

DRAFT
FOR DISCUSSION ONLY

UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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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, ~~17~~^{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 ~~nine~~^{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; ~~Colo. Rev. Stat. Ann. § 15-20-101; 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 ~~have~~ 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). ~~In fact~~^{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

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

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

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

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

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

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

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

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

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

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

18 Section 9 protects third persons who have transacted in good faith and for value.
19 Otherwise, third persons could be subject to claims by a spouse under Section 7 if the spouse
20 engages in some acts of bad faith management of community property while alive. Similarly,
21 Section 8 may grant beneficiaries of the decedent or the surviving spouse of the decedent rights
22 against third persons for unauthorized alienations. Section 9 ensures that in most instances, third
23 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) “Domicile” means the jurisdiction in which the primary residence of an individual is~~
6 ~~located, under the law of this state other than this [act].~~

7 ~~(2)~~(1) “Jurisdiction” means the United States, a state, a foreign country, or a political
8 subdivision of a foreign country.

9 ~~(3)~~(2) “Partition” means a voluntary division by spouses of property that either was
10 community property or is treated as community property under this [act].

11 ~~(4)~~(3) “Person” means an individual, estate, business or nonprofit entity, public
12 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
13 entity.

14 ~~(5)~~(4) “Spouse” means an individual who, ~~under the law of a jurisdiction,~~ is in a ~~valid~~
15 marriage or in a valid domestic or registered partnership that is recognized as valid in the
16 jurisdiction in which it is entered into and treated as valid under the conflict of laws principles of
17 this state.

18 ~~(6)~~(5) “State” means a state of the United States, the District of Columbia, Puerto Rico, the
19 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
20 the United States. The term includes a federally recognized Indian tribe.

21 **Comment**

22
23 ~~(1) Domicile. The definition of “domicile” is based upon the definition in the Restatement~~
24 ~~(Second) of Conflicts, which defines domicile as the place where a person “usually ... has his~~
25 ~~home.” Restatement (Second) of Conflicts § 11 cmt. (a). A person may reside in more than one~~
26 ~~place, but may have only one domicile. Restatement (Second) of Conflicts § 11(2) (“Every~~

1 person has a domicile at all times and, at least for the same purpose, no person has more than one
2 domicile at a time.”). If an individual has multiple residences, that individual’s domicile will be
3 ascertained under the appropriate standards applicable in this state.
4

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

12 ~~(3)~~
13 (2) Partition. The term “partition” is defined to mean a severance or division by spouses
14 of property that was community property or treated as community property. A partition may
15 occur while the parties are domiciled in a community property state or after they move to a non-
16 community property state. In the latter case, a partition can still occur irrespective of whether the
17 property retains ~~is its~~ community property character in the new state or is merely treated as
18 community property for purposes of application of this act.
19

20 (43) Person. The definition of “person” is based upon the standard Uniform Law
21 Commission definition.
22

23 (54) Spouse. The term “spouse” is defined expansively to include not only married
24 persons, of either sex, but also partners in other arrangements, such as domestic or registered
25 partnerships, under which community property may be acquired. *See, e.g.,* Cal. Fam Code §
26 297.5 (stating that domestic partners “have the same rights, protections and benefits, and are
27 subject to the same responsibilities, obligations and duties under law, whether derived from
28 statutes, administrative regulations, court rules, government policies, common law, or any other
29 provisions or sources of law, as are granted to and imposed upon spouses”); Nev. Rev. Stat. §
30 122A.200. The term may also encompass putative spouses and spouses under
31 common law or informal marriages. The putative spouse doctrine is a remedial doctrine
32 recognized in many states that allows a person in good faith to enjoy community property and
33 other civil effects of marriage, despite not being a party to a legally valid marriage. *See, e.g.,*
34 Unif. Marriage & Div. Act § 209. Although few, if any, community property states recognize
35 common law marriage, Texas does recognize “informal marriages” and thus parties to such an
36 arrangement ~~should~~could also be included in the definition of a “spouse” under this act. *See,*
37 *e.g.,* Tex. Fam. Code § 2.401. In all events, recognition of the validity of the marriage or
38 marriage-like arrangement by this state is dependent upon the treatment of that arrangement as
39 valid under the conflict-of-law principles of this state.
40

