

D R A F T
FOR DISCUSSION ONLY

UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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CLEAN DRAFT



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

In its original form, the UDCPRDA offered substantial benefits for citizens in non-community property states that adopted the act, namely the recognition and protection of property rights acquired in a community property state in which citizens were formerly domiciled. Today, this is more important than ever, as Americans are more mobile today than ever before. It is estimated that 7.5 million people moved 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 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, “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. REV. 50, 51 (1966). The Prefatory Note to the UDCPRDA observes that this is both a matter of policy “and probably a matter of constitutional law.” Unif. Disp. Comm. Prop. Rights Death Act, Pref. Note (1971).

Under traditional conflicts-of-law principles, the result is the same: a move from a community property state to a non-community property one does not change the nature of the property. Sarah N. Welling, *The Uniform Disposition of Community Property at Death Act*, 65 KY. L. J. 541, 545 (1977). The Restatement (Second) of Conflicts counsels that “[a] marital

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

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

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

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

29 Section 4 makes clear that if the spouses have partitioned their community property, the
30 UCPDDA no longer applies to that property, as the spouses themselves have ended the
31 community property classification of the property and mutually allocated to each other separate
32 property interests that were previously held as community.

33 Section 5 assists courts and the parties in evidentiary matters of proof in applying the
34 UCPDDA. Specifically, even if two spouses are married under a community regime in a
35 community property state, they may still acquire separate property that is owned individually and
36 is not part of their community regime. Community property states generally impose a
37 presumption that all property acquired by either spouse during the existence of their community
38 is presumed to be community, unless a spouse can demonstrate to the contrary. Section 5 adopts
39 the same type of rebuttable presumption, such that a party asserting the applicability of this act
40 would need to prove only that the property was acquired while domiciled in a community
41 property jurisdiction under a community property regime and not that the property was acquired

1 while domiciled in a community property jurisdiction and that the relevant property was not
2 acquired separately. It was thought that any other rule might make proof of application of the act
3 too difficult, given the passage of time, the absence of records, and the fading of memories
4 between the time when the property was originally acquired and the time of death of the
5 decedent.

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

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

17 Section 8 provides limitations periods within which a party must act to preserve rights
18 under this act.

19 Section 9 protects third persons who have transacted in good faith and for value.
20 Otherwise, third persons could be subject to claims by a spouse under Section 7 if the spouse
21 engages in some acts of bad faith management of community property while alive. Similarly,
22 Section 8 may grant beneficiaries of the decedent or the surviving spouse of the decedent rights
23 against third persons for unauthorized alienations. Section 9 ensures that in most instances, third
24 persons will be protected from these claims.

1 **UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT**

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

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Jurisdiction” means the United States, a state, a foreign country, or a political
6 subdivision of a foreign country.

7 (2) “Partition” means a voluntary division by spouses of property that either was
8 community property or is treated as community property under this [act].

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

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

13 (5) “Spouse” means an individual who is in a relationship under which community
14 property could have been acquired at the time of the relationship and which is recognized as
15 valid under conflicts of law principles in this state.

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

19 **Reporter’s Notes**

20
21 The amendment attempts to broadly define the term spouse to include any “relationship
22 under which community property could have been acquired” (e.g., marriage, domestic or
23 registered partnerships, common law marriages, and putative spouses), provided such a
24 relationship is recognized as valid under conflicts of law principles in the enacting states. See,
25 e.g., Restatement (Second) of Conflict of Laws § 283 (“A marriage which satisfies the
26 requirements of the state where the marriage was contracted will everywhere be recognized as
27 valid unless it violates the strong public policy of another state which had the most significant
28 relationship to the spouses and the marriage at the time of the marriage.”).

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Comment

(1) *Jurisdiction*. The term “jurisdiction” is included in this act in order to ensure the applicability of this act to individuals who acquired community property in a foreign country. For example, if a couple were married in Cuba, a community property jurisdiction, and acquired stock while domiciled there but sold the stock after moving to Florida, a non-community jurisdiction, the widow of the spouse in whose name the stock was registered would have a one-half interest in the property. See, e.g., *Quintana v. Ordone*, 195 So. 2d 577 (Dist. Ct. Fla. 3d Cir. 1967).

