MEMORANDUM

To: Ronald J. Scalise Jr., Reporter of the Uniform Community Property Disposition at Death Act Committee

From: Juan C. Antúnez, Observer, Miami, Florida

Subject: Comments to 10/27/2020 Draft of Uniform Community Property Disposition at Death Act ("UCPDDA")

Date: November 6, 2020

Dear Ron,

I hope you are well and that the following comments are helpful. Because the acronyms for the UCPDDA and the UDCPRDA are so long and cumbersome, whenever possible I'll refer instead to the "old act" and the "new act" in my comments below.

Regards,
Juan

General Comments:

1. **Include all of the examples provided in the comments to the old act in the comments to the new act.**

   As a practitioner in a common-law jurisdiction trying to understand the community-property concepts underlying the Uniform Disposition of Community Property Rights at Death Act ("UDCPRDA"), I find the detailed examples provided in the comments to the old act very helpful (especially given the almost complete lack of published judicial authority construing the old act). In order to better explain the new act and also highlight any differences vis-à-vis the old act, *all* of the examples provided in the comments to the old act should be included in the comments to the new act and identified in the same way with italicized and numbered subheadings, i.e., as *Example 1*, *Example 2*, etc. The facts of each example included in the comments to the old act should remain the same when incorporated into the comments for the new act, making it easier for practitioners to make an "apples to apples" comparison between the old and new acts.

2. **Include citations to all published judicial authority making any mention of the UDCPRDA in the comments to the new act.**

   There is barely any published judicial authority construing or even mentioning the UDCPRDA. To my knowledge there are only four examples in the almost fifty years since

the old act was first promulgated. All four of these cases should be cited at least once in the comments to the new act.

Two of these cases turn on the application of the UDCPRDA, and thus should be highlighted in the comments to the new act. *See Estate of Bach*, 145 Misc. 2d 945, 548 N.Y.S.2d 871 (Sur. Ct. 1989) (this case involved a couple that moved from Bolivia to New York); and *Johnson v. Townsend*, 259 So.3d 851 (Fla. 4th DCA 2018) (this case involved a couple that moved from Texas to Florida). The other two cases mention the old act in passing. *See First Blood Assocs. v. Comm'r*, 75 T.C.M. (CCH) 2138 (1998);[1] *In re Succession of Duke*, 16 So.3d 459 (La. Ct. App. 2009).[2]

Prefatory Note:

1. Include a clear statement of the new act's intended purpose and limited scope.

In the first paragraph of the prefatory note to the new act, only the text highlighted in yellow below is quoted from the prefatory note to the old act, leaving out key portions of the original paragraph, especially its use of the phrase "her half" and "his half," which is quoted in every presentation I've seen on the act in Florida.

> This Act has a very limited scope. If enacted by a common law state, it will only define the dispositive rights, at death, of a married person as to his interests at death in property "subject to the Act" and is limited to real property, located in the enacting state, and personal property of a person domiciled in the enacting state. The purpose of the Act is 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. It thus follows the typical pattern of community property which permits the deceased spouse to dispose of "his half" of the community property, while confirming the title of the surviving spouse in "her half."

This paragraph does a great job of explaining the act's intended purpose, and how testamentary community property rights work at their core (the estate's split between "her half" and "his half"). Rather than assume practitioners will go back and read all of the comments to the old act, I would quote the original paragraph in its entirety in the prefatory note to the new act.

[1] ("Florida is not a community property State. … Although not relevant to the instant matter, we note that community property principles have taken root in Florida to a limited degree. See Florida Uniform Disposition of Community Property Rights at Death Act, Fla. Stat. Ann. secs. 732.216–732.228 (West 1995). on Nov. 4, 1986.")

[2] ("Nevertheless, we note that Arkansas, in adopting the Uniform Disposition of Community Property Rights at Death Act ("Act"), AR–ST 28–12–101 et seq., has recognized the importance of protecting the interests of spouses who are domiciled in community property states. … The trial court did not err in classifying the Arkansas property as community property under Louisiana law.")

