

DRAFT

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Uniform Community Property Disposition at Death Act

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Uniform Community Property Disposition at Death Act

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Uniform Community Property Disposition at Death Act

Prefatory Note

The Uniform Disposition of Community Property Rights at Death Act (UDCPRDA) was approved by the Uniform Law Commission in 1971. The UDCPRDA established a system for non-community property states to address the treatment of community property acquired by spouses before they moved from a community property state to a non-community property state. According to the UDCPRDA, its purpose was “to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their ‘community’ rights.” Unif. Disp. Comm. Prop. Rights Death Act, Pref. Note, at 3 (1971). As of 2020, sixteen states 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 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 conflict-of-laws 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 Conflict of Laws counsels that “[a] marital property interest in a chattel, or right embodied in a document, which has been acquired

1 by either or both of the spouses, is not affected by the mere removal of the chattel or document to
2 a second state, whether or not this removal is accompanied by a change of domicile to the other
3 state on the part of one or both of the spouses.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS
4 § 259 (1971). Nevertheless, the existing law in non-community property states is often
5 uncertain. The UDCRPDA provided a relatively simple solution that served to clarify an
6 otherwise murky area of law.

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

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

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

1 Sections 1 and 2 provide the title of the act and definitions of terms used throughout the
2 act.

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

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

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

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

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

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

39 Sections 8 and 9 provide limitation periods within which a party must act to preserve

1 rights under the act. These sections recognize that the periods may differ depending upon
2 whether a claim is brought in a probate proceeding or in a separate judicial proceeding to perfect
3 title to property.

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

8 Sections 11 through 17 concern principles of law and equity, uniform application of the
9 act, electronic signatures, transitional and savings provisions, repeal of inconsistent laws, and the
10 effective date of the act. Notably, Section 15 makes the act applicable – within permissible
11 constitutional limitations – to any judicial proceeding commenced after the effective date of the
12 act, even to those who have moved from a community property jurisdiction and died before
13 enactment of the act.

1 **Uniform Community Property Disposition at Death Act**

2 **Section 1. Title**

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

4 **Section 2. Definitions**

5 In this [act]:

6 (1) “Electronic” means relating to technology having electrical, digital, magnetic,
7 wireless, optical, electromagnetic, or similar capabilities.

8 (2) “Jurisdiction” means the United States, a state, a foreign country, or a political
9 subdivision of a foreign country.

10 (3) “Partition” means divide voluntarily property to which this [act] otherwise
11 would apply.

12 (4) “Person” means an individual, estate, business or nonprofit entity, public
13 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
14 entity.

15 (5) “Personal representative” includes an executor, administrator, successor
16 personal representative, special administrator, and person that performs substantially the same
17 function.

18 (6) “Property” means anything that may be the subject of ownership, whether real
19 or personal, legal or equitable, or any interest therein.

20 (7) “Record” means information:

21 (A) inscribed on a tangible medium; or

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

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

(9) “Sign” means, with present intent to authenticate or adopt a record:

- (A) execute or adopt a tangible symbol; or
- (B) attach to or logically associate with the record an electronic symbol, sound, or process.

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

- (A) under which community property could be acquired during the existence of the relationship; and
- (B) that is in existence at the time of death of either party to the relationship.

(11) “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) *Electronic*. The term “electronic” is based upon the standard Uniform Law Commission definition.

(2) *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. Ordonez*, 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).

(3) *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.

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

(5) *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).

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

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

(8) *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.

(9) *Sign*. The definition of “sign” is based upon the standard Uniform Law Commission definition.

(10) *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 The reason for employing a broad definition in this act is not to expand or alter the definition of a spouse in an enacting state but rather to preserve the vested property rights of each person in a relationship that allowed for the acquisition of community property prior to moving to a non-community property state. The term “spouse,” may 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

1 faith to enjoy community property and other civil effects of marriage, despite not being a party to
2 a legally valid marriage. *See, e.g.*, Model Marriage & Div. Act § 209. Although few, if any,
3 community property states recognize common law marriage, Texas does recognize “informal
4 marriages” and thus parties to such an arrangement could also be included in the definition of a
5 “spouse” under this act. *See, e.g.*, Tex. Fam. Code § 2.401. Although Washington law does
6 allow for individuals in a “committed intimate relationship” to receive an equitable distribution
7 of property upon the termination of the relationship, it is not the intent of this act to include such
8 relationships within its ambit. Under Washington law, “committed intimate relationships” are
9 given recognition under Washington courts’ equitable power and are not treated as legal
10 arrangements that give rise to a marriage relationship. *See, e.g.*, *Oliver v. Fowler*, 168 P.3d 348,
11 *355 (Wash. 2007) (“Washington common law has evolved to look beyond how property is titled,*
12 *requiring equitable distribution of property that would have been community property had the*
13 *partners been married. But equity is limited; only jointly acquired property, but not separate*
14 *property, can be equitably distributed.”).*

15
16 (11) *State*. The definition of “state” is based upon the standard Uniform Law Commission
17 definition.

18 19 **Section 3. Included and Excluded Property**

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

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

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

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

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

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

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

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

7 (b) If spouses acquired community property by compliance with the law of a jurisdiction
8 that allows for creation of community property by transfer of property to a trust, the spouses are
9 deemed to have community property under this [act] only to the extent the property is held in the
10 trust or characterized as community property by the terms of the trust or the laws of the
11 jurisdiction under which the trust was created.