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

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

(4) *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. The term may also encompass putative spouses and spouses under common law or informal marriages. The putative spouse doctrine is a remedial doctrine recognized in many states that allows a person in good faith to enjoy community property and other civil effects of marriage, despite not being a party to a legally valid marriage. See, e.g., Unif. Marriage & Div. Act § 209. Although few, if any, community property states recognize common law marriage, Texas does recognize “informal marriages” and thus parties to such an arrangement could also be included in the definition of a “spouse” under this act. See, e.g., Tex. Fam. Code § 2.401. In all events, recognition of the validity of the marriage or marriage-like arrangement by this state is dependent upon the treatment of that arrangement as valid under the conflict-of-law principles of this state.

(5) *State*. The definition of “state” is based upon the standard Uniform Law Commission definition.

SECTION 3. INCLUDED AND EXCLUDED PROPERTY.

(a) This [act] applies to the following property of a spouse who formerly was domiciled in a jurisdiction where property could be acquired as community property, irrespective of how

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44

1 the property currently is titled or held:

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

3 (A) all or a proportionate part of each item of personal property, wherever
4 located, that was community property under the law of the jurisdiction where the decedent or the
5 surviving spouse of the decedent was domiciled at the time of acquisition;

6 (B) income, rents, or profits, and appreciations or other increases,
7 (i) derived from property described in paragraph (a) (1)(A) or (a)
8 (1)(C); or

9 (ii) that would have been characterized as community property
10 under the law of the jurisdiction where the decedent or the surviving spouse of the decedent was
11 domiciled at the time of its creation or production;

12 (C) property traceable to property described in paragraph (1) (A) and
13 (1)(B);

14 (2) whether or not a decedent was domiciled in this state at the time of death,

15 (A) all or a proportionate part of each item of real property located in this
16 state that was traceable to community property or acquired with community property under the
17 law of the jurisdiction where the decedent or the surviving spouse of the decedent was domiciled
18 at the time of acquisition;

19 (B) income, rents, or profits, and appreciations or other increases, derived
20 from property described in paragraph (2) (A).

21 (b) This [act] does not apply to the following property:

22 (1) property that has been partitioned between spouses;

23 (2) property subject to a waiver of rights granted by this act;

1 (3) property, which at the death of the decedent, is held by spouses with a right of
2 survivorship in favor of the surviving spouse; and

3 (4) property held in a form, including a revocable trust, that was paid or was
4 transferred on death of the decedent to the surviving spouse

5 **Reporter's Notes**

6
7 The amendment regarding “income, rents, or profits, and appreciations or other
8 increases” attempts to capture income of property that is traceable to community property by
9 including a new reference to (a)(1)(C) in section (a)(1)(B). In addition, provision (a)(1)(B)(ii)
10 attempts to capture income from separate property in those states where such income is
11 considered community property but not those states where income of separate property is
12 separate. At the same time, it attempts to capture the law in those states that would grant a
13 community property interest in the “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

16 The amendment to this section also combines this section with various exclusions from
17 former Section 4 of the act. It attempts to exclude certain classes of property from this act,
18 particularly, Section 6, which provides how property subject to this act is disposed of upon death.
19 These classes of property are excluded because the spouses themselves have either expressly or
20 tacitly provided for other mechanisms of disposition. Thus, the division of property interests
21 provided for in Section 6 should not apply.
22

