of one spouse of personal effort by the other spouse. It could apply in limited situations, but establishing it requires a very strong showing. Another possible exception could arise from mixing marital property with the individual property, also dealt with in Section 14. If the components of the mixed property can be traced, then no reclassification will occur. Monetary contributions to real estate acquisition or improvement are typically traceable, so that this form of reclassification regarding real estate should not be a frequent issue.

Donated Property: The rule treating property received by gift as individual property applies to gifts made to only one spouse. If a gift is made to both spouses, the donated property is marital property. This would apply to gifts to both in any form, including transfers to them as joint tenants, tenants in common, or in one of the title forms included in Section 11.

Effect on Existing Property: Subsection (h) states an important transitional rule. It can be assumed that in an adopting state one spouse might own property absolutely, and that a couple might also own property concurrently or as community property. The latter would be true of a couple which moved into an adopting state from one of the existing community property states as well as a couple in an adopting community property state. All of the property of a married couple in an adopting state on hand at the determination date would have a particular classification. Certain incidents would already have attached to the manner of ownership. Survivorship would be an incident of jointly held or entireties property. A tenancy in common would consist of undivided interests, with each interest subject to individual rights of disposition. Community property would have the incidents described in the *Uniform Disposition of Community Property Rights at Death Act*, and possibly others developed between the spouses by agreement. Trust interests would be regulated by governing instruments. The Act is *not* designed to alter these various incidents of ownership or to reclassify such property.

With minor exceptions, the arrival of the determination date for such a couple would neither reclassify any of their property as marital property nor as *any* type of property other than what it was prior to the determination date. The exceptions all operate on that property only *after* the determination date. They are limited and include only the "deferred marital property"

approach at dissolution and death set forth in Section 17 and 18, the income treatment set forth in Subsection (d), and the specific provisions of Subsection (i).

Note that Subsection (h) applies to property of *spouses* owned before the determination date. On the other hand Subsection (f) deals specifically with property owned *before marriage* by persons marrying in an adopting state after the Act is effective. It follows the traditional pattern of community property and dissolution-based marital property statutes in clearly classifying solely owned property owned before marriage as individual property effective with the marriage. Except for its income, individual property under the Act is analogous to solely owned property in a common law state or to separate property in an American community property state. Texas, Louisiana and Idaho separate property is even more kindred, since the income of separate property in those states is community property.

The "As If" Treatment: Subsection (i) is a statutory statement to identify pre-determination date property that is solely owned as functioning with a "fraternal twin" relationship to individual property under the Act. It is a transitional rule, stated as it is to avoid a direct substantive reclassification of pre-determination date property, but to clarify the functional treatment of it in applying the Act. It is important that it be read as the "as if" rule that it is, and not as a reclassification statute.

The exceptions in Subsection (i) are intended to avoid any interference with actual ownership incidents in property owned prior to the determination date. For example, community property owned prior to the determination date should not be treated functionally as individual property in applying the Act. On the other hand, tenancy in common property could function as if it were individual property under the Act's provisions with each owner's undivided interest being treated as though it were individual property. A tenancy in common of individual property of the respective spouses is possible under the Act.

Property "that is not marital property": There are references in the Act to property of a spouse ". . . that is not marital property . . ." (Sections 8(b) and 14(a)); property ". . . having any other classification . . ." (Section 14(a)); ". . . property of the designated owner of the policy . . ." (Section 12(c)(4)); ". . . all property then owned by the spouses . . . which would have been marital property . . ." (Section 17(1)); or ". . . all property then owned by the spouse . . . which would have been marital property . . ." (Section 18(a)). It is reasonable to ask why such references are not to *individual* property and to ask further whether the Act fractionalizes all property of spouses into marital *or* individual property. The explanation is part of the transition problem and is consonant with Subsection (b) and (i). Property in existence prior to adoption is *not* individual property, by definition, since the classification of individual property is a creation of the Act. Property in existence prior to adoption of the Act is whatever it is without the Act. Subsection (h) makes it clear that the Act does not go about reclassifying that property. Hence there will be a multitude of couples that will have property that is "something else" than marital property or the individual property established by the Act. That "something else" type of property is property of a spouse that ". . . is not marital property . . .," property ". . . having any

other classification . . ." and the like. Hence such descriptions are intentional in the reference they make to the "something else" or predetermination date property to which they point.

§ 5. Management and Control of Property of Spouses

(a) A spouse acting alone may manage and control:

(1) that spouse's property that is not marital property;

(2) except as provided in subsections (b) and (c), marital property held in that spouse's name alone or not held in the name of either spouse;

(3) a policy of insurance if that spouse is designated as the owner on the records of the issuer of it;

(4) the rights of an employee under an arrangement for deferred employment benefits that accrue as a result of that spouse's employment;

(5) a claim for relief vested in that spouse by other law; and

(6) marital property held in the names of both spouses in the alternative, including a manner of holding using the names of both spouses and the word "or".

(b) Spouses may manage and control marital property held in the names of both spouses other than in the alternative only if they act together.

(c) The right to manage and control marital property transferred to a trust is determined by the terms of the trust.

(d) The right to manage and control marital property does not determine the classification of property of the spouses and does not rebut the presumption of Section 4(b).

(e) The right to manage and control marital property permits gifts of that property only to the extent provided in Section 6.

(f) The right to manage and control any property of spouses acquired before the determination date is not affected by this [Act].

(g) A court may appoint a [conservator, guardian] to exercise a disabled spouse's right to manage and control marital property.

COMMENT

Title Based System: If Section 4 is the heart of the Act, then Section 5 and its management and control system is its aorta. Management and control is a title based system and to that extent will parallel the management and control rights which typically follow title in common law states. However, there is a very basic difference. While title is virtually synonymous with ownership in the common law system, it is perhaps best understood as a *nominee* relationship under the Act. Title can be viewed as something of a permeable membrane that presents one state of affairs to third parties while encompassing an ownership relationship between the spouses within that relationship which may well be different from the title-side of the membrane. To lawyers long attuned to common law concepts of the impermeable membrane view of title, the thrust is a new one. A fairly useful illustrative analogy is the fractionalization of title which occurs when a trust is created. A trustee has "legal title" (and management rights) while a beneficiary (usually undisclosed on legal title) has equitable and beneficial rights. Two sets of rights coexist, yet the outside world need deal only with the trustee as apparent owner, notwithstanding the beneficiary's completely valid, enforceable, coexisting, but usually undisclosed rights. In the marital property situation, the spouses as co-owners are analogous to the beneficiaries and a spouse as sole holder of marital property is analogous to the trustee as title holder. This comment is *not* intended to imply that marital property creates a trust, but simply to use an analogy to illustrate the coexisting relationships that are present in both situations.

Sole Management: Under Section 5 either spouse has sole management and control rights of a marital property asset which that spouse "holds" alone. No joinder for management and control functions would be required for that property. Holding is defined in Section 1(9) and that definition and this Section function together to treat conventional title as the method of determining holding.

Concurrent Holding: Management and control of concurrently held assets is dealt with specifically. The rights are related to the use of "and" or "or" in the title. If "and" is used in the concurrent title, *both* spouses manage and control, and joinder of both is required to discharge management and control functions. If "or" is used, it means what it says, and either spouse may manage and control the asset. Section 11(c) effectively applies the provisions on management and control of concurrent property not only to the special optional forms authorized by Section 11, but to conventional forms already in use in adopting states.

Bearer property and other property not "held" can be managed and controlled by either spouse, and no joinder is required. (Section 5(a)(2)). Section 5(a)(2) permits a spouse to manage and control property not held in the name of either spouse; this covers bearer property. The term "held" in Section 1(9) does not extend to bearer property, and the provisions of Section 5(a)(2) integrate with that by permitting one spouse to manage and control any marital property that does not come within the purview of the holding definition in section 1(9).

Special rules apply to insurance and employee benefits, and claims for relief. Insurance is managed and controlled by its owner. Employee benefits are managed and controlled by the employee on whose behalf they accrue. A claim for relief is managed and controlled by the spouse in whom the claim is vested by other law. (Section 5(a)(3), (4) and (5)).

§ 6. Gifts of Marital Property to Third Persons

(a) A spouse acting alone may give to a third person marital property that the spouse has the right to manage and control only if the value of the marital property given to the third person does not aggregate more than [$500] in a calendar year, or a larger amount if, when made, the gift is reasonable in amount considering the economic position of the spouses. Any other gift of marital property to a third person is subject to subsection (b) unless both spouses act together in making the gift.

(b) If a gift of marital property by a spouse does not comply with subsection (a), the other spouse may bring an action to recover the property or a compensatory judgment in place of the property, to the extent of the noncompliance. The other spouse may bring the action against the donating spouse, the recipient of the gift, or both. The action must be commenced within the earlier of one year after the other spouse has notice of the gift or 3 years after the gift. If the recovery occurs during marriage, it is marital property. If the recovery occurs after a dissolution or the death of either spouse, it is limited to one-half of the value of the gift and is individual property.

