D R A F T

FOR DISCUSSION ONLY

UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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~~February~~ March 12~~1~~, 2020

UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT

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Prefatory Note

The Uniform Disposition of Community Property Rights at Death Act (UDCPRDA) was approved by the Uniform Law Commission in 1971. The UDCPRDA established a system for non-community property states to address the treatment of community property acquired by spouses before they moved from a community property state to the non-community property state. According to the UDCPRDA, its purpose was "to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their 'community' rights." Unif. Disp. Comm. Prop. Rights Death Act, Pref. Note, at 3 (1971). As of 2020, sixteen states have enacted the UDCPRDA. Five states enacted the UDCPRDA in the 1970s, shortly after its approval. Or. Rev. Stat. § 112.705; Hawaii Rev. Stat. § 510-21; Colo. Rev. Stat. Ann. § 15-20-101; Ky. Rev. Stat. § 391.210; Mich. Comp. L. Ann. § 557.261. Another eight estates enacted the UDCPRDA in the 1980s. N.C. Gen. Stat. § 31C-1; N.Y. Est. Powers & Trusts Law § 6-6.1; Ark. Code. Ann. § 28-12-101; Va. Code § 64.1-197; Alaska Stat. § 13.41.005; Wyo. Stat. § 2-7-720; Conn. Gen. Stat. Ann. § 45a-458; Mont. Code Ann. § 72-9-101. One state enacted it in the 1992, (Fla. Stat. Ann. § 732.21), and two states – Utah and Minnesota – enacted the UDCPRDA in 2012 and 2013, respectively. Utah Code § 75-2b-101; Minn. Stat. § 519A.01.

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

Under traditional conflicts-of-law principles, the result is the same: a move from a community property state to a non-community property one does not change the nature of the property. Sarah N. Welling, *The Uniform Disposition of Community Property at Death Act*, 65 KY. L. J. 541, 545 (1977). The Restatement (Second) of Conflicts counsels that "[a] marital property interest in a chattel, or right embodied in a document, which has been acquired by either or both of the spouses, is not affected by the mere removal of the chattel or document to a second state, whether or not this removal is accompanied by a change of domicile to the other state on the part of one or both of the spouses." RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 259 (1971). Nevertheless, the existing law in non-community property states is often uncertain. The UDCRPDA provided a relatively simple solution that served to clarify an otherwise murky area of law.

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

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

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

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

Section 4 makes clear that if the spouses have partitioned or reclassified their community property or waived rights under the act, the UCPDDA no longer applies to that property, as the spouses themselves have ended the community property classification of the property and mutually allocated to each other separate property interests that were previously held as community. It also provides the required form for a partition, reclassification, or waiver, as the laws of a state adopting this act are not likely to provide rules outside of the act for such matters.

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

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

Section 7 is new and has no analogue in the UDCPRDA. It expands the applicability of the act to allow a court to recognize reimbursement rights and rights of redress for certain bad faith actions by one spouse that might impair the rights of the other spouse with respect to property to which the act applies. One such example could be the unauthorized alienation of property to the prejudice of the other spouse. This section allows for a damage or equitable claim to be brought at the death of one spouse by the other or by the spouse's personal representative, provided a spouse's interest in property was prejudiced by the actions of the other spouse.

Section 8 provides limitations periods within which a party must act to preserve rights under the act. This section recognizes that the periods may differ depending upon whether the party asserting a right is a creditor or a personal representative, heir, devisee, nonprobate transferee, or surviving spouse of the decedent. In addition, the periods may differ depending upon whether the claim is brought in a probate proceeding or in a separate judicial proceeding to perfect title to property.

Section 9 protects third persons that~~who~~ have transacted in good faith and for value. Otherwise, third persons could be subject to claims under Section 7 if one spouse had engaged in acts of bad faith management of community property while alive. Section 9 ensures that in most instances, a third person will be protected from these claims.

Sections 10 through 14 concern uniform application of the act, electronic signatures, transitional and savings provisions, repeal of inconsistent laws, and the effective date of the act. Notably, Section12 makes the act applicable – within permissible constitutional limitations – to any judicial proceeding commenced after the effective date of the act, even to those who have moved from a community property jurisdiction and died before enactment of the act.

UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Community Property Disposition at Death Act.

SECTION 2. DEFINITIONS. In this [act]:

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

(2) "Partition" means ~~a~~ to voluntary divide ~~division by spouses of~~ property ~~that was community property or is treated under~~to which this [act] ~~as community property at the time of the division~~would otherwise apply.

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

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

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

(6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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

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

(A) to execute or adopt a tangible symbol; or

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

(9) “Spouse” means an individual in a marriage or other relationship that:

(A) allows community property to be acquired during its existence; and

(B) is in existence at the time of death of either party.

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

Comment

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

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

(3) *Person*. The definition of “person” is based upon the standard Uniform Law Commission definition.

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

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

(6) *Record*. The definition of “record” is based upon the standard Uniform Law Commission definition.

(7) *Reclassify*. The definition of “reclassify” is necessary to recognize that spouses may

"transmute" or change the treatment of property from community to separate after they move from a community property jurisdiction to a non-community property jurisdiction. Although community property jurisdictions also have rules in effect for changing separate property to community property, such a change would be outside the scope of this act, which seeks only to maintain the treatment of community property acquired by spouses after moving to a non-community property jurisdiction.

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

(9) *Spouse*. The term "spouse" is defined expansively to include not only married persons, of either sex, but also partners in other arrangements, such as domestic or registered partnerships, under which community property may be acquired. *See, e.g*., Cal. Fam Code § 297.5 (stating that domestic partners "have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses"); Nev. Rev. Stat. § 122A.200(a)("Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses."; Wash. Rev. Code Ann. §297.5(a) (2006) ("Property … acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property."). The term may also encompass putative spouses and spouses under common law or informal marriages. The putative spouse doctrine is a remedial doctrine recognized in many states that allows a person in good faith to enjoy community property and other civil effects of marriage, despite not being a party to a legally valid marriage. *See, e.g*., Unif. Marriage & Div. Act § 209. Although few, if any, community property states recognize common law marriage, Texas does recognize "informal marriages" and thus parties to such an arrangement could also be included in the definition of a "spouse" under this act. *See, e.g.,* Tex. Fam. Code § 2.401. ~~In all events, recognition of the validity of the marriage or marriage-like arrangement by this state is dependent upon the treatment of that arrangement as valid under the conflict-of-law principles of this state. *See, e.g*., Restatement (Second) of Conflict of Laws § 283 ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").~~

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

SECTION 3. INCLUDED AND EXCLUDED PROPERTY.

(a) This [act] applies to the following property of a spouse, without regard to how the property is titled or held:

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

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

(B) income, rent, profit, appreciation, or other increase:

(i) derived from or traceable to property described in subparagraph (A); or

(ii) characterized as community property under the law of the jurisdiction where the decedent or the surviving spouse of the decedent was domiciled when it was earned; and

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

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

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

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

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

(1) spouses have partitioned or reclassified; or

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

Comment

This section makes the act applicable to spouses who were formerly domiciled in a community property jurisdiction. The term “jurisdiction” is used, rather than the narrower term “state,” to be clear that this act would apply to a spouse who was domiciled in foreign jurisdictions where community property may be acquired. Moreover, this act is applicable whenever a spouse was domiciled at any time in the past in a community property jurisdiction, has acquired property there, and has moved to another jurisdiction. Thus, if A and B were married in state X (a community property state) and acquired personal property there, but then moved to state Y (a non-community property state) prior to moving again to state Z (also a non-community property state) where they acquired real property before A eventually died~~s~~, state Z should apply this act to the property acquired by A and B in state X and state Z.

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

Under subsection (a)(1)(B), this act applies to “income, rent, profit, appreciation, or other increase~~s~~” derived from or traceable to community property under (a)(1)(B)(i) in addition to “income, rent, profit, appreciation, and other increase” from separate property under (a)(1)(B)(ii) in those states where such income is considered community property but not those states where income of separate property is separate. At the same time, subsection (a)(1)(B)(ii) makes this act applicable to “appreciation[] or other increase” in separate property that result from community effort or expenditures of “time, toil, or talent” of a spouse in community.