23 **Comment**

24
25 This section makes the act applicable to spouses who were formerly domiciled in a
26 community property jurisdiction. The term “jurisdiction” is used, rather than the narrower term
27 “state,” to be clear that this act would apply to a spouse who was domiciled in foreign
28 jurisdictions where community property may be acquired. The term “formerly ... domiciled” is
29 used to indicate that the act will be applicable whenever a spouse was domiciled at any time in
30 the past in a community property jurisdiction, has acquired property there, and has moved to
31 another jurisdiction. Thus, if A and B were married in state X (a community property state) and
32 acquired property there, but then moved to state Y (a non-community property state) prior to
33 moving again to state Z (also a non-community property state) where A eventually dies, state Z
34 should apply this act to the property acquired by A and B in state X.
35

36 Under subsection (1), the act applies to all personal property that was originally classified
37 as a community property by the state at the time in which it was acquired. The current location
38 of the personal property is not relevant for application of this act. Thus, if A and B were married
39 in state X (a community property state), acquired a car there, and eventually moved to state Z (a
40 non-community property state) where A eventually dies, then the car would be subject to this act,
41 even if the car was left in storage in state Y.
42

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

10
11 Under both section (1) and (2), this act applies to “all or a proportionate part” of property
12 that was acquired with community property. In other words, when an asset is acquired partly
13 with community property and partly with separate property, at least some portion of the property
14 should be characterized as community property. The issue of apportionment and commingling,
15 however, is a complex one with many state variations applicable to different types of assets.

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

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

42 Under subsection (1)(B) and (2)(B), income, rents, or profits derived from community
43 property are also subject to this act, as well as appreciations or other increases in community

1 property. This section should be read to include net income, rather than gross income, from
2 community property, as well as things produced from community property (i.e., “appreciations
3 and other increases”), even if not technically revenue producing. Thus, if a \$500,000 house were
4 purchased completely with community funds and increased in value to \$700,000 after spouses
5 moved to a non-community property state, then the entire house, not merely \$500,000 in value,
6 is classified as community property. Similarly, crops produced from a community property farm
7 and a foal produced from a horse that is owned as community property are also considered to be
8 community property.
9

10 Subsections (1)(B) and (2)(B) also apply not only to income, rents, and profits from
11 community property produced prior to moving to a non-community property jurisdiction, but
12 also after the move. Indeed, in the former case, such a rule would be unnecessary as all
13 community property states already characterize income, rents, or profits derived from, as well as
14 appreciations or other increases in, community property as community property. The rule in
15 subsections (1)(B) and (2)(B), however, is necessary to be clear that even after spouses move to a
16 non-community property state, the incomes, rents, and profits produced by community property
17 acquired prior to the move are still community property after the move to a non-community
18 property state. Thus, interest produced from a community property savings account is still
19 community property after A and B move from state X (a community property state) to state Z (a
20 non-community property state), irrespective of the location of the account.
21

22 As should be clear, this Section applies not only to property that was community property
23 under the law of the community property state but also to any property that is traceable to
24 community property. Simply stated, property is “traceable” to community property if the
25 property changes form without changing character. WILLIAM A. REPPY, CYNTHIA A. SAMUEL,
26 AND SALLY BROWN RICHARDSON, COMMUNITY PROPERTY IN THE UNITED STATES 161 (2015)
27 (quoting W. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 134 (1964)). By way of
28 illustration, if after moving from a state X (a community property state) to state Z (a non-
29 community property state), A and B transfer money from a community property bank account
30 opened in state X to a bank in their new domicile, state Z, then the bank account in state Z is
31 subject to this act because it is traceable to community property. Similarly, if A and B are
32 married in state X (a community property state), open a bank account there funded solely with
33 community property and buy a car with that money after moving to state Y (a non-community
34 property state), then the car would still be subject to this act because it is traceable to community
35 property. The same result would obtain even if A and B moved again from state Y to state Z
36 (another non-community property state) and exchanged their prior car for a new one in state Z.
37 The new car would still be subject to this act because it is traceable to the community property
38 originally acquired in state X.
39

40 **SECTION 4. FORM OF PARTITION OR WAIVER.** While domiciled in this state,
41 spouses may partition property subject to this [act] or waive rights granted by this [act] only by a
42 written agreement signed by both spouses.