41 (65) State. The definition of “state” is based upon the standard Uniform Law Commission
42 definition.
43

44 **SECTION 3. SCOPE** This [act] applies to the following property of a spouse who
45 formerly was domiciled in a jurisdiction where property could be acquired as community

property, irrespective of how the property currently is titled or held:

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

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

~~(2) whether or not a decedent is domiciled in this state at the time of death, all or a proportionate part of each item of real property located in this state that was community property under the law of the jurisdiction where the decedent or the surviving spouse of the decedent was domiciled at the time of acquisition;~~

~~(3) —~~ (B) income, rents, or profits, and appreciations or other increases, derived from property described in paragraph (1) and ~~(2)(A); and~~

~~(4) —~~ (C) property traceable to property described in paragraph (1), (2), (A) and (3); ~~(1)(B);~~

(2) whether or not a decedent was domiciled in this state at the time of death, (A) all or a proportionate part of each item of real property located in this state that was traceable to community property or acquired with community property under the law of the jurisdiction where the decedent or the surviving spouse of the decedent was domiciled at the time of acquisition;

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

Comment

This section makes the act applicable to spouses who were formerly domiciled in a community property jurisdiction. The term “jurisdiction” is used, rather than the narrower term “state,” to be clear that this act would apply to a spouse who was domiciled in foreign jurisdictions where community property may be acquired. The term “formerly ... domiciled” is

1 used to indicate that the act will be applicable whenever a spouse was domiciled at any time in
2 the past in a community property jurisdiction, has acquired property there, and has moved to
3 another jurisdiction. Thus, if A and B were married in state X (a community property state) and
4 acquired property there, but then moved to state Y (a non-community property state) prior to
5 moving again to state Z (also a non-community property state) where A eventually dies, state Z
6 should apply this act to the property acquired by A and B in state X.

7
8 Under subsection (a1), the act applies to all personal property that was originally
9 classified as a community property by the state at the time in which it was acquired. The current
10 location of the personal property is not relevant for application of this act. Thus, if A and B were
11 married in state X (a community property state), acquired a car there, and eventually moved to
12 state Z (a non-community property state) where A eventually dies, then the car would be subject
13 to this act, even if the car was left in storage in state Y.

14
15 Under subsection (b2), this act adopts the traditional situs rule for real estate and is made
16 applicable to all real estate located in a state where this act has been adopted, irrespective of
17 whether the party to whom the act applies is domiciled in the enacting state. Thus, if A and B,
18 while domiciled in a state X (a community property state) acquire real estate with community
19 funds in state Y (a non-community property state), but then move to state Z (also a non-
20 community property state), where A eventually dies, then this act will apply to the real estate in
21 state Y, assuming state Y has enacted this act. Whether or not state Z has enacted this act will be
22 important in ascertaining how the personal property of A is distributed, but not in the disposition
23 of the real estate, located in state Y.

24
25 Under both section (a1) and (b2), this act applies to “all or a proportionate part” of
26 property that was acquired with community property. In other words, when an asset is acquired
27 partly with community property and partly with separate property, at least some portion of the
28 property should be characterized as community property. The issue of apportionment and
29 commingling, however, is a complex one with many state variations applicable to different types
30 of assets.