The~~is~~ reference in this ~~sub~~section to “income” should be read to include net income, rather than the gross income, from community property, as well as things produced from community property (i.e., “appreciations and other increases”), even if not technically revenue producing. Thus, if a $500,000 house were purchased completely with community funds and increased in value to $700,000 after the spouses moved to a non-community property state, then the entire house, not merely $500,000 in value, is classified as community property. Similarly, crops produced from a community property farm and a foal produced from a horse that is owned as community property are also considered to be community property.

Subsection (a)(1)(B) ~~also~~ applies not only to “income, rent~~s~~, ~~and~~ profit~~s~~, appreciation, or other increase” from community property produced prior to moving to a non-community property jurisdiction, but also after the move. Indeed, in the former case, such a rule would be unnecessary as all community property states already characterize “income, rent~~s~~, ~~or~~ profit~~s~~, appreciation, or other increase” derived ~~from, as well as appreciations or other increases in, community~~ from community property as community property. The rule in subsection (a)(1)(B)(i), however, is necessary to be clear that even after spouses move to a non-community property state, the “income~~s~~, rent~~s~~, ~~and~~ profit~~s~~, appreciation, or other increase” produced by community property acquired prior to the move are still community property after the move to a non-community property state. Thus, interest produced from a community property savings account is still treated as community property after A and B move from state X (a community property state) to state Z (a non-community property state), irrespective of the location of the account.

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

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

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

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

Even among states that employ a "pro rata" approach, there is considerable variation for how the apportionment is made. As the comments in the UDCPRDA stated, "[a]ttempts at defining the various types of situations which could arise and the varying approaches which could be taken, depending upon the state, suggest that the matter simply be left to court decision as to what portion would, under applicable choice of law rules, be treated as community property." The UCPDDA follows the same approach. Thus, if A acquires $100,000 of life insurance, pays five of the monthly $1000 premiums from funds prior to marriage, pays 10 of the premiums with community property after marrying B, and pays 10 more premiums (before dying) from earnings acquired by B after A and B move to a non-community property state, then some portion of the life insurance policy should be considered community property, if the law of the community property state so treated it. This act leaves ~~discretion~~ to the courts ~~as to~~ how the determination of the apportionment is to be made.

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

Subsection (b) of this act makes clear that this act does not apply in cases where spouses have themselves divided former community property by means of a partition or when spouses have changed the classification of their property from separate to community. Similarly, this act does not apply to property that is subject to waiver of rights. Section 4 of this act prescribes the necessary form and procedures for partition, reclassification, or waiver of rights.

SECTION 4. FORM OF PARTITION, RECLASSIFICATION, OR WAIVER.

Spouses domiciled in this state may:

(1) partition or reclassify property to which this [act] applies only in a record signed by both spouses; or

(2) waive a right granted by this [act] only in compliance with the law of this state applicable to waiver of ~~by complying with the laws applicable to waive~~ a spousal right ~~under the law of this state~~.

Comment

This ~~S~~section specifies the necessary form or procedure for a partition or reclassification of property or waiver of rights under the act once the spouses have moved to the enacting state. This section requires that both spouses sign a record agreeing to any partition or reclassification. Both the terms "sign" and "record" are defined in Section 2 of this act. In community property jurisdictions, the change or reclassification of property acquired during marriage is known as "transmutation." As noted by scholars, "[t]he law in many community property states has moved toward requiring married couples to spell out their intentions regarding their property in writing." CHARLOTTE GOLDBERG, COMMUNITY PROPERTY 239 (2014). *See, e.g.*, Cal. Fam Code § 852(a) ("A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."); Idaho Code § 32-917 ("All contracts for marriage settlements must be in writing and executed and acknowledged or proved in like manner as conveyances of land are required to be exercised and acknowledged or proved."); *Hoskinson v. Hoskinson*, 80 P.3d 1049 (2003).

For a waiver of rights under this act, the parties must comply with the standards for enforceability of a waiver of spousal rights under the law of this state. Under the law of many states, a waiver of spousal rights is governed by the Uniform Premarital Agreement Act (1983). More recently, the Uniform Law Commission has promulgated the Uniform Premarital and Marital Agreement Act (2012). Section 9 of that act requires, among other things, that a waiver not be involuntary or executed under duress, that a party have access to independent legal representation, and that a party have had adequate financial disclosure. Unif. Premarital & Marital Agr. Act. § 9.