The paragraph quoted above also underscores the fact that the act applies only "at death," a point that cannot be reiterated enough in a common law jurisdiction like Florida, which by statue,[3] as well as case law,[4] has categorically rejected all forms of community property rights in divorce proceedings. I know this point is obvious from the text of the new act, but it bears repeating whenever possible.

2. Include an explanation of how the new act does not result in an unconstitutional impairment of vested property rights

The following statements are currently included in the second paragraph of the prefatory notes to the new act:

> As some commentators have noted, "once [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. 37 REV. 50, 51 (1966). The Prefatory Note to the UDCPRDA observes that this is both a matter of 38 policy "and probably a matter of constitutional law." Unif. Disp. Comm. Prop. Rights Death Act, 39 Pref. Note (1971).

This kind of reference to constitutionally protected vested property rights has led to confusion among some Florida practitioners, with some arguing that UDCPRDA is "unconstitutional" because "it divests constitutionally protect vested property rights without informed consent and without due process of law."[5] I believe this view is mistaken based on Florida's police power right to interfere with vested property rights whenever reasonably necessary to protect the health, safety, morals, and general wellbeing of the people by furthering important public policies. For example, in *Johnson v. Townsend*, 259 So.3d 851 (Fla. 4th DCA 2018), a Florida appellate court held that existing Florida law may divest a surviving spouse of her vested community property rights if she fails to file a timely claim. Although not addressed in the *Johnson* opinion, it appears to me that such divestiture is an appropriate exercise of Florida's police power right in furtherance of its

[3] "Title to disputed assets shall vest only by the judgment of a court. This section does not require the joinder of spouses in the conveyance, transfer, or hypothecation of a spouse's individual property; affect the laws of descent and distribution; **or establish community property in this state**." Fla. Stat. § 61.075(8) (emphasis added).

[4] *See Estabrook v. Wise*, 348 So.2d 355 (Fla. 1st DCA), *cert. denied*, 354 So.2d 980 (Fla. 1977), *cert. denied*, 435 U.S. 971, 98 S.Ct. 1612, 56 L.Ed.2d 63 (1978) ("Florida is not a community property state, and thus is not required to recognize an encumbrance predicated upon a foreign state's community property law. The establishment of non-record title interests arising out of marital claims should be settled in the forum state."); *Green v. Green*, 442 So.2d 354, 355 (Fla. 1st DCA 1983) ("Florida is not a community property state …); *Herrera v. Herrera*, 673 So.2d 143, 144 (Fla. 5th DCA 1996) ("Florida is not a community property state.")

[5] *See* Richard M. Warner, *Florida Community Property Rights Simplified*, Aug. 23, 2019, at pg. 3.4, 38th Annual Attorney Trust Officer Conference, The Florida Bar, Course No. 3241R. Available at: https://www.rpptl.org/uploads/VOLUME1revised.pdf.

strong public policy requiring "that estates of decedents be speedily and finally determined."[6]

The ideas animating the constitutional "takings" critique of UDCPRDA are apparent (although unstated explicitly) in the surviving spouse's arguments in the *Johnson* case, and in her motion to certify to the Florida Supreme Court the following question of "great public importance," which was included at the conclusion of the appellate opinion:

> Whether a surviving spouse's **vested** community property rights are part of the deceased spouse's probate estate making them subject to the estate's claims procedures, or are **fully owned** by the surviving spouse and therefore not subject to the estate's claims procedures.[7]

The Florida Supreme Court declined further review of the *Johnson* case.[8]

It would be helpful if the reference in the comments to "vested" property rights also included citations to authority clarifying that this kind of legislation does not result in an unconstitutional impairment of those vested property rights. *See, e.g., Addison v. Addison*, 399 P.2d 897 (Cal. 1965); *In re Miller*, 187 P.2d 722 (Cal. 1947). In *Quasi-Community Property in Arizona: Why Just at Divorce and Not Death?*,[9] the author provides an excellent summary of the historical development of this issue in California. Here's an excerpt from that article:[10]

> [In] *Addison v. Addison*, … [the] court **focused on the state's police power right** to interfere with vested property rights whenever reasonably necessary to protect the health, safety, morals, and general well being of the people. **Instead of approaching the issue as whether the quasi-community property law impaired a vested right, the court looked to whether the goals effectuated by the quasi-community property law were sufficiently necessary to public welfare**.