COMMENT

Since each spouse has a present undivided ownership in marital property, unrestricted gifts of marital property to a third person by one spouse of property managed and controlled by that spouse could defeat the interest of the other spouse in the donated property. Section 6 deals with gifts to third persons by spouses who have sole management and control rights. It has an absolute safe-harbor provision permitting gifts of a specified dollar amount per year to one individual. The amount is bracketed and should be set at any level determined to be appropriate in an adopting state. It also has a less objective test of reasonableness with reference to the economic position of the spouses when made. The section has teeth in the form of a right of recovery. The section is specific in authorizing a recovery of only the portion of the gift that exceeds the permissible limit, rather than the entire gift. If the gift was of a specific item, the alternative recovery of a compensatory judgment is available to avoid awkward fractionalized ownership of such an item after the recovery action.

§ 7. Property Transactions Between Spouses

(a) Restrictions on the power of spouses to enter into property transactions with each other are abolished.

(b) Spouses may reclassify their property by gift or marital property agreement.

§ 8. Obligations of Spouses

(a) An obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or the family.

(b) After the determination date:

(i) a spouse's obligation to satisfy a duty of support owed to the other spouse or to a child of the marriage may be satisfied only from all marital property and all other property of the obligated spouse that is not marital property;

(ii) an obligation incurred by a spouse in the interest of the marriage or the family may be satisfied only from all marital property and all other property of that spouse that is not

marital property;

(iii) an obligation incurred by a spouse before or during marriage that is attributable to an obligation arising before marriage or to an act or omission occurring before marriage may be satisfied only from property of that spouse that is not marital property and that part of marital property which would have been the property of that spouse, but for the marriage; and

(iv) any other obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, may be satisfied only from property of that spouse that is not marital property and that spouse's interest in marital property and in that order.

(c) This [Act] does not alter the relationship between spouses and their creditors with respect to any property or obligation in existence on the determination date.

(d) Provisions of a written consent signed by a creditor which diminish the rights of the creditor provided in this section are binding on the creditor.

(e) No provision of a marital property agreement adversely affects the interest of a creditor unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred. The effect of this subsection may not be varied by a marital property agreement.

(f) This [Act] does not affect the exemption of any property of spouses under other law.

COMMENT

Basic Doctrine: The section builds on a doctrine that has been developed and followed in Arizona, Louisiana and Washington. Ariz.Rev.Stat.Ann. § 25-215 (1956); La.Rev.Civ.Code Ann. art. 2360; Wash.Rev.Code Ann. § 26. 16.205 (1974). *See also* McClanahan, *Community Property Law in the United States*, § 10.4 (1982). The doctrine may be described as a "family

purpose" doctrine, and it concerns the obligations incurred during the marriage and establishes a bifurcation separating those obligations that have a relation to the marriage, or the family, or the community, from those obligations incurred for the purely personal purposes of an incurring spouse. The Louisiana statute uses the terms ". . . for the common interests of the spouses . . ." in its definition of obligations having a relation to the marriage. The obligation having a relation to the marriage is treated in the three states as a community obligation. Obligations for personal purposes are treated as those of the incurring spouse, and that spouse's separate property is available to satisfy them, along with the spouse's interest in community property. *See Cosper v. Valley Bank*, 28 Ariz. 373, 237 P. 175 (1925); *Garrett v. Shannon*, 13 Ariz.App. 332, 476 P.2d 538 (1970); *Beyer's v. Moore*, 45 Wash.2d 68, 272 P.2d 626 (1954).

The method used in the Act is to begin with a presumption. The same technique is used in Louisiana. La.Rev.Civ.Code Ann. art. 2361. An obligation incurred by a spouse during marriage is presumed to be incurred in the interest of the marriage or the family. The presumption specifically includes obligations arising out of an act or omission and thus covers the tort field. This is consistent with the development of the underlying family purpose doctrine. *See De Pinto v. Provident Security Life Ins. Co.*, 375 F.2d 50 (9th Cir. 1967); *McHenry v. Short*, 29 Wash.2d 263, 186 P.2d 900 (1947); *McFadden v. Watson*, 51 Ariz. 110, 74 P.2d 118 (1938); *Benson v. Bush*, 3 Wash.App. 815, 502 P.2d 1245 (1972).

With the presumption as a background, the section proceeds to establish four categories of obligations with which a couple may be involved, and to clarify what property is available to satisfy those different categories of obligations.

Support: All marital property and all other property of the obligated spouse is available to satisfy an obligation of support owed to the other spouse or a child of the marriage.

Family Purposes: Obligations falling within the presumption, being for the interest of the marriage, may be satisfied from all marital property and from the property of the incurring spouse that is not marital property. *See* Comment to Section 4 for discussion of "property that is not marital property."

Premarital Obligations: A premarital obligation or an obligation incurred during marriage but attributable to an act or omission before marriage is to be satisfied from the property of the incurring spouse that is not marital property and from the marital property that would have been the property of the incurring spouse but for the marriage. This latter quantum of property is different from a spouse's undivided half-interest in marital property. Assume a marriage with only one spouse earning wages and assume that that spouse had a premarital obligation for child support of a child of a prior marriage. The obligation could be satisfied from any property of the obligated spouse that was not marital property. It could also be satisfied from the wages or the savings from the wages earned during the marriage. If marriage had not occurred, the wages would have been the solely owned property of the obligated spouse. Thus Subsection (b)(iii) renders all of those wages available, even though the wages would typically have created marital

property. In the converse situation, if the obligation had been that of the spouse creating no wages, none of the employed spouse's wages, *nor any marital property created with them*, would be available for such an obligation. This prevents a windfall to the premarital creditor by a marriage, for no interest in marital property attributable to the effort of the new spouse of the obligated party becomes available to enhance the assets available to that creditor to satisfy a debt of the obligated spouse. The objective is that the marriage should be neutral as far as the premarital creditor is concerned, neither adding to nor detracting from the assets available for satisfaction of the claim.

All Other Obligations: Obligations not covered by the first three categories may be satisfied out of the property of the incurring spouse that is not marital property and from the interest of the incurring spouse in marital property. Subsection (b)(iv) specifically establishes the order of satisfaction by requiring that marital property should be reached after other property is exhausted. In this instance the marital property to be reached is the undivided one-half interest of the incurring spouse and is not the same as the property which the premarital creditor can reach. Under this fourth category would fall obligations incurred during marriage that were not incurred in the interest of the marriage or the family. *See de Elche v. Jacobsen*, 95 Wash.2d 237, 622 P.2d 835 (1980).

The provisions of the section can be altered if a creditor is willing to diminish the rights established by the section. For example, one spouse with substantial amounts of individual property might wish to limit the possible obligation of the other spouse, even though the purpose of the obligation was clearly in the interest of the marriage. That spouse could obtain a writing from a creditor under Subsection (d) which would accomplish this. In the absence of it, Subsection (b)(ii) would subject the interest of the nonincurring spouse in marital property to the obligation. *See* N.M.Stat.Ann. § 40-3-9A(4).

Marital Property Agreements: For purposes of a creditor's rights under the section, a marital property agreement may not redefine or reclassify marital property in a manner that has any adverse effect on the creditor unless the creditor had actual knowledge of the adverse provision when the credit was extended.

§ 9. Protection of Bona Fide Purchasers Dealing With Spouses

(a) In this section:

(1) "Bona fide purchaser" means a purchaser of property for value who: (i) has not knowingly been a party to fraud or illegality affecting the interest of the spouses or other parties to the transaction; (ii) does not have notice of an adverse claim by a spouse; and (iii) has acted in the transaction in good faith.

(2) "Purchase" means to acquire property by sale, lease, discount, negotiation, mortgage, pledge, or lien or otherwise to deal with property in a voluntary transaction other than a gift.

(3) A purchaser gives "value" for property acquired: (i) in return for a binding commitment to extend credit; (ii) as security for or in total or partial satisfaction of a pre-existing claim; (iii) by accepting delivery pursuant to a pre-existing contract for purchase; or (iv) generally, in return for any other consideration sufficient to support a simple contract.

(b) Notice of the existence of a marital property agreement, a marriage, or the termination of a marriage does not affect the status of a purchaser as a bona fide purchaser.

(c) Marital property purchased by a bona fide purchaser from a spouse having the right to manage and control the property under Section 5 is acquired free of any claim of the other spouse. The effect of this subsection may not be varied by a marital property agreement.

COMMENT

Third parties will deal with the spouse or spouses who manage and control, and that in turn depends on which spouse "holds" marital property. When one who satisfies the bona fide purchaser requirements deals with a spouse who has management and control rights under Section 5, the transaction is free from the claim of the other spouse. This section is one of three parts of the Act that cannot be altered by a marital property agreement. (Section 10(c)). Between the spouses, the section does not function to eliminate any claim, since it is addressed solely to the protection of bona fide purchasers. The definition of "purchase" follows UCC § 1-201(32). The effect of a marital property agreement on a creditor is discussed in the Comment to Section 8.

§ 10. Marital Property Agreement

(a) A marital property agreement must be a document signed by both spouses. It is enforceable without consideration.

(b) A marital property agreement may not adversely affect the right of a child to support.