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

This s~~S~~ection does not attempt to specific the requisite form or procedure for a partition prior to moving to the enacting state, which should be governed by the law of the community property state rather than this act. If parties have partitioned or reclassified previously acquired community property after moving to a non-community property state, this act would not apply to any such property owned by the decedent at death. The terms “partition” and “reclassify” are defined in Section 2 of this act.

SECTION 5. REBUTTABLE PRESUMPTIONS.

(a) ~~If a spouse was~~ All property acquired by a spouse when domiciled in a jurisdiction where community property could then be acquired by the spouse by operation of law and as an incident of a marriage or a similar relationship~~, all property acquired by the spouse when domiciled there~~ is presumed to be community property.

(b) ~~If a spouse was~~ All property acquired by a spouse when domiciled in a jurisdiction where community property could only then be acquired by agreement~~, then all property acquired by a spouse when domiciled there~~ is presumed to be community property only if the spouses complied with the procedures in the jurisdiction for acquiring community property.

(c) A presumption under this section may be rebutted by a preponderance of the evidence.

Comment

Subsection (a) of this section applies to so-called “opt out” states that provide for the acquisition of community or marital property by operation of law and as an incident of marriage. Scholars have noted that in the nine “opt out” states, community or marital property is not created by contract, although spouses can “opt out” by contract. Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It and Why Community Property Principles Benefit Women*, 11 U. MD. L.J. RACE RELIG. GENDER & CLASS 1 (2011) (One “characteristic of community property systems is that they arise by operation of law.”). ~~It~~This section adopts a blanket presumption in favor of treating all property acquired by a spouse while domiciled in a community property jurisdiction as community property, provided, of course, that the laws of the community property state allowed community property to “then be acquired” by *that* person. In other words, the presumption applies only to those persons who could acquire community property under the laws of the relevant jurisdiction and have complied with the necessary laws to do at the time of acquisition.

Consequently, the presumption does not apply to unmarried individuals or to those who have opted out of the community regime even if they acquire property while domiciled in a community property jurisdiction, as those individuals could not then acquire community property in that jurisdiction.

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

Subsection (b) ~~of this Section~~ applies to so-called "opt-in" states where spouses can elect community property, provided specific affirmative steps are taken to acquire property during marriage as community property. In "opt in" jurisdictions, the presumption of community property under this section does not apply unless the parties have, in fact, opted into the community regime or, as stated under this section, "have complied with the necessary procedures in that state for acquiring community property." *See, e.g.*, Alaska Stat. § 34.77.030(a).

Despite the above presumptions, a party may prove that the relevant property was separate, even though acquired during the existence of a community regime, such as by demonstrating that the property was acquired by inheritance. Although different community property states provide different standards for rebutting the relevant presumption of community property, this act adopts a preponderance standard for rebutting the presumption, as have a number of community property states. *See, e.g., Marriage of Ettefagh*, 59 Cal. Rptr. 3rd 419 (Cal. App. 2007); *Talbot v. Talbot*, 864 So. 2d 590 (La. 2003); *Brandt v. Brandt*, 427 N.W. 2d 126 (Wisc. App. 1988); *Sanchez v. Sanchez*, 748 P.2d 21 (N.M. App. 1987); *But see* Tex. Fam. Code § 3.03(b) ("The degree of proof necessary to establish that property is separate property is clear and convincing evidence."); *Reed v. Reed*, 44 P.3d 1100 (Idaho 2002) (requiring "reasonable certainty and particularity" to rebut the presumption).

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

SECTION 6. DISPOSITION OF PROPERTY RIGHTS AT DEATH.

(a) Except as otherwise provided in subsection (b), one-half of the property to which this [act] applies belongs to the surviving spouse of a decedent and is not subject to disposition by the decedent at death.

(b) If, at death, a decedent purports to dispose of property belonging to the surviving spouse to a third person and disposes of other property to the surviving spouse, the court must require the surviving spouse to elect either to ~~between~~ retain~~ing~~ the disposition to the surviving spouse or assert~~ing~~ rights under this [act].