1 **Reporter's Notes**

2
3 The amendment attempts to specify the necessary form or procedure for a partition or a
4 waiver of rights under the act once the spouses have moved to the enacting state. The
5 amendment does not attempt to specific the requisite form or procedure for a partition prior to
6 moving to the enacting state, which should be governed by the law of the community property
7 state, rather than this act. A mere unilateral act by a spouse of holding property in a form,
8 including a revocable trust, that has paid or has transferred property on death to a third person is
9 not a partition of the property or an agreement waiving rights granted under this [act].
10

11 **Comment**

12
13 If parties have partitioned previously-acquired community property after moving to a
14 non-community property state, this act would not apply to any such property owned by the
15 decedent at death. The term "partition" is defined in Section 2 of this act as "a voluntary
16 severance or division by spouses of property that either was community property or was treated
17 as community property."
18

19 The mere taking of title to property that was previously acquired as community property
20 in the form of a transfer-on-death deed, does not operate as a partition or waiver. For example, if
21 after moving from a community property state to a non-community property state, A retitles a
22 community property bank account owned with B into a bank account in A's name exclusively
23 with a pay-on-death designation to C, the retitling of former community property in the exclusive
24 name of "A, pay-on-death, C" does not constitute a partition, unless it can be shown that B
25 agreed voluntarily to sever B's interest in the property. For a partition to occur, both spouses
26 must agree to the severance of their community property interests. Whether there was an
27 agreement between the spouses to sever their community interests is a factual matter to be
28 ascertained by the courts.
29

30 On the other hand, this act presumptively does not apply to property titled in the name of
31 "A, pay on death, B," even if it can be shown that the property was community property. The
32 designation of a spouse as a beneficiary of the property on the death of the other spouse creates a
33 strong presumption that the spouses agreed to retitle the property and voluntarily sever their
34 community interests.
35

36 **SECTION 5. REBUTTABLE PRESUMPTION.** Property acquired by a spouse when
37 domiciled in a jurisdiction where property could then be acquired by the spouse as community
38 property is presumed to be community property, if the spouse has complied with the necessary
39 procedures for acquiring community property. The presumption may be rebutted by a
40 preponderance of the evidence.

Reporter's Notes

The amendment attempts to accommodate so-called “opt-in” states where spouses can elect community property provided specific affirmative steps are taken to acquire property during marriage as community property.

Comment

This section adopts a blanket presumption in favor of treating all property acquired by a spouse while domiciled in a community property jurisdiction as community property, provided, of course, that the laws of the community property state allowed community property to “then be acquired” by *that* person. In other words, the presumption applies only to those persons who could acquire community property under the laws of the relevant jurisdiction and have complied with the necessary laws to do at the time of acquisition. Consequently, the presumption does not apply to unmarried individuals or to those who have opted out of the community regime even if they acquire property while domiciled in a community property jurisdiction, as those individuals could not then acquire community property in that jurisdiction. Similarly, in jurisdictions that allow for parties to “opt in” to community property, the presumption of this section does not apply unless the parties have, in fact, opted into the community regime, as property could not “then be acquired” as community property absent an election by the parties that their property be treated as community property. See, e.g., Alaska Stat. § 34.77.030(a).

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

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

1 Unlike the prior version of this act, this act does not impose a presumption against the
2 applicability of this act for property acquired in a non-community property state and held in a
3 form that creates rights of survivorship. Taking title to property in various forms is often a
4 unilateral act that should not by itself serve as a presumption of partition of interests in a
5 community asset. After all, a spouse may move to non-community property state and open a
6 bank account with a pay-on-death designation to a friend or a sibling. Such an account should
7 not be presumed to be excluded from this applicability of this act, as the relevant account may
8 have been funded with community property acquired prior to the move. The ultimate treatment
9 of the relevant account will depend upon whether it can be proved that the money in the account
10 was traceable to community property.