(c) Except as provided in Sections 2, 8(e), and 9(c) and in subsection (b), in a marital property agreement spouses may agree with respect to:

(1) rights and obligations in any of their property whenever and wherever acquired or located;

(2) management and control of any of their property;

(3) disposition of any of their property on dissolution, death, or the occurrence or nonoccurrence of any other event;

(4) modification or elimination of spousal support;

(5) making a will, trust, or other arrangement to carry out the agreement;

(6) a provision that upon the death of either of them, any of their property, including after-acquired property, will pass without probate to a designated person, trust, or other entity by nontestamentary disposition;

(7) choice of law governing construction of the agreement; and

(8) any other matter affecting their property not in violation of public policy or a statute imposing a criminal penalty.

(d) A marital property agreement may be amended or revoked only by a later marital property agreement. The amended agreement or the revocation is enforceable without consideration.

(e) Persons intending to marry each other may enter into a marital property agreement as if married, but the agreement becomes effective only upon their marriage.

(f) A marital property agreement executed during marriage is not enforceable if the

spouse against whom enforcement is sought proves that:

(1) the agreement was unconscionable when made; or

(2) that spouse did not execute the agreement voluntarily; or

(3) before execution of the agreement, that spouse:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse;

(ii) did not voluntarily sign a written consent expressly waiving any right to disclosure of the property or financial obligations of the other spouse beyond the disclosure provided; and

(iii) did not have notice of the property or financial obligations of the other spouse.

(g) A marital property agreement executed before marriage is not enforceable if the spouse against whom enforcement is sought proves that:

(1) that spouse did not execute the agreement voluntarily; or

(2) the agreement was unconscionable when made and before execution of the agreement that spouse:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse;

(ii) did not voluntarily sign a written consent expressly waiving any right to disclosure of the property or financial obligations of the other spouse beyond the disclosure provided; and

(iii) did not have notice of the property or financial obligations of the other

spouse.

(h) An issue of unconscionability of a marital property agreement is for decision by the court as a matter of law.

(i) If a provision of a marital property agreement modifies or eliminates spousal support and that modification or elimination causes one spouse to be eligible for support under a program of public assistance at the time of dissolution, the court may require the other spouse to provide support to the extent necessary to avoid that eligibility, notwithstanding the terms of the agreement.

(j) A document signed before the effective date of this [Act] by spouses or unmarried persons who subsequently married each other which affects the property of either of them and is enforceable by either of them without reference to this [Act] is not affected by this [Act] except as provided otherwise in a marital property agreement made after the determination date.

COMMENT

The Act provides almost unlimited contractual freedom for persons who want to amend, avoid or adopt its provisions. This is codified in this section. An important characteristic of a marital property agreement is that it will usually be a postmarital agreement. On the other hand, a premarital agreement precedes the marriage by definition. Conceptually, the typical attitude toward a premarital agreement is that it will be changed infrequently after the marriage, if at all. On the other hand, the approach in this Act toward marital property agreements is that there may, and usually will, be many of them made at numerous times during a marriage. Section 10(e) specifically sanctions entry into a marital property agreement before marriage, but provides that it becomes effective only upon marriage of the parties to it. If they do not marry, the agreement would be a nullity.

Multiple Agreements: A number of separate and distinct marital property agreements might be in existence in a given marriage. In adopting states, spouses would be able to execute as many of these agreements as needed during their marriage. The policy announced by the section is that any arrangement that changes the application of the Act should be a marital property agreement. In turn it should conform with Section 10.

Scope: The specific group of matters which a marital property agreement can cover, set out in Subsection (c), is not exclusive. Paragraph 8 of the subsection extends the opportunity for contracting between spouses to any other matters not in violation of public policy or any statute imposing a criminal penalty.

Enforceability: There are two sets of provisions regarding enforceability. One is parallel to the *Uniform Premarital Agreements Act*. (Subsection (g)). These provisions apply to marital property agreements made before marriage. The second set of provisions applies to marital property agreements made after marriage. (Subsection (f)). The postmarital requirements elevate the test of "unconscionable when made" as a disqualifying factor. In the postmarital agreement an agreement may not be enforced against a spouse who proves that the agreement was unconscionable when made.

Although the Act sets forth a specific group of requirements for enforceability, they are not exclusive. Ordinary contract defenses not specifically ruled out by the Act (as lack of consideration is) remain available.

Dispositions At Death: Paragraph 6 of Subsection (c) contains provisions substantially similar to those in Washington law. Wash.Rev.Code Ann. § 26.16.120 (1974). These have been in effect in Washington since 1881, and they constitute a valuable and useful method of nonprobate disposition. The language in the Act contains after-acquired property provisions. It is intended to be used on an omnibus basis with respect to all property, or on a more limited basis with respect to a specified asset or group of assets. It constitutes a statutory authorization for a disposition other than one under the Statute of Wills. In that respect, it also follows certain of the policies announced in Section 6.201 of the *Uniform Probate Code*, although the latter is seen by many as being drafted to apply on an asset-by-asset basis rather than on the omnibus basis available in Subsection (c)(6). It should be noted that since the provisions of this type of agreement are incorporated in a marital property agreement, they may not be altered unilaterally. A discussion of the use of the agreements in Washington appears in Cross, *The Community Property Law of Washington*, 49 Wash.L.Rev. 729, 798, 805 (1974). A version of the arrangement in use in another state can be found in Idaho Code § 15-6-201 which incorporates the idea into Idaho's version of § 6.201 of the *Uniform Probate Code. See also* Bell, *Statutory Survivorship Contracts in the State of Washington*, 1 Community Prop.J. 239 (1974; Note, *The Community Property Agreement: A Probate Cure With Side Effects*, 18 Gonz.L.Rev. 121 (1983); Note, *A First Look at the Community Property Agreement in Idaho*, 12 Idaho L.Rev. 41 (1975).

No Consideration Required; Formalities: No consideration is required for a marital property agreement, and the agreement, amendments, and revocations of the agreement require the signature of *both* spouses. Subsection (d) relates to amendments and revocations and requires that these be by later marital property agreements. These would necessarily be documents signed by both spouses, since Subsection (a) requires that all marital property agreements be signed by both spouses.

Existing Agreements: Subsection (j) deals with a transitional problem. From the point of view of comprehensibility and ease of administration, it would be desirable to convert agreements relating to the subject matter of the Act to marital property agreements under the Act with the adoption of the Act. However, such legislation could be seen as impairing the obligation of those agreements and as retroactive, and it is therefore avoided. Thus a predetermination date agreement dealing with subject matter such as that in the Act will simply continue to stand on such authority as it had without the Act, and the Act neither helps nor hinders that agreement.

§ 11. Optional Forms of Holding Property, Including Use of "And" or "Or"; Survivorship Ownership

(a) Spouses may hold marital property in a form that designates the holders of it by the words "(name of one spouse) or (name of other spouse) as marital property." Marital property held in that form is subject to Section 5(a)(6).

(b) Spouses may hold marital property in a form that designates the holder of it by the words "(name of one spouse) and (name of other spouse) as marital property." Marital property held in that form is subject to Section 5(b).

(c) A spouse may hold individual property in a form that designates the holder of it by the words "(name of spouse) as individual property." Individual property held in that form is subject to Section 5(a)(1).

(d) Spouses may hold property in any other form permitted by law, including a concurrent form or a form that provides for survivorship ownership.

(e) If the words "survivorship marital property" are used instead of the words "marital property" in the form described in subsection (a) or (b), marital property so held is survivorship marital property. On the death of a spouse, the ownership rights of that spouse in survivorship marital property vest solely in the surviving spouse by nontestamentary disposition at death. The

first deceased spouse does not have a right of disposition at death of any interest in survivorship marital property. Holding marital property in a form described in subsection (a) or (b) does not alone establish survivorship ownership between the spouses with respect to the property held in that form.

COMMENT

Although the provisions of the Act do not require any particular form of labeling of title-documented property, that kind of labeling will be desirable in an adopting state. For a couple wishing to be specific and definite with respect to the classification of property, the labeling device provided by the section is a desirable provision for holding property.

Relationship to Management and Control: The section goes beyond mere labeling and provides specific confirmation of management and control rights with respect to types of labeling which are congruent with Section 5. Use of the Act's designation of property as marital property in a conjunctive or a disjunctive form will have different effects on management and control rights. The conjunctive ("and") form will require management and control by both spouses and joinder of both in transactions affecting the property. The disjunctive ("or") form permits management and control by either spouse without the necessity of joinder by the other.

Other Forms: Affirmative recognition of the ability to hold marital property in any form permitted by other law is provided by Subsection (d). This is consistent with the underlying difference under the Act between ownership and the integrated matters of title or holding and management and control.