(Emphasis added, internal citations omitted.)

3. Include the name of the choice-of-law rule codified in both the old and new acts.

In the third paragraph of the prefatory note to the new act, reference is made to "traditional conflicts-of-law principles," which I assume is a reference to the common law "partial mutability" choice-of-law rule for testamentary marital property rights. The prefatory note

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[6] *Estate of Brown*, 117 So.2d 478, 480 (Fla. 1960).

[7] *Id.* at 859 (emphasis added).

[8] *See Johnson v. Townsend*, 2019 WL 6248012 (Fla. 2019).

[9] *See* Mark Patton, Note, *Quasi-Community Property in Arizona: Why Just at Divorce and Not Death?*, 47 Ariz. L. Rev. 167 (2005) (Arizona).

[10] *Id*. at 183-185.

should expressly state that the act is codifying the "partial mutability" rule, which has been the prevailing doctrine in the U.S. for nearly 200 years,[11] and is "emphasized explicitly by the Restatement (First) of Conflict of Laws § 290 and in actual application by the Restatement (Second) of Conflict of Laws § 259."[12] That historical context makes clear that the old and new act are not creating new law, but rather codifying very old, very well-established law (which is always comforting to judges and the litigators appearing before them).

Also, the partial-mutability rule should be expressly defined. Here is Prof. Schoenblum's "plain English" definition of the rule, which I suggest including in its entirety somewhere in the comments for the new act:

> Under this conflict-of-laws rule, the right of a spouse in a movable asset acquired during marriage is determined by the law of the state in which the spouses had their marital domicile at the time of the acquisition of the asset. Thus, if the spouses change their marital domicile during the marriage, it is entirely possible that different movable assets will be governed by different laws. This conflict-of-laws rule is widely known as **"partial mutability"** because the law of the original marital domicile does not remain the governing law as to assets acquired after a change in marital domicile has taken place. In other words, there is "mutability." However, it is only "partial" because with respect to rights acquired at a particular marital domicile, they are not mutable and are not lost simply by moving to a new marital domicile that does not recognize those spousal rights.[13]

Section 2:

1. "Jurisdiction"

This term is used but not defined in the UDCPRDA, and is also used but not defined in the Uniform Probate Code. I see no reason to include a definition of the term "jurisdiction" in the new act.

If this defined term is going to be kept, then the comment should also include a reference to *Estate of Bach*, 548 N.Y.S.2d 871 (Sur. Ct. 1989), a New York Surrogate's Court judgment applying the UDCPRDA to community-property claims involving a couple that

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[11] "For nearly 200 years, the prevailing doctrine in the United States has been 'partial mutability.'" Jeffrey Schoenblum, *U.S. Conflict of Laws Involving International Estates and Marital Property: A Critical Analysis of Estate of Charania v. Shulman*, 103 Iowa L. Rev. 2119, 2121 (2018). *See also Newman v. Newman*, 558 So.2d 821 (Miss. 1990) ("[T]he … prevailing rule in American jurisdictions [is]: The law of the domicile at the time of acquisition of movable property determines the spouse's interests. … This rule is characterized as one of **partial mutability**, as distinguished from full mutability (the rights to marital property vary with the actual domicile) and immutability (the rights to marital property are governed by the law of the marital domicile).") (Emphasis added.)

[12] *Id*. at FN 54.

[13] *Id*. at 2121 (emphasis added).

moved to New York from Bolivia. The case currently cited to is instructive, and should be kept in the comment, but it's a pre-UDCPRDA case. *See Quintana v. Ordono,* 195 So.2d 577 (Fla. 3d DCA 1967).

2. "Spouse"

By including a modifier at the end of the definition stating that state law controls, the statutory definition of "spouse" becomes meaningless because not matter what the statute says, it's trumped by state law. The term "spouse" is so state-specific, I see no reason to define it in the act, especially since state law will govern anyway.