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

13 (1) spouses have partitioned or reclassified; or

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

15 **Comment**

16
17 This section makes the act applicable to spouses who were formerly domiciled in a
18 community property jurisdiction. The term “jurisdiction” is used, rather than the narrower term
19 “state,” to be clear that this act would apply to a spouse who was domiciled in foreign
20 jurisdictions where community property may be acquired. *See, e.g., Quintana v. Ordonez*, 195
21 So. 2d 577 (Dist. Ct. Fla. 3d Cir. 1967); *see also Estate of Bach*, 548 N.Y.S.2d 871 (Sur. Ct.
22 1989). Moreover, this act is applicable whenever a spouse was domiciled at any time in the past
23 in a community property jurisdiction, has acquired property there, and has moved to another
24 jurisdiction. Thus, if A and B were married in state X (a community property state) and acquired
25 personal property there, but then moved to state Y (a non-community property state) prior to
26 moving again to state Z (also a non-community property state) where they acquired real property
27 before A eventually died, state Z should apply this act to the property acquired by A and B in
28 state X and state Z.

29
30 Under subsection (a)(1)(A), this act applies to all personal property that was originally
31 classified as a community property by the state at the time at which it was acquired. The current
32 location of the personal property is not relevant for application of this act. Thus, if A and B were

1 married in state X (a community property state), acquired a car there, and eventually moved to
2 state Z (a non-community property state) where A eventually died, then the car would be subject
3 to this act, even if the car was left in storage in state Y.

4
5 Under subsection (a)(1)(B), this act applies to “income, rent, profit, appreciation, or other
6 increase” derived from or traceable to community property under (a)(1)(A) ~~after moving to a~~
7 non-community property jurisdiction. In some community property jurisdictions, income from
8 separate property is community property. Although not included in subsection (a)(1)(B),
9 “income, rent, profit, appreciation, and other increase” from separate property in those states
10 where such income is considered community property is included under subsection (a)(1)(A), as
11 that property would be “community property under the law of the jurisdiction where the decedent
12 or the surviving spouse was domiciled” prior to moving to the non-community property state. In
13 addition, subsection (a)(1)(A) applies to appreciations or other increases in separate property that
14 result from community effort or expenditures of time, toil, or talent of a spouse in community,
15 provided that the appreciation or other increase would be characterized as community property
16 by the relevant community property jurisdiction. *See, e.g., Pereira v. Pereira*, 103 P. 488 (Cal.
17 1909). This result would not obtain, however, when a couple moves from one of the community
18 property states where such an “appreciation[] or other increase” would not give rise to a
19 community property interest in separate property but would instead give rise to a claim for
20 reimbursement by one spouse against the other. *See, e.g., Jensen v. Jensen*, 665 S.W. 2d 107
21 (Tex. 1984); La. Civ. Code. art. 2368. Reimbursement claims of this nature are governed by
22 section 7 of this act rather than this section.

23
24 The reference in this section to “income” should be read to include net income, rather
25 than the gross income, from community property, as well as things produced from community
26 property (i.e., “appreciations and other increases”), even if not technically revenue producing.
27 Thus, if a \$500,000 house were purchased completely with community funds and increased in
28 value to \$700,000 after the spouses moved to a non-community property state, then the entire
29 house, not merely \$500,000 in value, is classified as community property. Similarly, crops
30 produced from a community property farm and a foal produced from a horse that is owned as
31 community property are also ~~considered to be~~ treated as community property.

32
33 Subsection (a)(1)(B) applies to “income, rent, profit, appreciation, or other increase”
34 from community property produced after moving to a non-community property jurisdiction,
35 Indeed, prior to a move, such a rule is unnecessary as all community property states already
36 characterize “income, rent, profit, appreciation, or other increase” derived from community
37 property as community property, and thus such “income, rent, profit, appreciation, or other
38 increase” is already included under subsection (a)(1)(A). The rule in subsection (a)(1)(B),
39 however, is necessary to be clear that even after spouses move to a non-community property
40 state, the “income, rent, profit, appreciation, or other increase” produced by community property
41 acquired prior to the move is ~~still~~ treated as community property after the move to a non-
42 community property state. Thus, interest produced from a community property savings account
43 after A and B move from state X (a community property state) to state Z (a non-community
44 property state) is still treated as community property, irrespective of the location of the account.

45
46 Under subsection (a)(2), this act adopts the traditional situs rule for real estate and is

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

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

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

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

40 Even among states that employ a “pro rata” approach, there is considerable variation for
41 how the apportionment is made. As the comments in the UDCPRDA stated, “[a]ttempts at
42 defining the various types of situations which could arise and the varying approaches which
43 could be taken, depending upon the state, suggest that the matter simply be left to court decision
44 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 to the courts how the determination of the apportionment is to be made.