Survivorship Ownership: An important substantive addition made by the section is a survivorship ownership feature. If the appropriate words described in the section are added to the designation by which the property is held, then survivorship ownership will follow that. If those words are not used, there is a specific statement that survivorship is not achieved by using the marital property form in either the conjunctive or the disjunctive form. It is important to note that survivorship marital property can be created with respect to marital property held in *either* the disjunctive form or the conjunctive form. This feature creates a wider option than would be afforded by limiting survivorship to the disjunctive form only. Management and control rights are unaffected by the addition of the survivorship language and relate back to the provisions in the last sentences of Subsections (a) and (b). The survivorship estate is not a form of joint tenancy but is a new statutory estate created by the section. It is not intended to carry on the arcane doctrines of joint tenancy but simply to establish a nonprobate survivorship incident by the utilization of the appropriate words on a document of title or other medium by which property is held. It is consistent with the policy of Section 10(c)(6) and Section 6.201 of the

Uniform Probate Code.

An adopting state will wish to review banking statutes dealing with concurrent ownership rights to assure appropriate recognition of the provisions of the section and coordination with existing provisions of banking statutes.

§ 12. Classification of Life Insurance Policies and Proceeds

(a) In this section:

(1) "Owner" means a person appearing on the records of the policy issuer as the person having the ownership interest or, if no person other than the insured appears on those records as a person having that interest, it means the insured.

(2) "Ownership interest" means the rights of an owner under a policy.

(3) "Policy" means an insurance policy insuring the life of a spouse and providing for payment of death benefits at the spouse's death.

(4) "Proceeds" means the death benefit from a policy and all other economic benefits from it, whether they accrue or become payable as a result of the death of an insured person or upon the occurrence or nonoccurrence of another event.

(b) If a policy issuer makes payments or takes actions in accordance with the policy and the issuer's records, the issuer is not liable because of those payments or actions unless, at the time of the payments or actions, it had actual knowledge of inconsistent provisions of a decree or marital property agreement or of an adverse claim by a spouse, former spouse, surviving spouse, or persons claiming under a deceased spouse's disposition at death.

(c) Except as provided in subsections (d), (e), and (f):

(1) The ownership interest and proceeds of a policy issued after the determination date which designates the insured as the owner are marital property without regard to the

classification of property used to pay premiums on the policy.

(2) The ownership interest and proceeds of a policy issued before the determination date which designates the insured as the owner are mixed property if a premium on the policy is paid from marital property after the determination date without regard to the classification of property used to pay premiums on that policy after the initial payment of a premium on it from marital property. The marital property component of the ownership interest and proceeds is the part resulting from multiplying the entire ownership interest and proceeds by a fraction of which the numerator is the period during marriage that the policy was in effect after the date on which a premium was paid from marital property and the denominator is the entire period the policy was in effect.

(3) The ownership interest and proceeds of a policy issued during marriage which designates the spouse of the insured as the owner are individual property of its owner without regard to the classification of property used to pay premiums on the policy.

(4) The ownership interest and proceeds of a policy that designates a person other than either of the spouses as the owner are not affected by this [Act] if no premium on the policy is paid from marital property after the determination date. If a premium on the policy is paid from marital property after the determination date, the ownership interest and proceeds of the policy are in part property of the designated owner of the policy and in part marital property of the spouses without regard to the classification of property used to pay premiums on that policy after the initial payment of a premium on it from marital property. The marital property component of the ownership interest and proceeds is the part resulting from multiplying the entire ownership interest and proceeds by a fraction of which the numerator is the period during

marriage that the policy was in effect after the date on which a premium was paid from marital property and the denominator is the entire period the policy was in effect.

(5) Written consent by a spouse to the designation of another person as the beneficiary of the proceeds of a policy is effective to relinquish that spouse's interest in the ownership interest and proceeds of the policy without regard to the classification of property used by a spouse or another to pay premiums on that policy. A designation by either spouse of a parent or child of either of the spouses as the beneficiary of the proceeds of a policy is presumed to have been made with the consent of the other spouse.

(6) Unless the spouses provide otherwise in a marital property agreement, designation of a trust as the beneficiary of the proceeds of a policy with a marital property component does not reclassify that component.

(d) This section does not affect a creditor's interest in the ownership interest or proceeds of a policy assigned or made payable to the creditor as security.

(e) The interest of a person as owner or beneficiary of a policy acquired under a decree or property settlement agreement incident to a prior marriage or parenthood is not marital property without regard to the classification of property used to pay premiums on that policy.

(f) This section does not affect the ownership interest or proceeds of a policy if neither spouse is designated as an owner in the policy or the records of the policy issuer and no marital property is used to pay a premium on the policy.

COMMENT

The section sets forth a series of rules regarding the classification of life insurance policies and the proceeds of them.

As with other provisions of the Act, it is important to review the section with an awareness that a marital property agreement can change its provisions.

Protected Parties: A series of definite rules operating on described objective facts protects certain parties to insurance policy transactions. The first protected party is the issuing insurance company. Subsection (b) relieves it from liability if it proceeds on the basis of the policy and its own records unless it has *actual knowledge* of other facts which would affect claims under the policy or those records.

The second protected party is a creditor to whom a policy is assigned or made payable. Subsection (d) provides that the section does not affect that creditor's interest in the policy, so that its provisions do not concern or impair the rights of the creditor.

The third protected party is a person who is an owner or beneficiary by virtue of provisions made in the dissolution of a prior marriage or as an incident to parenthood. In many dissolutions the maintenance of a life insurance policy for children of the marriage or for a former spouse is required. Subsection (e) accords to persons intended to be benefitted from that type of provision protection from the other provisions of the section.

Finally, Subsection (f) provides that if neither spouse is an owner of a policy and no marital property is used to pay a premium on the policy, the section will have no effect on the policy or its proceeds. Thus a typical business-based life insurance policy would ordinarily be unaffected by any provision of the section. Similarly, insurance owned and paid for by a child on the life of a parent would be unaffected by the section.

Carving out those four groups of protected persons leaves six separate situations with which the section deals.

The Basic Rule: The basic rule is found in Subsection (c)(1). If a policy is issued *after the determination date* and an insured spouse is the owner, it is a marital property policy, *without regard to the source of premium payments*. This situation is the typical garden-variety transaction in which one spouse is the owner of a policy on his or her life. The section offers a rule of comparative simplicity for that policy-it is marital property.

Straddles: The next situation dealt with is a "straddle." Subsection (c)(2) speaks of a policy that existed before the determination date which is owned by the insured and continues in force after the determination date. Payment of <u>any</u> premium on such a policy at any time *after* the determination date will operate as a reclassification of the policy ownership and proceeds. A formula is set forth in the section to establish the marital property component.

Spouse-Owned Insurance: Under Subsection (c)(3), the frequently used transaction of spouse-owned insurance is treated. The Act assumes that a designation of a spouse of an insured as an owner will typically be used if the parties desire that the non-insured spouse be the owner

for all purposes. The effect of the Act is to perfect that treatment. While the spouses could always agree to an alternative treatment, unless they do, a policy owned by one on the life of the other will be individual property of the owner without regard to the source of premium payments.

Third Person Ownership: A fourth situation, dealt with in Subsection (c)(4), concerns a policy owned by third persons with premiums paid from marital property. The "straddle" system and accompanying formula is used to deal with the ownership interest and proceeds. The straddle is again initiated by the first payment of a premium from marital property.

Parent or Child As Beneficiary: Subsection (c)(5) presents a means of relinquishing marital property interests in life insurance and contains a presumption that the designation by a spouse of a parent or a child of either spouse as a beneficiary is made with the consent of the other spouse.

Trust As Beneficiary: The marital property component of a policy retains that classification even if a trust is designated as a beneficiary under Subsection (c)(6). Consent of both spouses to another classification is possible to alter this result.

§ 13. Classification of Deferred Employment Benefits

(a) A deferred employment benefit attributable to employment of a spouse occurring after the determination date is marital property.

(b) A deferred employment benefit attributable to employment of a spouse occurring during marriage and partly before and partly after the determination date is mixed property. The marital property component of that mixed property is the part resulting from multiplying the entire benefit by a fraction of which the numerator is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator is the total period of the employment. Unless provided otherwise in a decree, marital property agreement, or written consent, valuation of a deferred employment benefit that is mixed property shall be made as of the death of a spouse or a dissolution.

(c) Ownership or disposition provisions of a deferred employment benefit which conflict with subsections (a) and (b) are ineffective between spouses, former spouses, or between a

surviving spouse and a person claiming under a deceased spouse's disposition at death.

(d) If an administrator of an arrangement for deferred employment benefits makes payments or takes actions in accordance with the arrangement and the administrator's records, the administrator is not liable because of those payments or actions unless, at the time of the payments or actions, it had actual knowledge of inconsistent provisions of a decree or marital property agreement or of an adverse claim by a spouse, former spouse, surviving spouse, or a person claiming under a deceased spouse's disposition at death.

COMMENT

This section deals with marital property rights in employment benefits. Its provisions may be varied by a marital property agreement.

Protection: As with the payment of life insurance proceeds under Section 12, Subsection (d) protects an entity which makes payments in accordance with the employee benefit plan and its own records. Unless it has actual knowledge that a decree or marital property agreement requires some other payment, or actual knowledge of an adverse claim by a spouse or surviving spouse, that entity has no liability even though its payments may be inconsistent with such rights or claims.