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

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

13 Under subsection ~~(e)~~1(B) and (2)(B), income, rents, or profits derived from community
14 property are also subject to this act, as well as appreciations or other increases in community
15 property. This section should be read to include net income, rather than gross income, from
16 community property, as well as things produced from community property (i.e., “appreciations
17 and other increases”), even if not technically revenue producing. Thus, if a \$500,000 house were
18 purchased completely with community funds and increased in value to \$700,000 after spouses
19 moved to a non-community property state, then the entire house, not merely \$500,000 in value,
20 is classified as community property. Similarly, crops produced from a community property farm
21 and a foal produced from a horse that is owned as community property are also considered to be
22 community property.
23

24 ~~Subsection (e)~~Subsections (1)(B) and (2)(B) also ~~applies~~apply not only to income, rents,
25 and profits from community property produced prior to moving to a non-community property
26 jurisdiction, but also after the move. Indeed, in the former case, such a rule would be
27 unnecessary as all community property states already characterize income, rents, or profits
28 derived from, as well as appreciations or other increases in, community property as community
29 property. The rule ~~is subsection (e) in subsections (1)(B) and (2)(B)~~, however, is necessary to be
30 clear that even after spouses move to a non-community property state, the incomes, rents, and
31 profits produced by community property acquired prior to the move are still community property
32 after the move to a non-community property state. Thus, interest produced from a community
33 property savings account is still community property after A and B move from state X (a
34 community property state) to state Z (a non-community property state), irrespective of the
35 location of the account.
36

37 ~~Under subsection (d);~~As should be clear, this ~~act also~~Section applies not only to property
38 that was community property under the law of the community property state but also to any
39 property that is a traceable to community property ~~in subsections (a) or (b).~~. Simply stated,
40 property is “traceable” to community property if the property changes form without changing
41 character. WILLIAM A. REPPY, CYNTHIA A. SAMUEL, AND SALLY BROWN RICHARDSON,
42 COMMUNITY PROPERTY IN THE UNITED STATES 161 (2015) (quoting W. BROCKELBANK, THE
43 COMMUNITY PROPERTY LAW OF IDAHO 134 (1964)). By way of illustration, if after moving from
44 a state X (a community property state) to state Z (a non-community property state), A and B
45 transfer money from a community property bank account opened in state X to a bank in their

1 new domicile, state Z, then the bank account in state Z is subject to this act because it is traceable
2 to community property. Similarly, if A and B are married in state X (a community property
3 state), open a bank account there funded solely with community property and buy a car with that
4 money after moving to state Y (a non-community property state), then the car would still be
5 subject to this act because it is traceable to community property. The same result would obtain
6 even if A and B moved again from state Y to state Z (another non-community property state) and
7 exchanged their prior car for a new one in state Z. The new car would still be subject to this act
8 because it is traceable to the community property originally acquired in state X.

10 **SECTION 4. EXCLUDED PROPERTY; EFFECT OF PARTITION OR WAIVER.**

11 (a) This [act] does not:

12 (1) apply to property that has been partitioned between spouses;

13 (2) prevent the partition of property to which this [act] would otherwise

14 apply; or

15 (3) affect an agreement waiving rights granted by this [act].

16 (b) A unilateral act by a spouse of holding property in a form, including a revocable trust,
17 that ~~allows for its payment~~has paid or ~~transfer~~has transferred property on death to a third person
18 is not a partition of the property or an agreement waiving rights granted under this [act]. Holding
19 property to which this [act] applies in a form, including a revocable trust, that ~~allows for its~~
20 ~~payment or transfer~~has paid or has transferred property on death to the surviving spouse of the
21 decedent is presumed to be a partition of the property or an agreement waiving rights granted
22 under this [act]. The presumption may be rebutted by clear and convincing evidence.

23 **Comment**

24
25 If parties have partitioned previously-acquired community property after moving to a
26 non-community property state, this act would not apply to any such property owned by the
27 decedent at death. The term “partition” is defined in Section 2 of this act as “a voluntary
28 severance or division by spouses of property that either was community property or was treated
29 as community property.”