11 **SECTION 6. DISPOSITION OF PROPERTY RIGHTS UPON DEATH.**

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

16 (b) If, at death, the decedent purported to dispose of property belonging to the surviving
17 spouse to a third person and disposed of other property to the surviving spouse, the court may
18 require the surviving spouse to elect between retaining the disposition to the surviving spouse or
19 asserting rights under this [act].

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

22 [Option 1 (Traditional Elective Share States): The property that belongs to the
23 decedent is not subject to elective-share rights of the surviving spouse.]

24 [Option 2 (Augmented Estate Elective Share States): For purposes of calculating
25 the augmented estate and elective share rights, the property under subsection (a) shall be
26 considered property of the surviving spouse and the property under subsection (c) shall
27 be considered property of the decedent. The value of property under subsection (a) shall
28 be used to satisfy the elective share rights of the surviving spouse.]

29 This section does not limit the rights of a surviving spouse to a [homestead, exempt property, or

family] allowance.

Legislative Note: *A state should substitute the state's surviving spouse appropriate statutory allowances in the bracketed language in subsection (c).*

Reporter's Note

The amendment attempts to accommodate the main varieties of elective share rights granted by states. In some states, a surviving spouses elective share rights are a fractional share (often 1/3) in the decedent's property. In such a case, states should elect Option 1, which precludes further application of elective share rights in the decedent's property under this act. Other states, however, grant elective share rights in some in an "augmented estate," which is frequently composed of all the decedent's property, all the decedent's nonprobate transfers, and all the surviving spouse's property and non-probate transfers to others. In those states, Option 2 should be elected so that the both the property of the decedent and the surviving spouse are considered part of the augmented estate, but then the surviving spouse's portion of the property is credited in satisfaction of his or her elective share rights. See, e.g., UPC 2-209(a)(2).

Comment

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

If, however, the decedent disposes of property subject to this act by non-probate transfer in favor of the third person, Section 7, rather than this section, would apply. In other words, this act, like the law in community property states, provides that reimbursement or equitable claims may be available to a surviving spouse when a decedent improperly alienates the interest of a spouse by means of a non-probate transfer. See, e.g., *T.L. James & Co. v. Montgomery*, 332 So. 2d 834 (La. 1975). If, however, the decedent disposes of property subject to this act by non-probate transfer in favor of the surviving spouse, a partition of that property is presumed under Section 4 of this act.

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

Under subsection (c), at the death of one spouse, one-half the property to which this act applies belongs to the decedent. Again, this is universal approach of community property states. As a result, the decedent can dispose of that property by any probate or non-probate mechanism. Elective share rights that are common in non-community property states do not apply in community property states, at least not with respect to community property in those states. Consequently, a surviving spouse does not have elective share rights against the decedent's share of the property under this act. Subsection (b), however, does not limit a surviving spouse's claim

1 for other statutory allowances, such as homestead allowances, allowances for exempt property,
2 and family allowances. See, e.g., Unif. Prob. Code §§ 2-402, 2-403, and 2-404.

3
4 If the decedent dies intestate, then one-half of the property covered by this act is included
5 in the decedent's intestate estate. Under many scenarios, the intestate law of most states would
6 grant to the surviving spouse a lump sum plus at least one half of the remainder of the decedent's
7 property, which would be in addition to the one-half interest granted to the surviving spouse in
8 property to which this act applies.

9
10 By way of illustration of this section, assume A and B were formerly domiciled in state X
11 (a community property jurisdiction) where all their property was community property, and have
12 subsequently moved to a state Y (a non-community property state). Upon moving to state Y, A
13 and B acquired a home in state Z (also a non-community property jurisdiction), titled solely in
14 B's name but with funds from the proceeds of the sale of the home in state X. A and B also
15 acquired stock while domiciled in state X, but held it in safety deposit boxes located in states U
16 and V (two other non-community property states). A and B also retained a summer house in
17 state X, which they acquired while domiciled there and which was titled solely in B's name. A
18 and B also acquired real property in state Z for investment purposes and held title as tenants by
19 the entireties. Finally, B acquired bonds held in B's name issued by the company that employed
20 B and acquired with earnings from B's job in state Z.