The Two Formats: The section deals with two situations. A deferred employment benefit attributable to employment *after* the determination date is marital property under Subsection (a). Such a benefit attributable to employment during marriage and *before and after* the determination date is subject to a formula which uses time periods.

The Array of Problems: There are many significant and important problems regarding employee benefits which the Act does not address specifically. As a property statute, the thrust of the Act is to treat an appropriate quantum of an employee benefit as marital property. From that point on, a court dealing with the matter will have before it the many other problems in the field. These include valuation problems, questions regarding the time at which an interest is to be quantified and delivered, questions relating to whether the plan is or is not in pay status, problems with respect to events affecting the plan which can occur with the passage of time, federal preemption problems, problems with respect to the claims of prior spouses, any many other problems that are now being heard on a daily basis in courts throughout the nation. *See* 3 *Equitable Distribution Rep.* 109 (Special Pension Issue, April 1983); McClanahan, *Community Property Law in the United States*, § 12.15 (1982); O'Neill, *Pensions As Marital Property:*

Valuation, Allocation and Related Mysteries. 16 Creighton L.Rev. 743 (1983); Campbell, *Pension Plan Benefits as an Asset in Dissolution-of-Marriage Cases*, 61 Taxes 583 (1983); *Kalinoski v. Kalinoski*, 9 Fam.L.Rep. 3033 (Pa.Ct. of Comm.Pl.1983). There is no consensus in the existing state of the law that justifies the formulation of more than the general policy in the section. Adopting states will already have dealt with many of these problems and the Act does not alter that case law, but simply operates to establish an appropriate marital property interest. The existing body of state case law may be applied to that property interest.

Some federal benefit programs, such as the Railroad Retirement Act (45 U.S.C. § 231 *et seq*.), preempt state definitions of property which include pension benefits in dissolution property settlements. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). *See also Fritz v. Railroad Retirement Board*, 449 U.S. 166 (1980). Where there is federal preemption former spouses may themselves qualify as independent beneficiaries. In the case of the Railroad Retirement Act, *see* 45 U.S.C. § 231a(c)(4) (divorced spouse annuity), and 45 U.S.C. § 231a(d)(1)(v) (surviving divorced wife). *See also* the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, reversing the United States Supreme Court decision in *McCarty v. McCarty*, 453 U.S. 210 (1981), and enacting into law a time period formula bearing some analogy to that used in the section. The preemption problem exists independently of the Act, and obviously cannot be solved by actual or proposed state legislation in any event. *See* Reppy and Samuels, *Community Property in the United States*, p. 396ff (1982).

§ 14. Mixed Property

(a) Except as provided otherwise in Sections 12 and 13, mixing marital property with property having any other classification reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced.

(b) Application by one spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity on individual property of the other spouse creates marital property attributable to that application if:

(i) reasonable compensation is not received for the application; and

(ii) substantial appreciation of the individual property of the other spouse results from the application.

COMMENT

Commingling of the assets of spouses is an everyday occurrence without the Act, and will continue with or without it. The Act supplies a rule to deal with it. Under that rule, mixing properties that cannot be identified or traced after the mixing will result in a reclassification. Since the general presumption of Section 4(b) operates to classify all spousal property as marital property, that will be the result in the absence of the ability to trace.

Tracing: The basic rule of Section 14 requires a tracing in order to "unmix" property. In turn the tracing would necessarily be done under the appropriate tracing rules of an adopting state. *See* McClanahan, *Community Property Law in the United States*, §§ 6.7 and 6.8 (1982) and Reppy and Samuels, *Community Property in the United States*, Chapter 10 (1982), for discussion of tracing principles. U.C.C. § 9-306 also supplies a version of tracing rules. The policy of the Act is to enhance the procedures and practices which create marital property. Consequently this section would have the effect of treating mixed property as marital property unless tracing was a possibility.

What of De Minimis Mixing? An obvious matter of concern is the possibility of serious injustice that could result from mixing a minimal amount of marital property with a substantial amount of other property. *See* Reppy and Samuels, *Community Property in the United States*, p. 128ff (1982). For example, one principal payment might be made from marital property on a large mortgage on a valuable piece of individual real property. This would mix marital and individual property. Another example might be one deposit of marital property to a very large individual bank account. However these types of transactions lend themselves to solution by an application of tracing, since the underlying types of property are very much record-oriented. Meeting the burden of proof in a tracing process from the records should usually be possible.

A more difficult case is that of fungible properties-a large stamp, coin or precious gem collection, for example. These will create the same types of problems that they already create when they are not in unified ownership. Commingling of fungible goods without being willing to sacrifice ownership is a highly dangerous practice and would remain so under the Act. In reality the spouse who stands to gain from a reclassification arising from a "tainting" of a large collection of fungibles with a small amount of marital property will have to carry the burden of proving that a mixing even occurred. In a sense that imposes the burden on that spouse to trace the marital property *into* the mixed property, which will be an effective though backward threshold method of tracing.

Commingled Accounts: Commingled accounts (such as bank accounts and mutual fund accounts to which continuing payments for new purchases are made) and increased value resulting from payments on liens on property are examples of types of mixed property which will undoubtedly occur and which will typically require solutions. Those problems and solutions for them already exist in dissolution and probate matters. The Act would necessarily build on the procedures for tracing that exist in an adopting state. In addition, accounts of that type are frequently accompanied by normal and routine documentation and records which would ease the tracing process.

One rather common mixing process will undoubtedly occur. Many bank accounts, mutual fund accounts and common-stock dividend reinvestment programs provide automatic reinvestment of dividends and interest. Under the Act, income is marital property. Hence the automatic reinvestment of income will be a mixing of marital property with other property if the accounts or common stock are not already marital property. Under the section this will reclassify the accounts or common stock to marital property absent tracing. Spouses wishing to avoid this result could avoid automatic reinvestment of dividends or interest in such programs or could create an individual property classification for the reinvested income by a marital property agreement.

Physical Labor: The section deals with another extremely important issue. It is the situation arising from the application to the individual property of one spouse of personal effort by the other spouse and carrying the burden of proving its elements will be difficult. The rule of the section is strict. It articulates a bias against creation of marital property from such an act unless the effort has been substantial and has been responsible for substantial appreciation. Routine, normal, and usual effort is not substantial. Though drawing a precise line as to what is substantial and what is not is not possible, the section does not create opportunity to translate for recognizing minimal effort to a property interest. The section is only satisfied by proof of (1) a truly substantial effort followed by (2) a truly substantial appreciation *attributable to the effort* for which (3) no reasonable compensation was received. Many situations can be visualized. Real property transactions are those in which the problem will typically occur. One spouse will bring real property into the marriage. After the marriage, that real property will be an important element in the economic life of the couple. The other spouse will improve it by physical labor. This might be work on a farm, or improvements or additions to a home or to a piece of commercial real estate. The statute operates to avoid the creation of marital property if reasonable compensation for the effort was paid at the time that it occurred. If the compensation was nominal or nonexistent, then the provisions of the section still require a showing that the effort was substantial and that substantial appreciation resulted from it. Otherwise there can be no quantification of the marital property created by the effort and the spouse expending the effort will simply have done so without anything demonstrable to show for it.

What is the Laborer's Right? Section 14(b) provides that the physical labor creates *marital property* when it is applicable. That would mean that the right of the spouse who created the marital property is to an interest in the asset, and not to a right of reimbursement or a lien for a specific amount. As the marital property component rises and falls in value, the interest rises and falls.

Burden of Proof: Many mixing problems that might otherwise exist will be resolved by burden of proof requirements. A spouse claiming a particular classification for an asset contrary to the general presumption of Section 4(b) will have the burden of proof on that claim, and failure to meet it would render any mixing issue moot. In particular meeting the burden of proof should be helpful in the *de minimus* mixing situations, since proving mixing, even of small amounts, is itself a form of tracing.

§ 15. Interspousal Remedies

(a) A spouse has a claim against the other spouse for breach of the duty of good faith imposed by Section 2 resulting in damage to the claimant spouse's present undivided one-half interest in marital property.

(b) A court may order an accounting of the property and obligations of the spouses and may determine rights of ownership in, beneficial enjoyment of, or access to, marital property and the classification of all property of the spouses.

(c) A court may order that the name of a spouse be added to marital property held in the name of the other spouse alone, except with respect to:

(1) a partnership interest held by the other spouse as a general partner;

(2) an interest in a professional corporation, professional association, or similar entity held by the other spouse as a stockholder or member;

(3) an asset of an unincorporated business if the other spouse is the only spouse involved in operating or managing the business; or

(4) any other property if the addition would adversely affect the rights of a third person.

(d) Except as provided otherwise in Section 6(b), a spouse must commence an action against the other spouse under subsection (a) not later than 3 years after acquiring actual knowledge of the facts giving rise to the claim.