(c) Subject to subsection (d), one-half of the property to which this [act] applies belongs to the decedent and is subject to disposition by the decedent at death.

Alternative A

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

Alternative B

(d) For the purpose of calculating the augmented estate and elective-share rights, the property under subsection (a) is deemed to be property of the surviving spouse and property under subsection (c) is deemed to be property of the decedent. [The value of property under subsection (a) must be applied and credited in satisfaction of the elective share rights of the surviving spouse.]

End of Alternatives

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

~~(1) at the death of the decedent, was held by spouses with a right of survivorship and was paid or transferred to the surviving spouse of the decedent; or~~

~~(2) is held in a form, including a revocable trust, that was paid or was transferred on death of the decedent to the surviving spouse.~~

(f) This section does not limit the right of a surviving spouse to [a homestead] [an exempt property] [a family] allowance.

Legislative Note: *A traditional elective-share state should adopt Alternative A and should adopt the language beginning with the word "this" in subsection (e). An augmented-estate elective-share state whose statute does not adequately address rights in community property should adopt Alternative B and should adopt the language beginning with word "except" in subsection (e).*

Comment

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

If, however, the decedent disposes of property subject to this act by non-probate transfer in favor of the third person, Section 7, rather than this section, applies. In other words, this act, like the law in community property states, provides that reimbursement or equitable claims may be available to a surviving spouse when a decedent improperly alienates the interest of a spouse by means of a non-probate transfer. *See, e.g., T.L. James & Co. v. Montgomery*, 332 So. 2d 834 (La. 1975).

Under subsection (b), if the decedent disposes of the surviving spouse's share of property under this act but transfers other property to the surviving spouse, a court may require the surviving spouse to make an equitable election to retain the disposition from the decedent or assert rights under this act.

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

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

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

At B's death, the home in state Y~~Z~~ and the stock located in states U and V would be property subject this act, and consequently, B would have the right under this section to dispose of half. The home retained in state X would be community property under the law of state X, but this act applies only to real property located in the adopting state. ~~Because the~~The investment property located in state Z ~~was held as tenants by the entireties, it is strongly presumed that A and B partitioned that property and thus made this act inapplicable to that asset~~would not be subject to this act because state Z has not adopted the act . Finally, the bonds held in B's name would not be subject to this act because they were acquired with property earned and acquired in state Y~~Z~~, a non-community property state.

As this section ~~of the act~~ provides that property subject to this act is partly owned by the surviving spouse of the decedent at the death of the decedent, subsection (c~~d~~) provides property held with rights of survivorship or in transfer-on-death forms are excluded from this section when the property is paid or transferred to the surviving spouse. Section 7 of this act, however, may still be applicable if less than a one-half interest in the property has been transferred to the surviving spouse at death.

Subsection (f~~e~~) makes clear that this act does not limit a surviving spouse's claim for other statutory allowances, such as homestead allowances, allowances for exempt property, and family allowances. See, e.g., Unif. Prob. Code §§ 2-402, 2-403, and 2-404.

SECTION 7. OTHER REMEDIES AVAILABLE AT DEATH.

(a) At the death of an individual, the surviving spouse or a personal representative, heir, or nonprobate transferee of the decedent may assert a right with respect to property to which this [act] applies based on an act of:

(1) the surviving spouse or decedent during the marriage; or

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

(b) In determining ~~remedies~~ the rights available under subsection (a) and the corresponding remedies, a court shall apply equitable principles and may, in its discretion, also consider the community property law of the jurisdiction where the decedent or the surviving spouse was domiciled when the property was acquired or enhanced.

Comment

Subsection (a) confirms that comparable rights that would be available to protect a spouse in a community property jurisdiction remain available at death in a non-community property state under this act. Two rights often provided by community property jurisdictions are rights of reimbursement and rights associated with monetary claims against a spouse for marital waste, fraud, or bad faith management.