21
22 At B's death, the home in state Z and the stock located in states U and V would be
23 property subject this act, and consequently, B would have the right under this section to dispose
24 of half. The home retained in state X would be community property under the law of state X, but
25 this act applies only to real property located in the adopting state. Because the investment
26 property located in state Z was held as tenants by the entireties, it is strongly presumed that A
27 and B partitioned that property and thus made this act inapplicable to that asset. Finally, the
28 bonds held in B's name would not be subject to this act because they were acquired with
29 property earned and acquired in state Z, a non-community property state.

30
31 **SECTION 7. OTHER LEGAL AND EQUITABLE REMEDIES AVAILABLE AT**
32 **DEATH.** With respect to property to which this [act] applies, at the death of the decedent, the
33 personal representative of the decedent or the surviving spouse may bring an action for legal or
34 equitable relief if the action:

35 (1) arises out of an:

36 (A) act of the surviving spouse or decedent during the marriage; or

37 (B) act of the decedent which takes effect at the death of the decedent; and

38 (2) could have been brought under the law of the jurisdiction where the decedent or the

1 surviving spouse was formerly domiciled.

2 **Comment**

3
4 This section confirms that comparable legal and equitable remedies that would be
5 available to protect a spouse in a community property jurisdiction remain available at death in a
6 non-community property state under this act. Two remedies often provided by community
7 property jurisdictions are claims for reimbursement and monetary claims against a spouse for
8 marital waste, fraud, or bad faith management.
9

10 Claims for reimbursement are commonly available when community property has been
11 used to satisfy a separate obligation or when separate property has been used to improve
12 community property or vice versa, *see, e.g.*, La. Civ. Code art. 2364, 2366, and 2367; Cal. Fam.
13 Code § 2640. Different community property states calculate the amount of reimbursement
14 differently. *See, e.g., Hiatt v. Hiatt*, 487 P.2d 1121 (Idaho 1971) (awarding reimbursement based
15 upon the enhanced value of the property even if it exceeds the amount spent); *Portillo v.*
16 *Shappie*, 636 P.2d 878 (N.M. 1981) (assessing reimbursement based upon the enhanced value of
17 the improved property even if it exceeds the amount of money expended); La. Civ. Code art.
18 2366 (providing for reimbursement based upon the amount expended); *Marriage of Sedlock*, 849
19 P.2d 1243 (Wash. App. 1993) (awarding reimbursement based upon the amount spent); Estate of
20 *Kobyliski v. Hellstern*, 503 N.W.2d 369 (Wis. App. 1993) (assessing reimbursement based upon
21 the greater of the amount spent or the value added). This section grants courts flexibility in
22 assessing the amount of the reimbursement.
23

24 Different community property states also provide different remedies to a spouse whose
25 community property interest has been unduly impaired by another spouse with authority to
26 manage or alienate community property. In California, for example, a court may award a
27 defrauded spouse a percentage interest or an amount equal to a percentage interest in any asset
28 transferred in breach of a spouse's fiduciary duty. Cal. Fam. Code § 1101. In Texas, the
29 doctrine of "fraud on the community" protects one spouse when the other wrongfully depletes
30 community property through actual or constructive fraud by allowing a court to allocate other
31 property to the defrauded spouse through any legal or equitable remedy necessary, including a
32 money judgment or a constructive trust. *See, e.g., Tex. Fam. Code § 7.009; see also Osuna v.*
33 *Quintana*, 993 S.W.2d 201 (Tex. Ct. App. Corpus Christi 1999) ("The breach of a legal or
34 equitable duty which violates the fiduciary relationship existing between spouses is termed
35 'fraud on the community,' a judicially created concept based on the theory of constructive
36 fraud."). In Louisiana, a spouse may be awarded damages when the other spouse acted
37 fraudulently or in bad faith. *See* La. Civ. Code art. 2354 ("A spouse is liable for any loss or
38 damage caused by fraud or bad faith in the management of the community property."). In
39 addition to damages and equitable relief, some community property states statutorily grant courts
40 authority to add the name of a spouse to a community asset titled solely in the name of the other
41 spouse in order to protect the interest of the previously unnamed spouse. *See, e.g., Cal. Fam.*
42 *Code § 1101 (c); Wisc. Stat. § 766.70(3).* This section provides the court with broad authority to
43 grant damages or to craft any other appropriate equitable remedy necessary to protect a spouse.
44
45