For example, if the existing definition is applied in Florida, under the first part of the definition of the term "spouse" would presumptively cover non-married registered domestic partners and putative spouses in Florida. However, under the second part of the definition Florida's conflict-of-laws principles kick in, which means these couples would no longer qualify as "spouses" under the new act. *See Cohen v. Shushan,* 212 So.3d 1113, 1116 (Fla. 2d DCA 2017);[14] and *American Airlines v. Mejia,* 766 So.2d 305 (Fla. 4th DCA 2000).[15]

If this defined term is going to be kept, then the comment referencing U.S. states extending community property rights to non-married registered domestic partners should be expanded for completeness. In addition to the parenthetical explaining California's statute,[16] similar parentheticals should be provided for Washington,[17] and Nevada.[18]

3. Terms otherwise defined in the Uniform Probate Code

I would include the following sentence somewhere in the commentary to the definitional section:

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[14] ("While Israel has . . . established the reputed spouse relationship as something of an alternative to marriage, and indeed, has conferred a broad array of rights to reputed spouse couples that . . . are 'equal' to marriage, Israeli law has purposely kept the status of these two relationships separate. Reputed spouses are not married spouses under Israeli law.")

[15] ("*Unión Marital de Hecho*" under Colombian law was not the equivalent of common law marriage in the United States, and thus, partner to *unión* could not be a surviving spouse under state law for purposes of Wrongful Death Act.)

[16] *See* Cal. Fam. Code § 297.5(a) (West 2006) ("Registered domestic partners shall have the same rights … as are granted to and imposed upon spouses."); Cal. Fam. Code § 760 (West 2006) ("[A]ll property, real or personal, wherever situated, acquired by a married person [or registered domestic partner] during the marriage [or registered domestic partnership] while domiciled in this state is community property.").

[17] *See* Wash. Rev. Code Ann. §26.16.030 (West 2011) ("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.").

[18] *See* Nev. Rev. Stat. Ann. §122A.200 (LexisNexis 2010) ("Domestic partners have the same rights … as are granted to and imposed upon spouses.").

The terms "person" and "state" are also defined in Section 1-201 of the Uniform Probate Code, but the more modern version of these definitions is included here for ease of reference. For purposes of this act, the definitions in this section control.

Section 3:

With regard to asset tracing, the comment to this section should include a reference to *Estate of Bach*, 548 N.Y.S.2d 871 (Sur. Ct. 1989), a New York Surrogate's Court judgment applying the UDCPRDA to community-property claims traced back 30 years to when the couple first moved to New York from Bolivia

Section 4:

1. Non-spousal, non-probate transfers

In section 4(b), I would edit the phrase "including revocable trusts" to also make reference to the other most common forms of non-spousal non-probate transfers as follows:

… including revocable trusts and life insurance, pension accounts, joint accounts, and bank accounts with pay-on-death designations …

2. Spousal, non-probate transfers

In section 4(c), I would edit the phrase "including revocable trusts" to also make reference to the other most common form of spousal non-probate transfer as follows:

… including revocable trusts and property held as tenants by the entireties …

Section 6:

I found subsection 6(b) to be confusing. It should be revised to make clear that the authority granted to a court under this subsection can in no way be used to decrease the total value of a surviving spouse's property claims. In other words, subsection 6(b) should be revised to make clear that no matter what, a surviving spouse is entitled to property having a total value equal to all of her interests in the community property *plus* her share of "his half" of the estate she is otherwise entitled as an testate or intestate heir.

If subsection 6(b) is going to be kept, please include a numbered example in the commentary for both testate and intestate estates demonstrating in concrete terms exactly how the math is supposed to work under subsection 6(b).

Section 7:

1. Why are certain potential claimants excluded?

In section 8 of the new act standing to bring claims is extended to an "heir, beneficiary, or creditor" of the decedent. Why are these potential claimants excluded from section 7? Is it impossible that any of these excluded parties might have standing to bring the claims contemplated in section 7 "under the law of the jurisdiction where the decedent or the surviving spouse was formerly domiciled"?