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

Subsection (b) of this section applies to so-called “opt-in” states where spouses can elect community property by establishing a community property trust. *See, e.g.*, Alaska Stat. § 34.77.100; Ky. Rev. Stat. Ann. § 386.20; Tenn. Code Ann. § 17-35-101; S.D. Codified Laws § 55-17-3. The intent of this act is not to override the terms of a community property trust but rather to treat as community property only that property held in a community property trust or characterized as community property by the terms of the trust or the relevant state law. Different community property trust provisions and different state laws may offer different rules for what constitutes community property. Alaska law, for example, provides that “appreciation and income of property transferred to a community property trust is community property if declared in the trust to be community property.” Alaska Stat. § 34.77.030(i). Most other community property trust statutes are silent on the treatment of income from community property. Kentucky law, however, provides that “[a]ll property owned by a community property trust shall be considered community property,” but “[w]hen property is distributed from a community property trust, it shall no longer constitute community property.” Ky. Rev. Stat. Ann. § 386.22(7) & (8). The intent of this act is to apply only to the property held in trust or treated as community property by the law of the jurisdiction where the trust was created. Once it is ascertained what is characterized or treated as community property, then this act would apply to that property and to property traceable to it under subsection (a). It is notable, however, that Section 6 of this act generally does not govern the disposition on death of property that has been transferred by the decedent to the decedent’s surviving spouse by “nonprobate transfer instrument,” which would

1 include property transferred on death pursuant to the provisions of a community property trust.

2
3 At least one state allows for the acquisition of community property by spouses pursuant
4 to an agreement, including an agreement that provides “that all property acquired by either or
5 both spouses during the marriage is community property.” Alaska Stat. §34.77.100. In such a
6 case, subsection (a) of this section, rather than subsection (b), is applicable.

7
8 Subsection (c) of this section makes clear that this act does not apply in cases where
9 spouses have themselves divided former community property by means of a partition or when
10 spouses have changed the classification of their property from community to separate. Such a
11 division or change in classification could occur either before or after the spouses move from the
12 community property jurisdiction to a non-community property jurisdiction. Similarly, this act
13 does not apply to property as to which rights have been waived. Section 4 of this act prescribes
14 the necessary form and procedures for partition, reclassification, or waiver of rights.

15 16 **Section 4. Form of Partition, Reclassification, or Waiver**

17 (a) Spouses domiciled in this state may partition or reclassify property to which this [act]
18 otherwise would apply. The partition or reclassification must be made in a record signed by both
19 spouses.

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

23 **Comment**

24
25 This section specifies the necessary form or procedure for a partition or reclassification of
26 property or waiver of rights under the act once the spouses have moved to the enacting state.
27 This section requires that both spouses sign a record agreeing to any partition or reclassification.
28 Both the terms “sign” and “record” are defined in Section 2 of this act. In community property
29 jurisdictions, the change or reclassification of property acquired during marriage is known as
30 “transmutation.” As noted by scholars, “[t]he law in many community property states has moved
31 toward requiring married couples to spell out their intentions regarding their property in writing.”
32 CHARLOTTE GOLDBERG, COMMUNITY PROPERTY 239 (2014). *See, e.g.*, Cal. Fam Code § 852(a)
33 (“A transmutation of real or personal property is not valid unless made in writing by an express
34 declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the
35 property is adversely affected.”); Idaho Code § 32-917 (“All contracts for marriage settlements
36 must be in writing and executed and acknowledged or proved in like manner as conveyances of
37 land are required to be exercised and acknowledged or proved.”); *Hoskinson v. Hoskinson*, 80
38 P.3d 1049 (Idaho 2003).

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

9
10 Failure to comply with the requirements of this section will preclude partition,
11 reclassification, or waiver under this section but may give rise to an equitable claim under
12 section 7 of this act.

13
14 A mere unilateral act by a spouse of holding property in a form, including a revocable
15 trust, that has paid or has transferred property on death to a third person is not a partition of the
16 property or an agreement waiving rights granted under this [act]. The mere taking of title to
17 property that was previously acquired as community property in the form of a transfer-on-death
18 deed does not operate as a partition, reclassification, or waiver. For example, if after moving
19 from a community property state to a non-community property state, A retitles a community
20 property bank account owned with B into a bank account in A's name exclusively with a pay-on-
21 death designation to C, the retitling of former community property in the exclusive name of "A,
22 pay-on-death, C" does not constitute a partition. For a partition or reclassification to occur, both
23 spouses must agree to the severance of their community property interests and comply with the
24 necessary form requirements imposed by this section.

25
26 This section does not attempt to specify the requisite form or procedure for a partition
27 prior to moving to the enacting state, which should be governed by the law of the community
28 property state rather than this act. If parties have partitioned or reclassified previously acquired
29 community property after moving to a non-community property state, this act would not apply to
30 any such property owned by the decedent at death. The terms "partition" and "reclassify" are
31 defined in Section 2 of this act.

32 33 **Section 5. Community Property Presumption**

34 All property acquired by a spouse when domiciled in a jurisdiction where community
35 property could then be acquired by the spouse by operation of law as an incident of marriage or
36 ~~similar other~~ relationship under which community property could then be acquired is presumed
37 to be community property. This presumption may be rebutted by a preponderance of the
38 evidence.