COMMENT

The section will create a change in the law of those states which prohibit litigation between spouses regarding property rights during an ongoing marriage. Since the Act creates

respective vested interests in marital property while still permitting individual management and control of that property, there is an obvious possibility that management and control rights could be exercised in a way that damages or eliminates the interest of the spouse who does not hold the property. This section creates a remedy for this type of conduct. An important purpose of the section is creation of a remedy for a violation of the good faith responsibility between spouses required by Section 2. *See* McClanahan, *Community Property Law in the United States*, § 9.12 (1982); Reppy and Samuels, *Community Property in the United States*, p. 243 ff (1982); Comment, *California's New Community Property Law-Its Effect On Interspousal Mismanagement Litigation*, 5 Pac.L.J. 723 (1974). It also affords a remedy for violations of specific provisions contained throughout the Act. However, it is not intended to reverse interspousal immunity beyond its terms unless an adopting state should choose to do so. Note that Section 6, dealing with gifts, also creates rights for one spouse to proceed against the other spouse. Those rights are in addition to the provisions of this section.

The Basis: The rationale of the section is well explained in De Funiak and Vaughn, *Principles of Community Property*, § 151 (1971). There it is pointed out that in community property jurisdictions

> ". . . it must follow as a logical result that each is entitled to protect or enforce against the other his or her rights in the common property or to enforce or protect as against the other his or her rights in separate property, even by civil action. . . . the common law fiction that husband and wife are one person, so that one cannot sue the other during coverture, is alien to the community property system's view of the spouses as individuals in their own right . . . if this right to sue did not exist, one spouse, especially if the title to the property were in his or her name, might be enabled to appropriate community property to his or her own use or otherwise deny or injure the rights therein of the other spouse without the other spouse having any remedy whereby to defeat such conduct."

Accounting: The accounting remedy contemplated is a form of balancing of the property rights between the spouses. It is not intended that such an accounting would be the classic fiduciary accounting in either style or substance. In particular, it is not intended that such an accounting should prevent the balancing of losses and gains or that it should charge one spouse with losses while not crediting gains. Rather, the accounting would simply establish what is marital property and what is not. If an "unmixing" under Section 14 was appropriate, that would be accomplished in the accounting. In addition to the accounting, the rights of the spouses by way of ownership or beneficial enjoyment of or access to marital property or other property is a contemplated form of relief under the Act. The remedy could well include some form of separation of property if needed to protect the ownership or beneficial enjoyment of the spouses in any of their property. *See* Reppy and Samuels, *Community Property in the United States*, p. 247 ff (1982).

"*Add-A-Name*": One of the ways in which a spouse's interest could be injured would

follow utilization of a one-spouse method of holding property and management or disposition of that property to the prejudice of the other spouse. In order to prevent this, the section has a specific provision for adding the name of a spouse to the form in which marital property is held. However, this procedure has certain safeguards and prohibitions. The "add-a-name" function cannot occur with respect to general partnership interests, professional entities, unincorporated businesses operated by the other spouse, or other property if a third party's interests would be adversely affected.

Statute of Limitations: The section contains a statute of limitations. This is intended to function as a means of clearing the records. It operates in a manner similar to that used in fraud-type statutes of limitations. The time period runs only after actual knowledge of facts which would give rise to a claim. If there is a dissolution or death, the statute of limitation provisions would be subject to an adopting state's limiting provisions for actions between parties to a dissolution and for claims against an estate set out in its dissolution and probate statutes.

If the statute of limitations operates during the course of a marriage to bar any actions, that bar will be in effect at death or dissolution. That could mean frustration in some circumstances, so that consideration of enforcement of rights under the section during the course of a marriage will be appropriate.

While it is not the purpose of the section to open the door to a torrent of interspousal "economic fault" litigation, it is nonetheless necessary to provide remedies for conduct that injures the interest of one of the spouses. The dominant theme of the relationship between the spouses toward their property is established by the good faith requirement of Section 2. As stated in the comment to that section, a spouse is not bound to succeed in an economic sense. An appropriate regard for the property interests of the other spouse and an avoidance of an unfair advantage are the norm under the good faith requirement. This section provides a remedy for interference or damage. If that can be proven, particularly against an allegation of good faith conduct by the other spouse, a remedy is appropriate. However, such matters should not be dredged up after the apparent ratification that would be implied by the passage of time. The specific statute of limitations has been added for that reason and in order to operate as something of a "cleansing" process in matters of marital economics.

§ 16. Invalid Marriages

If a marriage is invalidated by a decree, a court may apply so much of this [Act] to the property of the persons who were parties to the invalid marriage as is necessary to avoid an inequitable result.

COMMENT

The section should be read with Sections 208 and 209 of the *Uniform Marriage and Divorce Act* dealing with declarations of invalidity and putative spouses. Adopting states should also review their annulment provisions if they do not follow Section 208. The section is intended to deal only with spousal relations and not with unmarried cohabitation.

§ 17. Treatment of Certain Property at Dissolution

Except as provided in Section 16:

(1) In a dissolution, all property then owned by the spouses that was acquired during marriage and before the determination date which would have been marital property under this [Act] if acquired after the determination date must be treated as if it were marital property.

(2) In a dissolution, any property of either spouse which can be traced to property received by a spouse after the determination date as a recovery for a loss of earning capacity during marriage must be treated as if it were marital property.

(3) After a dissolution, each former spouse owns an undivided one-half interest in the former marital property as a tenant in common except as provided otherwise in a decree or written consent.

[(4) In an action for legal separation, the court may decree the extent to which property acquired by the spouses after the legal separation is marital property and the responsibility of each spouse for obligations incurred after the decree of legal separation.]

COMMENT

The Act contains no provision which would make an immediate alteration in the classification of the property of couples to which it becomes applicable who had married before its effective date. *See* Comment to Section 4. That property will continue to have whatever characteristics it had before the Act became applicable to its owners. The policy reason for this approach is avoidance of constitutional problems which would attend any effort to alter existing rights in property acquired before the Act was effective.

The Concept of Deferral: To that extent, the Act parallels procedures followed when states adopt changes in intestate share and forced heirship provisions or changes which create equitable distribution structures to apply at dissolution. Such changes make no *immediate* change in the rights in property which existed at the time the changes become effective. However, with respect to all of that existing property, as well as property acquired after the statutory change, when a time of dissolution is subsequently reached, such statutes typically create a state-authorized system of division and disposition which is applied to that property. It is accepted that a state has an appropriate role in determining the disposition of property at dissolution. It has also been settled that provisions in state dissolution property settlement statutes can affect not only property which came into being after those statutes were enacted, but property which came into being before that. *Kujawinski v. Kujawinski*, 71 Ill.2d 563, 376 N.E.2d 1382 (1978); *Fournier v. Fournier*, 376 A.2d 100 (Me.1977); *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (1974).

In addition, it appears to be settled that the domiciliary state's property division provisions will generally affect all property of the spouses, even though originally created or acquired in another state. Clark, *Law of Domestic Relations*, § 11.4 (1968); Leflar, *Conflict of Laws: Dividing Property When Marriage Ends*, 1 Fairshare #8 at p. 9 (Aug. 1981). Certain residual problems continue to arise regarding real property outside the domiciliary state, but as a practical matter, those are usually settled by *in personam* jurisdiction of the dissolution court over the parties and its authority to decree certain actions by those persons before it in a litigated case. Leflar, *op. cit.* at p. 10.

The Act as a Property Statute: Under the Act, property which a couple acquires from their respective efforts, as well as all income earned or accrued after the Act becomes applicable to that couple will be marital property. Each spouse will own an undivided one-half interest in that marital property. Consequently, in analyzing the property marshalled in a dissolution proceeding, each spouse is the *owner* of half of the marital property. If a state has provisions authorizing the alteration of property ownership by equitable distribution at divorce after the application of appropriate factors, then those factors and that authorized division would apply to marital property as it applies to the property each spouse owns prior to the adoption of the Act. Assume, as an example, that in a common law state without the Act spouses own all of their property as tenants in common, and that the state has an equitable distribution statute authorizing reallocation of property ownership in a dissolution after the application of a set of factors. Also assume that after the application of the factors, a determination is reached that Spouse A should receive sixty percent of the total divisible property and Spouse B should receive forty percent. The dissolution court would have jurisdiction to reallocate ten percent of the property of one of the two tenants in common in favor of the other one in order to create the sixty-forty ratio of ownership.

If instead, all property of the couple was marital property under the Act, with everything else being identical, the same court could and should attain the same result. In both instances, property "owned" by one spouse is being reallocated in an equitable distribution proceeding to

the other spouse. That is the precise way in which the ownership element in marital property should be applied and administered by a dissolution court under its equitable distribution statutes or procedures.