If the intent is to categorically exclude heirs, beneficiaries, and creditors as claimants under section 7, an affirmative statement should be included in the act making that decision clear and an explanation should be included in the comments discussing why these parties are categorically excluded as claimants under section 7.

2. Reference to "former" domicile needs to be clarified.

In subsection (2), reference is made to the "law of the jurisdiction where the decedent or the surviving spouse was **formerly domiciled**." This statement should be clarified to make clear that the "law" being referred to is the law of the respective community property jurisdiction that gives rise to the property claims at issue in the case. Couples can, and often do, change domicile multiple times over the course of their marriage. They may have multiple "former" marital domiciles.

3. Examples needed.

All of the case law included in the comments to section 7 is really helpful to a common-law lawyer like myself. However, this section is also crying out for multiple examples of how claims would actually play out in practice. Please include a separate example of the type of claim covered by each of the following scenarios described in the comments.

- "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."

- "Different community property states also provide different remedies to a spouse whose community property interest has been unduly impaired by another spouse with authority to manage or alienate community property."

- "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 claim for damages, recovery, or reimbursement to the surviving spouse."

- "Although most instances of application of this section will involve monetary claims against by one spouse against another, this section does preserve 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."

Section 8:

1. **Heading.**

   The heading for this section should clearly indicate its purpose to a busy practitioner skimming the act looking for filing deadlines and claims procedure. As an alternative heading I would recommend: PROCEEDING FOR COMMUNITY PROPERTY; TIME LIMIT. This heading is modeled on the comparable section heading for elective share claims under the Uniform Probate Code. *See* UPC, Section 2-211 (PROCEEDING FOR ELECTIVE SHARE; TIME LIMIT).

2. **Defined term "record"**

   These claims will all be litigated in probate proceedings. Why introduce a new defined term like "record" instead of simply using a term like "petition," which is defined in the Uniform Probate Code and thus needs no additional definition in this section.

3. **Mandatory filing deadlines; extensions.**

   The six-month deadline for filing a claim after a personal representative is appointed needs to be mandatory. For example, all filing deadlines for elective-share claims under the Uniform Probate Code are mandatory. *See* UPC, Section 2-211(a) (PROCEEDING FOR ELECTIVE SHARE; TIME LIMIT).[19] In the absence of a mandatory filing deadline, it is impossible to determine with certainty who is entitled to what assets of an estate prior to final distribution.

   If the six-month filing deadline is not mandatory, probate courts will step in and fill the void by applying generally applicable deadlines for creditor claims in probate proceedings, which is exactly what happened in *Johnson v. Townsend*, 259 So.3d 851, 858 (Fla. 4th DCA 2018), a case applying general Florida probate law to a claim asserted under UDCPRDA.

[19] ("Except as provided in subsection (b), the election **must be made** by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires.") (Emphasis added.)

Once the six-month filing deadline is made mandatory, a process for seeking extensions of that deadline should also be included, as is permitted for elective-share claims under the Uniform Probate Code. *See* UPC, Section 2-211(b) (PROCEEDING FOR ELECTIVE SHARE; TIME LIMIT).[20]

4. Examples needed.

Please include separate examples in the comments involving each of the following scenarios:

- The decedent and her husband moved to Florida from Texas. The decedent dies owning no property titled in her name alone, but she does have a ½ community property interest in a $1 million investment account initially funded in Texas. The decedent's child from a prior marriage is her only heir. This child makes a claim on behalf of her mother's estate against the surviving spouse seeking a ½ interest in the $1 million investment account, thus increasing her inheritance from zero to $500,000.

- The decedent and her husband moved to Florida from Bolivia. The decedent dies owning no property titled in her name, but she does have a ½ community property interest in a $1 million investment account initially funded in Bolivia. The decedent personally guaranteed a $500,000 bank loan that came due upon her death. The bank, as a creditor of the decedent's estate, makes a claim on behalf of the estate against the surviving spouse seeking a ½ interest in the $1 million investment account, thus satisfying its unpaid debt.

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[20] ("Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election.")