39 **Comment**

40

1 This section applies to so-called “opt out” states that provide for the acquisition of
2 community or marital property by operation of law and as an incident of marriage. Scholars
3 have noted that in the nine “opt out” states, community or marital property is not created by
4 contract, although spouses can “opt out” by contract. Caroline Bermeo Newcombe, *The Origin*
5 *and Civil Law Foundation of the Community Property System, Why California Adopted It and*
6 *Why Community Property Principles Benefit Women*, 11 U. MD. L.J. RACE RELIG. GENDER &
7 CLASS 1 (2011) (One “characteristic of community property systems is that they arise by
8 operation of law.”). This section adopts a blanket presumption in favor of treating all property
9 acquired by a spouse while domiciled in a community property jurisdiction as community
10 property, provided, of course, that the laws of the community property state allowed community
11 property to “then be acquired” by *that* person. In other words, the presumption applies only to
12 those persons who could acquire community property under the laws of the relevant jurisdiction
13 by virtue of marriage or similar relationship. ~~Consequently, the presumption does not apply to~~
14 ~~unmarried individuals~~ The phrase “or other relationship under which community property could
15 then be acquired” is a reference to the definition of spouse in section 2(10), which recognizes
16 that in some jurisdictions domestic or registered partners may acquire community property. The
17 presumption does not apply to non-spouses or to those who have opted out of the community
18 regime even if they acquire property while domiciled in a community property jurisdiction, as
19 those individuals could not then acquire community property in that jurisdiction.
20

21 Although stated in various ways, the blanket presumption of this section is common in
22 community property jurisdictions. *See, e.g.*, N.M. Stat. Ann. § 40-3-12(A) (“Property acquired
23 during marriage by either husband or wife, or both, is presumed to be community property.”);
24 Wisc. Stat. § 766.31(2) (“All property of spouse is presumed to be marital property.”); Tex. Fam.
25 Code § 3.003(a) (“Property possessed by either spouse during or on dissolution of marriage is
26 presumed to be community property”); La. Civ. Code art. 2340 (“Things in the possession of a
27 spouse during the existence of a regime of community of acquets and gains are presumed to be
28 community, but either spouse may prove they are separate property.”); Cal. Fam. Code § 760;
29 Model Marital Prop. Act. § 4(a) (“All property of spouses is marital property except that which is
30 classified otherwise by this Act.”); Wisc. Stat. § 766.31(2) (“All property of spouses is presumed
31 to be marital property.”).
32

33 Despite the above presumption, a party may prove that the relevant property was
34 separate, even though acquired during the existence of a community regime, such as by
35 demonstrating that the property was acquired by inheritance. Although different community
36 property states provide different standards for rebutting the presumption of community property,
37 this act adopts a preponderance standard for rebutting the presumption, as have a number of
38 community property states. *See, e.g., Marriage of Ettefagh*, 59 Cal. Rptr. 3rd 419 (Cal. App.
39 2007); *Talbot v. Talbot*, 864 So. 2d 590 (La. 2003); *Brandt v. Brandt*, 427 N.W. 2d 126 (Wisc.
40 App. 1988); *Sanchez v. Sanchez*, 748 P.2d 21 (N.M. App. 1987); *But see* Tex. Fam. Code §
41 3.03(b) (“The degree of proof necessary to establish that property is separate property is clear
42 and convincing evidence.”); *Reed v. Reed*, 44 P.3d 1100 (Idaho 2002) (requiring “reasonable
43 certainty and particularity” to rebut the presumption).
44

45 Unlike Section 2(2) of the UDCPRDA, this act does not impose a presumption against
46 the applicability of this act for property acquired in a non-community property state and held in a

1 form that creates rights of survivorship. *See, e.g., Trenk v. Soheili*, 273 Cal. Rptr. 3d 184 (Ct.
2 App. 2d Cir. 2d Div. 2020) (stating that “the manner in which a married couple holds title to real
3 property is not sufficient in itself to rebut the statutory presumption that is community
4 property”). Taking title to property in various forms is often a unilateral act that should not by
5 itself serve as a presumption of partition of interests in a community asset. After all, a spouse
6 may move to non-community property state and open a bank account with a pay-on-death
7 designation to a friend or a sibling. Such an account should not be presumed to be excluded from
8 this applicability of this act, as the relevant account may have been funded with community
9 property acquired prior to the move. The ultimate treatment of the relevant account will depend
10 upon whether it can be proved that the money in the account was traceable to community
11 property.
12

13 **Section 6. Disposition of Property at Death**

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

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

18 **Alternative A**

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

21 **Alternative B**

22 (c) For the purpose of calculating the augmented estate of the decedent and the elective-
23 share rights of the surviving spouse:

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

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

27 **End of Alternatives**

28 (d) [Except for the purpose of calculating the augmented estate of the decedent and the
29 elective-share rights of the surviving spouse, this] [This] section does not apply to property

1 transferred ~~to the surviving spouse~~ by right of survivorship or under a revocable trust or other
2 nonprobate transfer.

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

5 (f) If at death a decedent purports to dispose of property that, under this section, belongs
6 to the surviving spouse to a third person and disposes of other property to the surviving spouse,
7 this section does not limit the authority of the court under other law of this state to require that
8 the spouse elect between retaining the disposition from the decedent or asserting rights under this
9 [act].