30
31 The mere taking of title to property that was previously acquired as community property
32 in the form of a transfer-on-death deed, does not operate as a partition or waiver. For example, if
33 after moving from a community property state to a non-community property state, A retitles a

community property bank account owned with B into a bank account in A's name exclusively with a pay-on-death designation to C, the retitling of former community property in the exclusive name of "A, pay-on-death, C" does not constitute a partition, unless it can be shown that B agreed voluntarily to sever B's interest in the property. For a partition to occur, both spouses must agree to the severance of their community property interests. Whether there was an agreement between the spouses to sever their community interests is a factual matter to be ascertained by the courts.

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

SECTION 5. REBUTTABLE PRESUMPTION. Property acquired by a spouse when domiciled in a jurisdiction where property could then be acquired by the spouse as community property is presumed to be community property. The presumption may be rebutted by a preponderance of the evidence.

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*.² 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;

1 Unif. Marital Prop. Act. § 4(a) (“All property of spouses is marital property except that which is
2 classified otherwise by this Act.”).

3
4 Despite the above presumption, a party may prove that the relevant property was
5 separate, even though acquired during the existence of a community regime, such as by
6 demonstrating that the property was acquired by inheritance. Although different community
7 property states provide different standards for rebutting the relevant presumption of community
8 property, this act adopts a preponderance standard for rebutting the presumption, as have a
9 number of community property states. *See, e.g., Marriage of Ettefagh*, 59 Cal. Rptr. 3rd 419
10 (Cal. App. 2007); *Talbot v. Talbot*, 864 So. 2d 590 (La. 2003); *Brandt v. Brandt*, 427 N.W. 2d
11 126 (Wisc. App. 1988); *Sanchez v. Sanchez*, 748 P.2d 21 (N.M. App. 1987); *But see* Tex. Fam.
12 Code § 3.03(b) (“The degree of proof necessary to establish that property is separate property is
13 clear and convincing evidence.”); *Reed v. Reed*, 44 P.3d 1100 (Idaho 2002) (requiring
14 “reasonable certainty and particularity” to rebut the presumption).

15
16 Unlike the prior version of this act, this act does not impose a presumption against the
17 applicability of this act for property acquired in a non-community property state and held in a
18 form that creates rights of survivorship. Taking title to property in various forms is often a
19 unilateral act that should not by itself serve as a presumption of partition of interests in a
20 community asset. After all, a spouse may move to non-community property state and open a
21 bank account with a pay-on-death designation to a friend or a sibling. Such an account should
22 not be presumed to be excluded from this applicability of this act, as the relevant account may
23 have been funded with community property acquired prior to the move. The ultimate treatment
24 of the relevant account will depend upon whether it can be proved that the money in the account
25 was traceable to community property.

26 27 **SECTION 6. DISPOSITION OF PROPERTY RIGHTS UPON DEATH.**

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

31 (b) If, at death, the decedent ~~purports~~purported to dispose of property belonging to the
32 surviving spouse to a third person and ~~disposes~~disposed of other property to the surviving
33 spouse, the court may require the surviving spouse to elect between retaining the disposition to
34 the surviving spouse or asserting rights under this [act].

35 (c) One-half of the property to which this [act] applies belongs to the decedent and is
36 subject to disposition by the decedent at death. The property that belongs to the decedent is not

subject to elective-share rights of the surviving spouse. 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).*

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 ~~decedent's~~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 (~~bc~~), 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 for other statutory allowances, such as homestead allowances, allowances for exempt property, and family allowances. *See, e.g., UPC Unif. Prob. Code* §§ 2-402, 2-403, and 2-404.

~~In addition, this section provides that~~If the decedent dies intestate, then one-half of the property covered by this act is included in the decedent's intestate estate. ~~Assuming a decedent dies intestate, this act will likely result in half the property subject to this act belonging to the surviving spouse, whereas~~Under many scenarios, the intestate law of most states ~~awards~~would grant to the surviving spouse a lump sum plus at least one half of the remainder of the ~~decedent's property, which would be in addition to the one-half interest granted to the surviving spouse in~~ property to which this act ~~does not apply~~applies.