Possible Adopting State Revisions: Obviously an adopting state may wish to review its equitable distribution procedures and consider revising them after giving recognition to the effect of the adoption of the Act. However, the Act can and should function in a cognate fashion with respect to existing dissolution legislation. Coordination would certainly be necessary if an existing body of statutory law establishes a defined class of "marital property" to be marshalled and divided in the dissolution process only. That definition would have to be altered or omitted so that the definition of marital property in the Act would not conflict. However, not all states applying equitable distribution procedures follow a *statutory* definition of marital property. Some states apply their equitable distribution procedures to *all* property whenever and from wherever derived (Connecticut, Massachusetts). Some have *judicial* definitions of the universe of property to which their statutes apply (Florida, Ohio). Others have presumptions as to an appropriate division (Arkansas, North Carolina, Wisconsin). Still others have developed patterns of division which may have the same effect as a presumption (Pennsylvania). There are some fifty different systems in use, and virtually none of them is identical with any of the rest. *See* Freed, *Equitable Distribution as of December 1982*, 9 Fam.L.Rep. 4001 (1983) and Freed, *Family Law in the Fifty States: An Overview*, 4 Fam.L.Q. 289 (1983). Even if substantial statutory identity exists, case law has developed different answers to identical questions in different jurisdictions.

Division in an Adopting State May Be Unequal or Equal: It is not the mission of the Act to enter into the territory of equitable distribution or other systems of property division at dissolution. It is intended to operate as a property statute and to establish that a definite vested property interest exists in marital property from the instant of the creation of that property which traces through investment and reinvestment of the original property to property acquired with its proceeds. Consequently, a distribution different from an equal one in a dissolution of spouses owning marital property would simply be a property division dealing with the existing property rights of the spouses in marital property and reaching a particular result to achieve an equitable distribution of the marital property. Dealing with vested property rights in such a division is already a typical part of equitable distribution procedures. The Act is not designed to interfere with such a division under the statutes and cases in an adopting state or to ordain an equal division when that is not otherwise indicated. What the Act will do is to create a different balance of ownership *going in* to the equitable division procedure from one which typically exists in common law jurisdictions in which title and ownership are synonymous.

"*Other Than Marital" Property At Dissolution*: What has been said relates to actual marital property, which is property acquired by efforts of a couple and form their income from all sources after the Act applies to them. Such a couple could be a couple married after the Act is adopted. It could be a couple living in an adopting state, both before and after the Act was adopted. It could also be a couple domiciled elsewhere and moving into an adopting state after

the adoption. The "determination date" with be that event which renders the Act applicable to the property of each couple coming under its provisions. In the three situations, there will only be one in which the provisions of the Act would cover all post-marital income and all property acquired by productive efforts of the couple from and after their marriage so long as they live in the adopting state. That will be the couple marrying in an adopting state after the Act becomes effective and remaining in it until dissolution. As to couples in the other two situations, presumably they would have some accumulation of "other than marital" property which existed before the determination date and which could well have been marital property if the Act had been in effect when and where that property was acquired. That is obvious in the case of a couple marrying in and living in an adopting state both before and after the Act becomes effective. All of the income earned or accrued and the property acquired by productive efforts of that couple during their marriage would have been marital property if the Act had been in effect when it was acquired. Similarly, with a couple moving into an adopting state following adoption but bringing with them property which they had acquired in other jurisdictions, their income earned or accrued and property acquired by their productive efforts which was owned prior to moving into the state would have been marital property if in fact the Act had applied when and where it was acquired.

The Deferred Approach: The situation calls for an approach to deal with the property of couples who are seeking a divorce but who own something "other than marital" property. Section 17 applies a *deferred* marital property concept to that other property. An example will help to illustrate how it operates. Assume a couple always lived in an adopting state but lived there before the adoption. Before the adoption but during marriage, they acquired Blackacre with the proceeds of the employment of one or both of them. After adoption of the Act, they acquired Whiteacre with proceeds of employment occurring after the adoption. Their marriage is now dissolving. Whiteacre is clearly marital property and is owned in the equal undivided interests specified by the Act because it was acquired after the Act as the result of personal effort of one or both spouses and was marital property from its inception. On the other hand, Blackacre is some form of property other than marital property. That is because the Act does not operate retroactively, and Blackacre was owned before the Act applied to the couple. However, with the filing of the divorce suit, Blackacre is treated *as if* the Act had been in force when it was acquired, and will therefore be treated in the dissolution proceeding in a manner similar to Whiteacre.

Comparison With Existing Approaches: The way in which the section and the deferral concept operates is not substantially different from much existing equitable distribution legislation which provides that as of dissolution all of the property of the couple takes on the characteristics either of marital property or separate property (e.g., Colorado, Illinois, Missouri). That constitutes a deferred approach to such property, creating a class of dissolution-only marital property as of a deferred time namely the institution of the dissolution proceeding. A number of such statutes and procedures are in place in the several states, and the way this section operates is to follow the technique used in those statutes with respect to property which *would have been* marital property if the Act had been in effect as to the couple when and where the property was

acquired. *See* Freed, *op. cit.*

Certain Personal Injury Recoveries: Subsection (b) deals with a matter related to Section 4(g)(6). The latter provision classifies as individual property a recovery for personal injury except for the component of the amount of the recovery attributable to expenses paid from marital property. Under Subsection (b) there is a deferred reclassification of any of that recovery that can be traced to the personal injury recovery as allocable to a loss of earning capacity. In the first instance, Section 4(g)(6) avoids the necessity of an allocation. That should make the personal injury action simpler. Ultimately, an allocation would be possible under Subsection (b) but only if there was still on hand at dissolution a traceable portion of the personal injury recovery allocable to a loss of earning capacity during marriage.

An example is illustrative. Assume a massive personal injury and a recovery of $1,000,000. Assume no expenses were paid from marital property, so that the provisions of Section 4(g)(6) classified the entire amount as individual property. In a dissolution, some years later, the uninjured spouse is able to show that $200,000 of the amount still on hand is fairly allocable to a loss of earning capacity. Then $200,000 would be treated *as if* it were marital property, giving the uninjured spouse an opportunity to show that *before* the application of the appropriate equitable distribution factors, $100,000 could be treated as his or her marital property in the dissolution proceeding.

The rationale for the Subsection (b) treatment is that earnings are ordinarily marital property. By creating the possibility that residual amounts allocable to lost earnings could be marital property, an opportunity to achieve an equitable result in an appropriate case is presented. Loss of earning power is singled out because earnings would themselves have created marital property if they had not been lost. At dissolution it is appropriate to create some protection and replacement for the other spouse for the marital property that would have been there but for the injury. On the other hand, to have forced this determination at the time of the injury would impair the litigating posture, hence it is delayed to a point at which the issue significantly affects the interests of the uninjured spouse.

Oversight Problems: Subsection (c) is an "oversight" section. As pointed out in the Comments to Section 1(8), persons must be married to hold marital property. Ordinarily in a dissolution a disposition of all the property of the spouses will be made by decree or an agreement. Subsection (c) anticipates that this will occur, but makes a provision for a tenancy-in-common if satisfactory action has been omitted as to any former marital property. It is <u>not</u> a presumption or other indication that an equal division is either appropriate or required. Rather it deals only with oversight situations to clarify rights of former spouses when those rights have not been clarified by other documentation incident to the dissolution.

Subsection (d) is a bracketed section which would be appropriate in states in which a legal separation is recognized.

Contractual Variance: As with all provisions of the Act that contain no specific prohibition against contractual variance, the provisions of the section may be varied by a marital property agreement.

§ 18. Treatment of Certain Property at Death of Spouse

(a) At the death of a spouse domiciled in this State, all property then owned by the spouse that was acquired during marriage and before the determination date which would have been marital property under this [Act] if acquired after the determination date must be treated as if it were marital property.

(b) At the death of a spouse domiciled in this State, any property of the spouse which can be traced to property received by the spouse after the determination date as a recovery for a loss of earning capacity during marriage must be treated as if it were marital property.

COMMENT

The Deferred Approach At Death: The deferred approach used in Section 17 at dissolution is also appropriate at death, and the reasons are substantially the same. A leading text explains the rationale:

> "[T]here was almost universal acceptance of the rule that, when spouses changed their domicile, taking their property with them, the move did not change the classification of the property in the new domicile. . . . [I]f this move were from one state to another state having the same system of marital-property law, no serious problems arose. But when the move was from a common law state to a community property state, serious problems arose and inequitable results were the rule, not the exception. To hold that separate property from a common law state was also the husband's separate property in the community property state, and then to subject it to the laws of wills and succession of the community property state relating to separate property, changed its attributes and legal characteristics, and the rights and interests of the spouses in this property in a major way. What had happened in all these cases was that the wife had lost the protection furnished to her in the common law state by dower, or a statutory interest in lieu thereof, and had acquired no protection of any kind under the laws of the community property state. . . . It was noticed that, in most of the cases which reached the reviewing courts, nearly all of the property brought from the common law states was in the

> name of the husband and, under their law, was his separate property. When this was treated as the husband's separate property in the community property state, he could devise it by will to others than the spouse, and often did, the wife receiving no part of the estate." McClanahan, *Community Property Law in the United States*, § 13.9 (1982).

California developed the initial response to the problem described by McClanahan and its solution appears in Cal.Prob.Code § 201.5. Idaho has followed the California approach in Idaho Code §§ 15-2-202 and 15-2-203. *See also* Reppy, *Community Property in California*, p. 292 ff (1980). Section 18 is similar to this legislation, although it does not use the same terminology. The approach is to create a *deferred* property right which applies at death. When it applies, property of the *deceased* spouse which would have been marital after acquisition if it had been originally acquired under the Act is treated *as if* it had been so acquired for purposes of disposition at death. A provision regarding personal injury recoveries analogous to that in Section 17 is also included as Subsection (b).