10 **Legislative Note:** *A traditional elective-share state should adopt Alternative A and adopt the language*
11 *beginning with “This” in subsection (d). An augmented-estate, elective-share state whose statute does*
12 *not address rights in community property adequately should adopt Alternative B and adopt the language*
13 *beginning with “Except” in subsection (d). In subsection (e), a state should insert the statutory reference*
14 *to the applicable allowances, such as homestead, exempt property, or family.*

16 Comment

17
18 Under subsection (a), at the death of one spouse, one-half the property to which this act
19 applies belongs to the surviving spouse. This is the universal approach of community property
20 states. As a result, the decedent cannot dispose of the property belonging to the surviving spouse
21 by will or intestate succession. An attempt to do so would be ineffective.

22
23 If, however, the decedent disposes of property subject to this act by nonprobate transfer
24 in favor of the third person, Section 7, rather than this section, applies. In other words, this act,
25 like the law in community property states, provides that reimbursement or equitable claims may
26 be available to a surviving spouse when a decedent improperly alienates the interest of a spouse
27 by means of a nonprobate transfer. *See, e.g., T.L. James & Co. v. Montgomery*, 332 So. 2d 834
28 (La. 1975).

29
30 Under subsection (b), at the death of one spouse, one-half the property to which this act
31 applies belongs to the decedent. Again, this is universal approach of community property states.
32 As a result, the decedent can dispose of that property by any probate or nonprobate mechanism.
33 Elective share rights that are common in non-community property states do not apply in
34 community property states, at least not with respect to community property in those states. With
35 respect to elective shares rights, however, there is great variation among non-community
36 property states. In some states, a surviving spouse’s elective share rights are a fractional share
37 (often 1/3) in the decedent’s property. In such a case, states should elect Alternative A, which
38 precludes further application of elective share rights in the decedent’s property under this act.

1 Other states, however, grant elective share rights in an “augmented estate,” which is frequently
2 composed of all the decedent’s property, all the decedent’s nonprobate transfers, and all the
3 surviving spouse’s property and nonprobate transfers to others. *See* Unif. Prob. Code § 2-203.
4 In those states, Alternative B should be elected so that the both the property of the decedent and
5 the surviving spouse are considered part of the augmented estate, but then the surviving spouse’s
6 portion of the property is credited in satisfaction of the surviving spouse’s elective share rights.
7 *See, e.g.,* Unif. Prob. Code § 2-209(a)(2).
8

9 If the decedent dies intestate, then one-half of the property covered by this act is included
10 in the decedent’s intestate estate. The intestate law of most states would grant to the surviving
11 spouse a lump sum plus at least one half of the remainder of the decedent’s property, which
12 would be in addition to the one-half interest granted to the surviving spouse in property to which
13 this act applies.
14

15 By way of illustration of this section, assume A and B were formerly domiciled in state X
16 (a community property jurisdiction) where all their property was community property and have
17 subsequently moved to a state Y (a non-community property state that has adopted this act).
18 Upon moving to state Y, A and B acquired a home in state Y, titled solely in B’s name but with
19 funds from the proceeds of the sale of the home in state X. A and B also acquired stock while
20 domiciled in state X, but held it in safety deposit boxes located in states U and V (two other non-
21 community property states). A and B also retained a summer house in state X, which they
22 acquired while domiciled there and which was titled solely in B’s name. A and B also acquired
23 real property in state Z (a non-community property state that has not adopted this act) for
24 investment purposes. Finally, B acquired bonds held in B’s name issued by the company that
25 employed B and acquired with earnings from B’s job in state Y.
26

27 At B’s death, the home in state Y and the stock located in states U and V would be
28 property subject this act, and consequently, B would have the right under this section to dispose
29 of half. The home retained in state X would be community property under the law of state X, but
30 this act applies only to real property located in the adopting state. The investment property
31 located in state Z would not be subject to this act because state Z has not adopted the act .
32 Finally, the bonds held in B’s name would not be subject to this act because they were acquired
33 with property earned and acquired in state Y, a non-community property state.
34

35 Subsection (c) provides two alternatives. In states that grant a surviving spouse an
36 elective share only in the probate estate, this section excludes elective share rights in property
37 subject to this act, as the surviving spouse is already provided a one-half interest in the relevant
38 property. In states that have adopted an augmented-estate approach to the elective share, this
39 subsection makes clear that for purposes of calculating the augmented estate, one-half of the
40 property assigned to the decedent is treated as the decedent’s property and the other one-half is
41 treated as the property of the surviving spouse.
42

43 Subsection (d) provides that, with one exception, this section does not apply to any
44 property transferred ~~to a surviving spouse~~ by means of a nonprobate transfer or a right of
45 survivorship designation. After all For example, if property is transferred by the decedent to a
46 third person by means of a nonprobate transfer, the surviving spouse may pursue a claim under

Section 7 of this act, rather than this section. Moreover, if the property is transferred to a surviving spouse by the decedent then the surviving spouse should not have further rights to that property or claims against the decedent's estate by virtue of the transfer. The one exception is for purposes of ascertaining elective-share rights in those states that have adopted an augmented-estate approach to the elective share.