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

20
21 Although most instances of application of this section will involve monetary claims
22 against by one spouse against another, this section does preserve other “equitable relief,” which
23 may involve recognition of rights against third persons to whom property has been transferred by
24 one spouse without authorization of the other. Equitable doctrines, such as a “constructive
25 trust,” are common remedies used by courts to protect the interest of a spouse. This section,
26 however, must be read in conjunction with Section 9 of this act, which protects good faith
27 transferees of property from one spouse who give value. Thus, good faith transferees for value
28 will be protected by Section 9 of this act, such that a spouse’s claim for bad faith management
29 would solely be cognizable against the other spouse. If, however, one spouse improperly
30 donates or transfers property to which this act applies to a third person who is not in good faith,
31 equitable relief against a third person may, in the discretion of the court, be available to the
32 spouse whose rights are impaired. After all, improper gifts of community property by one spouse
33 are generally voidable as against a third person in community property jurisdictions. See, e.g.,
34 *Polk v. Polk*, 39 Cal. Rptr. 824 (App. 1964); Wisc. Stat. § 766.70; La. Civ. Code art. 2353;
35 *Mezey v. Fioramonti*, 65 P.2d 980 (Ariz. App. 2003); Uniform Marital Property Act § 6(b).

36 37 **SECTION 8. RIGHTS OF SURVIVING SPOUSE, HEIR, BENEFICIARY, AND** 38 **CREDITOR.**

39 (a) In this section, “record” means information that is inscribed on a tangible medium or
40 that is stored in an electronic or other medium and is retrievable in perceivable form.

41 (b) A surviving spouse of the decedent may send a demand in a record to the personal

1 representative of the decedent asserting a right under this [act]. The demand must be sent not
2 later than six months after the appointment of the personal representative. If the surviving spouse
3 does not send the demand, the personal representative does not have a duty to apply this [act].

4 (c) An heir, beneficiary, or creditor of the decedent may send a demand in a record to the
5 personal representative of the decedent asserting a right under this [act]. The demand must be
6 sent not later than six months after the appointment of the personal representative.

7 (d) The following actions asserting a right under this [act] must be brought not later than
8 three years after the death of the decedent:

9 (1) an action by the surviving spouse against an heir, beneficiary, or transferee of
10 the decedent; and.

11 (2) an action by an heir, beneficiary, or creditor against the surviving spouse.

12 **Comment**

13
14 Subsection (b) of this section allows a surviving spouse to protect rights under this act
15 and provides a statute of limitation for doing so. Namely, a surviving spouse must institute an
16 action against the successors of the decedent within three years of the date of death of the
17 decedent. Although not required, a surviving spouse may also file a written demand with the
18 personal representative of the decedent. Unless the surviving spouse does so within six months
19 of the opening of decedent's estate, the personal representative has no fiduciary duty to
20 investigate or to attempt to ascertain whether this act applies to any property owned by the
21 decedent.

22
23 Subsection (c) of this section allows the personal representative, an heir, or a beneficiary
24 of the decedent to protect rights under this act and provides a statute of limitation for doing so.
25 Namely, an action must be instituted against the surviving spouse within three years of the date of
26 death of the decedent. Although not required, the heirs, beneficiaries or creditors of the decedent
27 may attempt to protect their interests by filing a written demand with the personal representative
28 of the decedent within six months of the opening of decedent's estate. Unlike in subsection (b) of
29 this section, the personal representative of the decedent has an obligation to attempt to ascertain
30 whether the decedent has property rights that should be protected under this act. See, e.g., Unif.
31 Prob. Code §§ 3-703 (general duties) & 3-706 (duty to prepare an inventory).