The Property Right: There is an important parallel between the treatment of marital property at death and dissolution. It is that of the property right of the deceased spouse in the marital property as just that: a property right. The deceased spouse is the *owner* of a one-half undivided interest in marital property and it is subject to disposition at death as any other owned property. The ownership right is an integral part of the Act, expressly stated in Section 4(c). As with the same ownership right at divorce, it must be dealt with as an ownership right, and integrated into the probate system as property subject to disposition at death. If the spouse dies testate and the half interest in marital property is not disposed of by a non-testamentary method, it is subject to disposition as part of the testate estate. An attempt to dispose of *more* than the decedent's interest in marital property would be no different from an attempt to dispose of any other property a person did not own-it would be a nullity. It would amount to interference with the ownership right of the other spouse, subject to bring dealt with as any such interference is already dealt with by applicable law.

Appropriate Intestacy Provisions: If a deceased spouse dies intestate, and an adopting states makes no change in its intestacy laws, the marital property interest of the decedent will be subject to intestate disposition. This raises interesting questions as to appropriate action in an adopting state. In the American community property states intestate disposition of separate property follows a pattern that varies from state to state as it does in common law states. All of the American community property states follow one pattern for disposing of community property and another for separate property. Obviously common law states have had no occasion for such a dual system and none is in place.

The typical intestate disposition of the first deceased spouse's interest in *community* property is in favor of the surviving spouse. However, that is not the universal rule. In California, Idaho, Nevada, New Mexico and Washington, upon the death of either spouse intestate, the decedent's half of the community property does pass to the surviving spouse.

However, in Arizona, Louisiana and Texas, the decedent's half of the community property passes to the surviving spouse if there are no descendants. If there are descendants, the proportions vary from 100%, if all then surviving descendants are also descendants of the surviving spouse (Arizona), to one-half (Texas), to legal usufruct (life estate) only (Louisiana), to none, if one or more of the surviving descendants are not also descendants of the surviving spouse (Arizona).

Uniform Probate Code Provisions: There were significant historical reasons in the American community property states for bifurcating their intestate treatment of community and separate property which have never been present in American common law states. There would appear to be at least one element of community property intestacy law that ought to be followed by an appropriate alteration of intestacy laws by an American common law state adopting the Act. That would constitute following the recommendation set forth in Section 2.102A of the Uniform Probate Code. With respect to community property disposed of in intestacy, the recommendation was that "the one-half of community property which belongs to the decedent spouse passes to the [surviving spouse]." Apart from such an alteration, adopted to refer to marital property rather than community property, adopting states should *require* no substantial change in intestacy laws. Property other than marital property could remain subject to present patterns with the local preferences for particular schemes perpetuated. The logic of the alteration with respect to marital property is the logic at the heart of the Act, which is that of a sharing mode for marital acquisitions. A spouse who disapproves would have testamentary disposition as an option, and as noted below the testamentary disposition should not be subject to forced-share election.

Forced or Elective Shares: A corollary problem to intestate distribution is the elective share of a surviving spouse in testate dispositions. Among American community property states, only Louisiana's forced heirship provisions (in favor of others than the surviving spouse) interfere with the *first* deceased spouse's right of disposition of his or her share of the community. An adopting state should follow the majority rule and bar the enforcement of elective share rights of a surviving spouse against the interest in marital property of the first deceased spouse. The same reasoning would apply to the deferred marital property created by Section 18. The section itself establishes in the surviving spouse a half interest in the deferred marital property of the *deceased* spouse. Hence there is an effective statutory sharing in favor of the survivor in that property already established by the Act, and no further elective right in that property is needed or appropriate for that survivor. The result is that elective rights should be limited, if they are in fact perpetuated by an adopting state. They should apply only to individual property and other property in which the surviving spouse acquires no interest by the terms of the Act.

The Novel Question For Adopting States: With respect to elective share rights in an adopting state against property other than marital property of Section 18 deferred marital property, a substantial and novel question is presented. In community property states, separate property is not subject to elective rights by the other spouse. McClanahan, *op. cit.*, § 11.4. The policy rationale is that community property rights are adequate protection and separate property is separate and should be under the unfettered control of its owner. However, if an adopting state

followed that pattern it would represent a considerable retreat from existing spousal protection in most common law states. It would appear appropriate for an adopting state to retain elective rights against all property other than marital property and Section 18 deferred marital property, rather than to switch to the community property structure. However a major policy issue is presented by this question which each adopting state will necessarily consider for itself. A compromise might be the use of a lesser forced-share percentage against individual property than is presently in place. Here the issue of sharing will necessarily be considered in its fullest form, and the issues confronted will be *de novo*, since they have not previously been considered in this form in either common law or community property states. The closest approach was California's debate over quasi-community property which resulted in Cal.Prob.Code § 201.5, previously discussed, but this did not present identical issues. In considering any possible revisions, an adopting state may wish to consider the data revealed and discussed in Fellows, Simon & Rau, *Public Attitudes About Distribution At Death and Intestate Succession Laws in the United States*, 1978 Am.B.Found. Research J. 319; *see also* Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 Wash.L.Rev. 277 (1975).

Section 18 Protects the Survivor: Section 18 is itself a statute that emphasizes protection to the survivor rather than the decedent. It does not treat all property of *either* spouse in the referred mode, but only property acquired by the *decedent*. Thus the survivor will acquire a one-half interest in that property without the necessity of any election and without regard to will provisions. As with marital property, the surviving spouse will own a share of the deferred marital property as a property right and not as a result of exercising any elective right. Review of elective share provisions regarding this property is necessary. If appropriate in a state's statutory scheme, an attempt by a first decedent to defeat the operation of Section 18 should be barred by appropriate elective share provisions which would confirm Section 18 rights in favor of the surviving spouse. In Idaho the interest of a survivor in Idaho quasi-community property is protected by forced-share provisions. Idaho Code §§ 15-2-202, 203. In California the quasi-community interest is simply stated as a property interest of the survivor. Cal.Prob.Code § 201.5.

The Administration Issue: Historically the entire community was administered when a spouse died. *See* De Funiak and Vaughn, *Principles of Community Property*, §§ 205-07 (1971). This pattern has been eroding. At this time, California and Nevada require administration only of the decedent's interest in the community. Arizona, Idaho, New Mexico and Washington follow the traditional pattern, though all four have simplified administration procedures under their versions of the *Uniform Probate Code* or Washington's non-intervention provision. Texas and Louisiana have simplified procedures when there is a surviving spouse but no issue, in Texas, or when succession without administration occurs, in Louisiana. In addition, Texas has independent administration as a possibility. *See* Mennell, *Community Property*, p. 355 ff (1982). An adopting state will necessarily face the administration issue and will be forced to consider whether the California and Nevada solution represents the appropriate trend.

The following sums up state intestacy, elective share and probate law provisions that

would be appropriate for consideration by an adopting state for application on the death of a spouse subject to the Act:

(1) Type of Property Subject to Testamentary Disposition	(2) Amount Subject to Disposition By Decedent	(3) What Are Survivor's Rights of Election as To Amount in Column 2?	(4) Intestate Disposition As to Amount in Column 2
Marital Property	One-half	None (already owns other half of marital property)	To surviving spouse. If no surviving spouse (because of simultaneous death) by existing law in adopting state
"Deferred Marital" or Section 18 Property	One-half	None, but should be given elective right to secure survivor's half if necessary as in Idaho	Same
All other property subject to disposition at death by decedent	All	As provided by existing law in adopting state	As provided by existing law in adopting state, including appropriate augmented estate provisions

As with all provisions of the Act that contain no specific prohibition against contractual variance, the provisions of the section may be varied by a marital property agreement.

[§ 19. Estate by Entireties

This [Act] does not affect the relationship between spouses and their creditors with respect to property held by spouses in an estate by entireties after the determination date.]

COMMENT

This is a bracketed section which would apply only in jurisdictions in which estates by entireties are used. The effect of the section would be to permit the continuation of the creditor protection afforded by the tenancy by entirety provisions. *See* 41 Am.Jur.2d *Husband & Wife* § 55.

§ 20. Rules of Construction

Unless displaced by this [Act], the principles of law and equity supplement its provisions.

§ 21. Uniformity of Application and Construction

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

§ 22. Short Title

This [Act] may be cited as the "Uniform Marital Property Act."

§ 23. Severability

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

§ 24. Time of Taking Effect

This [Act] takes effect on January 1, 19[____].

§ 25. Repeal

The following Acts and parts of Acts are repealed:

COMMENT

In an adopting state, it would be necessary to consider the interrelationship between provisions of the *Uniform Marital Property Act* and all other statutes of the state that affect the property rights of spouses. In particular, Section 15 would require attention to provisions

concerning interspousal immunity from suits. Section 18 would require attention to intestacy and forced share provisions of probate laws.

§ 26. Laws Not Repealed

This [Act] does not repeal:

(1)

(2)

(3)