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

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

Section 7. Other Remedies Available at Death

(a) At the death of an individual, the surviving spouse or a personal representative, heir, or nonprobate transferee of the decedent may assert a right based on an act of:

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

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

(b) In determining rights under subsection (a) and corresponding remedies, the court:

(1) shall apply equitable principles; and

(2) may consider the community property law of the jurisdiction where the decedent or 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~~ The phrase “or other relationship under which community property could then be acquired” is a reference to the definition of spouse in section 2(10), which recognizes that in some jurisdictions domestic or registered partners may acquire community property and thus should have remedies available to protect vested property rights under this section. It is not intended to grant rights to cohabitants or to individuals in relationships other than those in which community property could be acquired under the law of the state in which the spouses are domiciled. Two rights often provided to spouses 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. These rights should be available to a spouse without regard to whether the act of the other spouse giving rise to the claim occurred in the community property jurisdiction, prior to a move, or in the non-community property jurisdiction, after a move. Furthermore, nonprobate transfers of community property to a third person without the consent of the surviving spouse may give rise to claims by the surviving spouse under this section.

Claims for reimbursement are commonly available when community property has been used to satisfy a separate obligation or when separate property has been used to improve community property or vice versa, *see, e.g.*, La. Civ. Code art. 2364, 2366, and 2367; Cal. Fam. Code § 2640-; Tex. Fam. Code §§ 3.401-3.410. Different community property states calculate the amount of reimbursement differently. *See, e.g., Hiatt v. Hiatt*, 487 P.2d 1121 (Idaho 1971) (awarding reimbursement based upon the enhanced value of the property even if it exceeds the amount spent); *Portillo v. Shappie*, 636 P.2d 878 (N.M. 1981) (assessing reimbursement based upon the enhanced value of the improved property even if it exceeds the amount of money expended); La. Civ. Code art. 2366 (providing for reimbursement based upon the amount expended); *Marriage of Sedlock*, 849 P.2d 1243 (Wash. App. 1993) (awarding reimbursement based upon the amount spent); *Estate of Kobyliski v. Hellstern*, 503 N.W.2d 369 (Wis. App. 1993) (assessing reimbursement based upon the greater of the amount spent or the value added). This section grants courts flexibility in assessing the amount of the reimbursement.

The rights granted by this section are operable at the death of an individual and may not be asserted during the existence of the marriage. This approach is consistent with the law of various community property jurisdictions. *See, e.g.*, La. Civ. Code art. 2358 (“A claim for reimbursement may be asserted only after termination of the community property regime, unless otherwise provided by law.”). *But see* Model Marital Property Act § 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

1 may have inappropriately donated property to a third person. Similarly, at the death of the
2 decedent, the decedent may have inappropriately transferred property belonging to the surviving
3 spouse to a third person by nonprobate transfer. Although community property states generally
4 enforce such transfers, they correspondingly grant a right to claim damages, a right to recover the
5 property, or a right to reimbursement by the surviving spouse. Again, this section grants a court
6 broad authority to craft legal or equitable remedies to protect a spouse. Of course, the
7 application of this section must yield when appropriate to federal law. *See, e.g.*, Employment
8 Retirement Security Act, 29 U.S.C. Section 1001 et seq.; *Boggs v. Boggs*, 520 U.S. 833 (1997)
9 (holding that ERISA pre-empted state community property law and remedies, even though the
10 relevant ERISA-governed retirement plan was funded with community property).
11

12 Subsection (b) provides that a court in evaluating a claim under subsection (a) should
13 apply “equitable principles” to craft rights and remedies and “may consider” the law of the
14 community property jurisdiction where the decedent or the surviving spouse was formerly
15 domiciled at the time the property was acquired or enhanced in deciding what rights to recognize
16 and what remedies to provide to a spouse under this act. A court, however, is not limited by this
17 section to proceed only in the manner or exactly as the court in a community property
18 jurisdiction would proceed. Often ascertaining the existence and scope of a right that could have
19 been asserted in a community property jurisdiction is an exceedingly difficult task and could
20 involve difficult investigations of the law of different states or foreign jurisdictions from years or
21 even decades in the past. Such laws might not be readily available to or ascertainable by a court
22 under this act, given barriers in publication and language. For example, ascertaining the nuances
23 of French community property law for a couple that has moved from Paris to New York in the
24 1960s would be a daunting task indeed. Thus, subsection (b) is intended to provide flexibility to
25 a court to consider the laws of the community property jurisdiction but not necessarily proceed
26 as a court would in that jurisdiction.
27

28 Similarly, in ascertaining the remedies associated with the right under this section, a court
29 should look to but not be bound by the law of the community property jurisdictions. Even
30 among community property jurisdictions, the remedies associated with various rights often vary
31 significantly when one spouse’s interest has been unduly impaired by another spouse with
32 authority to manage or alienate community property. Although most instances of application of
33 this section will involve monetary claims against by one spouse against another, this section does
34 not limit a court’s power to grant other equitable relief, which may involve recognition of rights
35 against third persons to whom property has been transferred by one spouse without authorization
36 of the other.
37

38 Equitable doctrines, such as a “constructive trust,” are common remedies used by courts
39 to protect the interest of a spouse. In California, for example, a court may award a defrauded
40 spouse a percentage interest or an amount equal to a percentage interest in any asset transferred
41 in breach of a spouse’s fiduciary duty. Cal. Fam. Code § 1101. In Texas, the doctrine of “fraud
42 on the community” protects one spouse when the other wrongfully depletes community property
43 through actual or constructive fraud by allowing a court to allocate other property to the
44 defrauded spouse through any legal or equitable remedy necessary, including a money judgment
45 or a constructive trust. *See, e.g.*, Tex. Fam. Code § 7.009; *see also Osuna v. Quintana*, 993
46 S.W.2d 201 (Tex. Ct. App. Corpus Christi 1999) (“The breach of a legal or equitable duty which