32
33 The time periods provided in this section are generally borrowed from other areas of law.
34 Specifically, a six-month period is not an uncommon period for a non-claim statute for creditors
35 and the three-year period is adapted from claims challenging revocable trusts and for contesting

1 nonprobated wills. See Unif. Trust Code § 604; Unif. Prob. Code § 3-108.

2 3 **SECTION 9. PROTECTION OF THIRD PERSON.**

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

6 (1) transacts, in good faith and for value:

7 (A) with a spouse; or

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

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

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

14 **Comment**

15
16 This section is based upon Section 1012 of the Uniform Trust Code. Like the Uniform
17 Trust Code, this section does not define "good faith." It does, however, require that a third
18 person be without knowledge that the other party to the transaction is acting without authority
19 with respect to property to which this act applies. For a definition of knowledge, see Unif. Trust
20 Code § 104. Moreover, this section makes clear that a person dealing with another party is not
21 charged with a duty to inquire as to the extent of the property of the exercise of the purported
22 power or authority of that party. This section, like the Uniform Trust Code, acknowledges that a
23 definition of good faith that is consistent with a state's commercial statutes, such as Section 1-
24 201 of the Uniform Commercial Code, would be consistent with the purpose of this section.
25 This section should be read in conjunction with Section 7 of this act, which provides that courts
26 retain the ability at the death of one spouse to grant equitable relief to the other for actions that
27 have impaired rights granted by this act.

28
29 This section protects third persons in two different situations. First, during life, both
30 spouses may engage in a variety of transactions with third parties concerning the property to
31 which this act applies. This section protects third persons who deal with either spouse
32 concerning property to which this act applies, provided the third person gives value, is in good
33 faith, and does not have knowledge that the spouse who is a party to the transaction is improperly
34 exercising authority over property. Although third persons are ordinarily allowed to deal with a
35 spouse who has apparent title concerning a marital asset during the existence of the marriage, no

1 good reason could be found for protecting bad faith third parties with knowledge of the
2 commission of fraud on the rights of the other spouse. For example, if A retitles community
3 property belonging partly to B solely in A's name and sells it to C, C is protected from any claim
4 by A with respect to the property because C gave value and provided C is in good faith and does
5 not know that A improperly transferred property belonging to B. To the extent B has a
6 cognizable claim under Section 7 of this act, it will be solely against A, not C. On the other
7 hand, if A donated a community asset to C, C would not be protected by this section and B's
8 claim under Section 7 of this act could be cognizable against A or C or both.

9
10 Second, this section also applies after the death of a decedent. Section 8 of this act
11 provides relevant time periods within which a surviving spouse may assert rights against a
12 personal representative of the decedent, as well as heirs or transferees of the decedent. Similarly,
13 it also provides relevant time periods within which the heirs, beneficiaries, or creditors of the
14 decedent may assert rights against the surviving spouse or the personal representative of the
15 decedent. This section protects third persons who transact with those relevant parties in
16 possession of apparent title to property, provided the third person gives value, is in good faith,
17 and is without knowledge that the other party to the transaction is improperly exercising
18 authority. For example, if after A's death, A's surviving spouse, B, sells Blackacre, which is
19 titled solely in B's name, to C, C will be protected from liability under this section, even if
20 Blackacre was subject to this act because it was traceable to community property, provided, of
21 course, C was in good faith and without knowledge that B was exceeding his authority.

22
23 **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
24 applying and construing this uniform act, consideration must be given to the need to promote
25 uniformity of the law with respect to its subject matter among states that enact it.

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

32 **[SECTION 12. REPEAL.** The [Uniform Disposition of Community Property Rights at
33 Death Act] is repealed.]

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

1 **Comment**

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

5 **SECTION 13. EFFECTIVE DATE.** This [act] takes effect...