Claims for reimbursement are commonly available when community property has been used to satisfy a separate obligation or when separate property has been used to improve community property or vice versa, *see, e.g*., La. Civ. Code art. 2364, 2366, and 2367; Cal. Fam. Code § 2640. Different community property states calculate the amount of reimbursement differently. *See, e.g., Hiatt v. Hiatt*, 487 P.2d 1121 (Idaho 1971) (awarding reimbursement based upon the enhanced value of the property even if it exceeds the amount spent); *Portillo v. Shappie*, 636 P.2d 878 (N.M. 1981) (assessing reimbursement based upon the enhanced value of the improved property even if it exceeds the amount of money expended); La. Civ. Code art. 2366 (providing for reimbursement based upon the amount expended); *Marriage of Sedlock*, 849 P.2d 1243 (Wash. App. 1993) (awarding reimbursement based upon the amount spent); Estate of *Kobyliski v. Hellstern*, 503 N.W.2d 369 (Wis. App. 1993) (assessing reimbursement based upon the greater of the amount spent or the value added). This section grants courts flexibility in assessing the amount of the reimbursement.

The rights granted by this section are operable at the death of an individual and may not be asserted during the existence of the marriage. This approach is consistent with the law of various community property jurisdictions. *See, e.g.*, La. Civ. Code art. 2358 ("A claim for reimbursement may be asserted only after termination of the community property regime, unless otherwise provided by law."). *But see* Uniform Marital Property Act § 13 (allowing claims for breach of the duty of good faith and for an accounting to be brought by spouses during an ongoing marriage). The relief sought under this section may, however, be for actions of a spouse taken either during life or that take effect at death. For instance, during life, a spouse may use community funds to augment a separate property asset. Moreover, a spouse during the marriage may have inappropriately donated property to a third person. Similarly, at the death of the decedent, the decedent may have inappropriately transferred property belonging to the surviving spouse to a third person by non~~-~~probate transfer. Although community property states generally enforce such transfers, they correspondingly grant a right to claim damages, to recover~~y~~ ~~of~~ the property, or to reimburse~~ment to~~ the surviving spouse. Again, this section grants a court broad authority to craft legal or equitable remedies to protect a spouse. Of course, the application of this section must yield when appropriate to federal law. *See, e.g.*, Employment Retirement Security Act, 29 U.S.C. Section 1001 et seq.; *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding that ERISA pre-empted state community property law and remedies, even though the relevant ERISA-governed retirement plan was funded with community property).

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

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

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

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

This section~~, however,~~ must be read in conjunction with Section 9 of this act, which protects good faith transferees of property ~~from one spouse~~ who give value. Thus, good faith transferees for value will be protected by Section 9 of this act, such that a spouse's claim for bad faith management would solely be cognizable against the other spouse. If, however, one spouse improperly donates or transfers property to which this act applies to a third person who is not in good faith, equitable relief against a third person may, in the discretion of the court, be available to the spouse whose rights are impaired. After all, improper gifts of community property by one spouse are generally voidable as against a third person in community property jurisdictions. *See, e.g., Polk v. Polk*, 39 Cal. Rptr. 824 (App. 1964); Wisc. Stat. § 766.70; La. Civ. Code art. 2353; *Mezey v. Fioramonti*, 65 P.2d 980 (Ariz. App. 2003); Uniform Marital Property Act § 6(b).

SECTION 8. RIGHT OF SURVIVING SPOUSE, HEIR, BENEFICIARY, OR CREDITOR.

(a) With respect to property to which this [act] applies, the surviving spouse of the decedent may assert a claim for relief ~~according to~~under the following rules:

(1) I~~i~~n a probate proceeding, a surviving spouse must send a demand in a record to the personal representative of the decedent not later than [six months] after the appointment of the personal representative, and, in the absence of such a claim, the personal representative is not liable for failing to apply this [act].~~;~~

(2) I~~i~~n the absence of a probate proceeding, a surviving spouse must commence an action against the heirs, devisees, or nonprobate transferees of the decedent not later than [three years] after the death of the decedent.~~; and~~

(3) I~~i~~n an action to perfect title to property or to assert a right to a nonprobate asset, a surviving spouse must commence an action against the heirs, devisees, or nonprobate transferees of the decedent not later than [three years] after the death of the decedent.