1 violates the fiduciary relationship existing between spouses is termed ‘fraud on the community,’
2 a judicially created concept based on the theory of constructive fraud.”). In Louisiana, a spouse
3 may be awarded damages when the other spouse acted fraudulently or in bad faith. *See* La. Civ.
4 Code art. 2354 (“A spouse is liable for any loss or damage caused by fraud or bad faith in the
5 management of the community property.”). In addition to damages and equitable relief, some
6 community property states statutorily grant courts authority to add the name of a spouse to a
7 community asset titled solely in the name of the other spouse in order to protect the interest of
8 the previously unnamed spouse. *See, e.g.,* Cal. Fam. Code § 1101 (c); Wisc. Stat. § 766.70(3).
9 This section provides the court with broad authority to grant damages or to craft any other
10 appropriate equitable remedy necessary to protect a spouse. Available legal and equitable
11 remedies available in courts of this state may not be co-extensive with the legal and equitable
12 remedies available in the relevant community property jurisdiction.

13
14 Because the grant of authority to courts under subsection (b)(2) is a discretionary one, a
15 higher court should review a trial court’s application of this subsection only under an “abuse of
16 discretion” standard.

17
18 This section must be read in conjunction with Section 910 of this act, which protects
19 good faith transferees of property who give value. Thus, good faith transferees for value will be
20 protected by Section 910 of this act, such that a spouse’s claim for bad faith management would
21 solely be cognizable against the other spouse. If, however, one spouse improperly donates or
22 transfers property to which this act applies to a third person who is not acting in good faith,
23 equitable relief against a third person may, in the discretion of the court, be available to the
24 spouse whose rights are impaired. After all, improper gifts of community property by one spouse
25 are generally voidable as against a third person in community property jurisdictions. *See, e.g.,*
26 *Polk v. Polk*, 39 Cal. Rptr. 824 (App. 1964); Wisc. Stat. § 766.70; La. Civ. Code art. 2353;
27 *Mezey v. Fioramonti*, 65 P.2d 980 (Ariz. App. 2003); Model Marital Property Act § 6(b).

28 29 **Section 8. Right of Surviving Spouse**

30 (a) The surviving spouse of the decedent may assert a claim for relief with respect to
31 rights under this [act] ~~according to~~ in accordance with the following rules:

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

33 (A) commence an action against the heirs, devisees, or nonprobate
34 transferees of the decedent who are in possession of the property not later than [three years] after
35 the death of the decedent; or

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

(2) In all other actions, the surviving spouse must:

- (A) 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; or
- (B) if no personal representative is appointed, commence an action not later than [three years] after the death of the decedent.

(b) ~~Absence~~ Absent a timely demand under subsection (a)(1)(B) or (a)(2)(A), the personal representative may distribute the assets of the decedent's estate without personal liability for a spouse's claim under this [act].

Legislative Note: A state should insert in subsection (a)(1)(A) and (a)(2)(B) the time for asserting a claim to a nonprobate asset, probating a will, or challenging a revocable trust and in subsections (a)(1)(B) and (a)(2)(A) the time for asserting a claim in a probating proceeding. The six-month period is not an uncommon period for a non-claim statute for creditors, and the three-year period is adapted from statute of limitations on claims challenging revocable trusts and for actions against distributees of an estate.

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 statutes of limitations on claims challenging revocable trusts and for actions against distributees of an estate. See Unif. Trust Code § 604; Unif. Prob. Code § 3-1006. This section fills a gap that existed in the UDCPRDA, which did not provide for specific statute of limitations periods for bringing claims under the act. Thus, courts were left to speculate as to what time periods applied. See, e.g., *Johnson v. Townsend*, 259 So. 3d 851 (Fla. 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 applied).

Subsection (a)(1) of this section allows a surviving spouse to protect rights in or to specific assets under this act and provides a statute of limitation for doing so. It provides time frames for a surviving spouse to assert a right under this act either directly against an heir, devisee, or nonprobate transferee of the decedent who is in possession of property that belongs to the surviving spouse under this act (see (a)(1)(~~a~~A)) or in a probate proceeding by sending a demand to the court-appointed personal representative of the decedent (see (a)(1)(~~b~~B)). 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 in or to property, may assert that claim directly against C under subsection (a)(1)(~~a~~A) or in the probate proceeding

1 under subsection (a)(1)(~~b~~B)). A surviving spouse, however, is not foreclosed from pursuing the
2 option in (a)(1)(~~a~~A) if a claim under subsection (a)(1)(~~b~~B) is first brought and is unsuccessful.

3
4 Subsection (a)(2) of this section provides a procedure and statute of limitation for all
5 other claims of the surviving spouse under this act that are not claims in or to specific assets. For
6 example, if A's claim is one for reimbursement of community funds under Section 7, then A's
7 claim is a claim as a creditor and not one in or to specific property. As a result, A would have to
8 assert the claim under subsection (a)(2).

9
10 Subsection (b) allows the personal representative of the decedent to distribute assets of
11 the decedent's estate without risk of personal liability if the surviving spouse fails to make a
12 timely demand under subsection (a).