(b) With respect to property to which this [act] applies, an heir, devisee, or nonprobate transferee of the decedent may assert a claim for relief ~~according to~~under the following rules:

(1) I~~i~~n a probate proceeding, an heir, devisee, or nonprobate transferee of the decedent must send a demand in a record to the personal representative of the decedent not later than [six months] after appointment of the personal representative.~~;~~

(2) I~~i~~n the absence of a probate proceeding, an heir, devisee, or nonprobate transferee of the decedent must commence an action against the surviving spouse of the decedent not later than [three years] after the death of the decedent.~~; and~~

(3) I~~i~~n an action to assert~~ing~~ a right to a nonprobate asset, an heir, devisee, or nonprobate transferee of the decedent must commence an action against the surviving spouse of the decedent not later than [three years] after the death of the decedent.

(c) With respect to property to which this [act] applies, the personal representative of the decedent may commence an action to perfect title to property or an action against the surviving spouse of the decedent asserting a right to a nonprobate asset not later than [three years] after the death of the decedent.

[(d) With respect to property to which this [act] applies, a creditor of the decedent may assert a claim within the earlier of:

(1) [one year] after the decedent's death;

(2) if notice is by publication, within [four months] after the date of first publication of notice of appointment of the personal representative; or

(3) if actual notice is given, not later than:

(A) [60 days] after the mailing or other delivery of notice to the creditor to present the claim; or

(B) ~~within~~ [four months] after published notice.]

Legislative Note: *A state should insert in subsections (a)(1) and (b)(1) the relevant time for asserting a claim in a probate proceeding and in subsections (a)(2) and (3), (b)(2) and (3), and (c) the relevant time ~~frame~~ for asserting a claim to a nonprobate asset or for probating a will or challenging a revocable trust.*

In s~~S~~ubsection (d), a state should insert or reference its existing non-claim statute ~~with regard to~~governing the time for asserting a creditor's claim.

Comment

The time periods provided in this section are generally borrowed from other areas of law. Specifically, a six-month period is not an uncommon period for a non-claim statute for creditors, and the three-year period is adapted from claims challenging revocable trusts and for contesting nonprobated wills. *See* Unif. Trust Code § 604; Unif. Prob. Code § 3-108. This section fills a gap that existed in the UDCPRDA, which did not provide for specific statute of limitations periods for bringing claims under the act. Thus, courts were left to speculate as to what time periods applied. *See, e.g.*, *Johnson v. Townsend*, 259 So. 3d 851 (Fla. 4th D. Ct. App. 2018) (holding that in the absence of a specific statute of limitations in the Florida version of the UDCPRDA, the general statute of limitation for asserting a claim or cause of action against the decedent).

Subsection (a) of this section allows a surviving spouse to protect rights under this act and provides a statute of limitation for doing so. It provides time frames for a surviving spouse asserting a right under this act either in a probate proceeding (see (a)(1)) or outside the probate process in the case of an action to perfect title to property, in the case of nonprobate assets, or in the case no probate proceedings occur (see (a)(2)). Unless the surviving spouse acts within the relevant period of time in a probate proceeding, the personal representative has no fiduciary duty to investigate or to attempt to ascertain whether this act applies to any property owned by the decedent. Because a surviving spouse may have various types of property rights or creditor claims under this act, the time periods for bringing those claims may differ according to the nature of the claim. Under Section 6 of this act, a surviving spouse may have a property interest in an asset transferred to a third person. To protect such a right, the surviving spouse may, but is not required to, bring a claim asserting a property right under this act in a probate proceeding under subsection (a)(1). Subsection (a)(3), however, also allows the surviving spouse to assert a claim to perfect title to property directly against the holder of the property. For example, if after the death of B, B's spouse, A, asserts a claim to personal property subject to this act that has been given by B in a will to C, then A, whose claim is an action to perfect title to property, may assert that claim in the probate proceeding under subsection (a)(1) or directly against C under subsection (a)(3). On the other hand, if A's claim is one for reimbursement of community funds under Section 7, then A's claim is a claim as a creditor and not one for perfection of title to property. As a result, A would have to assert the claim under subsection (a)(1).

Subsection (b) ~~of this section~~ allows an heir, devisee, or nonprobate transferee of the decedent to protect rights under this act and provides a statute of limitation for doing so. It provides time frames for asserting a right under this act either in a probate proceeding (see (b)(1)) or outside the probate process in the case of an action to perfect title to property, in the case of nonprobate assets, or in the case no probate proceedings occur (see (b)(2)). Unlike in subsection (a) ~~of this section~~, the personal representative of the decedent has an obligation to attempt to ascertain whether the decedent has property rights that should be protected under this act, even if no claim is asserted under subsection (b) by an heir, devisee, or nonprobate transferee. *See, e.g.*, Unif. Prob. Code §§ 3-703 (general duties) & 3-706 (duty to prepare an inventory). Like subsection (a), an heir, devisee, or nonprobate transferee may, but is not required to, bring a claim asserting a property right under this act in the probate proceeding under subsection (b)(1). Subsection (b)(3) allows the heir, devisee, or nonprobate transferee, however, to assert such a claim directly against the holder of the property.

Subsection (c) ~~of this section~~ allows personal representative of the decedent to protect rights under this act and provides a statute of limitation for doing so. It provides a time frame for a personal representative of the decedent to recover nonprobate property or perfect title in probate property after being notified by heirs or devisees that probate property is held by the surviving spouse.

Subsection (d) ~~of this section~~ provides a time frame for creditors of the decedent to bring claims. It is based upon Section 3-803 of the Uniform Probate Code, regarding the time frames for creditors asserting claims in probate proceedings.

SECTION 9. PROTECTION OF THIRD PERSON.

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

(1) transacts in good faith and for value:

(A) with a spouse; or

(B) after the death of the decedent, with a surviving spouse, personal representative, heir, or beneficiary; and

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

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

Comment

This section is based upon Section 1012 of the Uniform Trust Code. Like the Uniform Trust Code, this section does not define "good faith." It does, however, require that a third person be without knowledge that the other party to the transaction is acting without authority with respect to property to which this act applies. For a definition of knowledge, see Unif. Trust Code § 104. Moreover, this section makes clear that a person dealing with another party is not charged with a duty to inquire as to the extent or~~f~~ the propriety~~property~~ of the exercise of the purported power or authority of that party. This section, like the Uniform Trust Code, acknowledges that a definition of good faith that is consistent with a state's commercial statutes, such as Section 1-201 of the Uniform Commercial Code, would be consistent with the purpose of this section. This section should be read in conjunction with Section 7 of this act, which provides that courts retain the ability at the death of one spouse to grant equitable relief to the other for actions that have impaired rights granted by this act.

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

Second, this section also applies after the death of a decedent. Section 8 of this act provides relevant time periods within which a surviving spouse may assert rights against a personal representative of the decedent, as well as heirs or transferees of the decedent. Similarly, it also provides relevant time periods within which the heirs, beneficiaries, or creditors of the decedent may assert rights against the surviving spouse or the personal representative of the decedent. This section protects third persons who transact with those relevant parties in possession of apparent title to property, provided the third person gives value, is in good faith, and is without knowledge that the other party to the transaction is improperly exercising authority. For example, if after A's death, A's surviving spouse, B, sells Blackacre, which is titled solely in B's name, to C, C will be protected from liability under this section, even if Blackacre was subject to this act because it was traceable to community property, provided, of course, C was in good faith and without knowledge that B was exceeding his authority.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c) or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 12. TRANSITIONAL AND SAVING PROVISIONS.

(a) Except as otherwise provided in subsection (b), this [act] applies to all judicial proceedings with respect to property to which this [act] applies commenced on or after [the effective date] regardless of the date of the death of the decedent.

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

Comment

This act is intended to have the widest possible effect within constitutional limitations. Specifically, this act applies to the property of a decedent who dies before the enactment of this act, unless a court determines otherwise under the provisions of this section. This act cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter vested property rights. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this act. Nor is an act done before the effective date of this act affected by the act's enactment.

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

[SECTION 13. REPEAL. The [Uniform Disposition of Community Property Rights at Death Act] is repealed.]

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

Comment

This section repeals the adopting State's present Uniform Disposition of Community Property Rights at Death Act. The effective date of this s~~S~~ection should be the same date selected by the state in Section 12 for the application of this act.

SECTION 14. EFFECTIVE DATE. This [act] takes effect . . . .