13 14 **Section 9. Right of Heir, Devisee, or Nonprobate Transferee**

15 An heir, devisee, or nonprobate transferee of the decedent may assert a claim for relief
16 with respect to rights under this act ~~according to~~ in accordance with the following rules:

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

19 (~~1~~A) commence an action against the surviving spouse of the decedent
20 who is in possession of the property not later than [three years] after the death of the decedent; or

21 (~~2~~B) send a demand in a record to the personal representative of the
22 decedent not later than [six months] after the appointment of the personal representative.

23 (~~b~~2) In all other actions, an heir, devisee, or nonprobate transferee must:

24 (~~1~~A) send a demand in a record to the personal representative of the
25 decedent not later than [six months] after the appointment of the personal representative; or

26 (~~2~~B) if no personal representative is appointed, commence an action not
27 later than [three years] after the death of the decedent.

28 **Legislative Note:** A state should insert in subsection (~~a~~)(1)(A) and (~~b~~)(2)(B) the time for
29 asserting a claim to a nonprobate asset, probating a will, or challenging a revocable trust and in
30 subsections (~~a~~)(2)(B) and (~~b~~)(1)(A) the time for asserting a claim in a probating proceeding.

31
32 **Comment**

1 The time periods provided in this section are generally borrowed from other areas of law.
2 Specifically, a six-month period is not an uncommon period for a non-claim statute for creditors,
3 and the three-year period is adapted from claims challenging revocable trusts and for actions
4 against the distributees of an estate. *See* Unif. Trust Code § 604; Unif. Prob. Code § 3-1006. This
5 section fills a gap that existed in the UDCPRDA, which did not provide for specific statute of
6 limitations periods for bringing claims under the act. Thus, courts were left to speculate as to what
7 time periods applied. *See, e.g., Johnson v. Townsend*, 259 So. 3d 851 (Fla. 4th D. Ct. App. 2018)
8 (holding that in the absence of a specific statute of limitations in the Florida version of the
9 UDCPRDA, the general statute of limitation for asserting a claim or cause of action against the
10 decedent applied).

11
12 Subsection (~~a~~)(1)(A) of this section allows an heir, devisee, or nonprobate transferee of
13 the decedent to protect rights under this act and provides a statute of limitation for doing so. It
14 provides time frames for an heir, devisee, or nonprobate transferee to assert a right under this act
15 either directly against a surviving spouse of the decedent who is in possession of property that
16 belongs to an heir, devisee, or nonprobate transferee under this act (see (~~a~~)(1)(A)) or in a probate
17 proceeding by sending a demand to the court-appointed personal representative of the decedent
18 (see (~~a~~)(2)(B)). Unlike in section 8, the personal representative of the decedent has an
19 obligation to attempt to ascertain whether the decedent has property rights that should be
20 protected under this act, even if no claim is asserted under subsection (~~a~~)(1)(A) by an heir,
21 devisee, or nonprobate transferee. *See, e.g.,* Unif. Prob. Code §§ 3-703 (general duties) & 3-706
22 (duty to prepare an inventory).

23
24 Subsection (~~b~~2) of this section provides a procedure and statute of limitation for all other
25 claims of an heir, devisee, or nonprobate transferee of the decedent under this act that are not
26 claims in or to specific assets.

27 28 **Section 10. Protection of Third Person**

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

31 (1) transacts in good faith and for value:

32 (A) with a spouse; or

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

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

37 (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 or a reason to know that the other party to the transaction is acting without authority with respect to property to which this act applies. For a definition of knowledge, see Unif. Trust Code § 104. Moreover, this section provides that a person dealing with another party is not charged with a duty to inquire as to the extent or the propriety of the exercise of the purported power or authority of that party. This section, like the Uniform Trust Code, acknowledges that a definition of good faith that is consistent with a state’s commercial statutes, such as Section 1-201 of the Uniform Commercial Code, would be consistent with the purpose of this section. This section should be read in conjunction with Section 7 of this act, which provides that courts retain the ability at the death of one 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 or reason to know 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 marital asset during the existence of the marriage, no good reason could be found for protecting bad faith third ~~parties~~ persons with knowledge or reason to know 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 provided C gave value, 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~~ 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~~ section 9 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 11. Principles of Law and Equity

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

Comment

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

Section 12. Uniformity of Application and Construction

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

Section 13. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “, as amended”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

1 **Section 14. Saving Provision**

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

6 **Section 15. Transitional Provision**

7 Except as provided in Section 14, this [act] applies to a judicial proceeding with respect
8 to property to which this [act] applies commenced on or after [the effective date of this [act]]
9 regardless of the date of the death of the decedent.

10 **Comment**

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

18
19 The amendment to this section is generally based upon Section 8-101 of the Uniform
20 Probate Code and Section 1106 of the Uniform Trust Code.

21
22 **[Section 16. Repeal; Conforming Amendments]**

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

24 [(b) . . .]

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

27
28 *[A state should examine its statutes to determine whether conforming amendments are*
29 *required by provisions of this act.]*

30
31 **Comment**

32 This section repeals the adopting state's present Uniform Disposition of Community

1 Property Rights at Death Act. The effective date of this section should be the same date selected
2 by the state in Section 12 for the application of this act.

3 **Section 17. Effective Date**

4 This [act] takes effect