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

12
13 At B's death, the home in state Z and the stock located in states U and V would be
14 property subject this act, and consequently, B would have the right under this section to dispose
15 of half. The home retained in state X would be community property under the law of state X, but
16 this act applies only to real property located in the adopting state. Because the investment
17 property located in state Z was held as tenants by the entireties, it is strongly presumed that A
18 and B partitioned that property and thus made this act inapplicable to that asset. Finally, the
19 bonds held in B's name would not be subject to this act because they were acquired with
20 property earned and acquired in state Z, a non-community property state.

21
22 **SECTION 7. OTHER LEGAL AND EQUITABLE REMEDIES AVAILABLE AT**
23 **DEATH.** With respect to property to which this [act] applies, at the death of the decedent, the
24 personal representative of the decedent or the surviving spouse may bring an action for legal or
25 equitable relief if the action:

26 (1) arises out of an:

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

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

29 (2) could have been brought under the law of the jurisdiction where the decedent or the
30 surviving spouse was formerly domiciled ~~at the time of the act under paragraph (1).~~

31 **Comment**

32
33 This section confirms that comparable legal and equitable remedies that would be
34 available to protect a spouse in a community property jurisdiction remain available at death in a
35 non-community property state under this act. Two remedies often provided by community
36 property jurisdictions are claims for reimbursement and monetary claims against a spouse for
37 marital waste, fraud, or bad faith management.

1 Claims for reimbursement are commonly available when community property has been
2 used to satisfy a separate obligation or when separate property has been used to improve
3 community property or vice versa, *see, e.g.*, La. Civ. Code art. 2364, 2366, and 2367; Cal. Fam.
4 Code § 2640. Different community property states calculate the amount of reimbursement
5 differently. *See, e.g., Hiatt v. Hiatt*, 487 P.2d 1121 (Idaho 1971) (awarding reimbursement based
6 upon the enhanced value of the property even if it exceeds the amount spent); *Portillo v.*
7 *Shappie*, 636 P.2d 878 (N.M. 1981) (assessing reimbursement based upon the enhanced value of
8 the improved property even if it exceeds the amount of money expended); La. Civ. Code art.
9 2366 (providing for reimbursement based upon the amount expended); *Marriage of Sedlock*, 849
10 P.2d 1243 (Wash. App. 1993) (awarding reimbursement based upon the amount spent); Estate of
11 *Kobyliski v. Hellstern*, 503 N.W.2d 369 (Wis. App. 1993) (assessing reimbursement based upon
12 the greater of the amount spent or the value added). This section grants courts flexibility in
13 assessing the amount of the reimbursement.

14
15 Different community property states also provide different remedies to a spouse whose
16 community property interest has been unduly impaired by another spouse with authority to
17 manage or alienate community property. In California, for example, a court may award a
18 defrauded spouse a percentage interest or an amount equal to a percentage interest in any asset
19 transferred in breach of a spouse's fiduciary duty. Cal. Fam. Code § 1101. In Texas, the
20 doctrine of "fraud on the community" protects one spouse when the other wrongfully depletes
21 community property through actual or constructive fraud by allowing a court to allocate other
22 property to the defrauded spouse through any legal or equitable remedy necessary, including a
23 money judgment or a constructive trust. *See, e.g., Tex. Fam. Code § 7.009; see also Osuna v.*
24 *Quintana*, 993 S.W.2d 201 (Tex. Ct. App. Corpus Christi 1999) ("The breach of a legal or
25 equitable duty which violates the fiduciary relationship existing between spouses is termed
26 'fraud on the community,' a judicially created concept based on the theory of constructive
27 fraud."). In Louisiana, a spouse may be awarded damages when the other spouse acted
28 fraudulently or in bad faith. *See* La. Civ. Code art. 2354 ("A spouse is liable for any loss or
29 damage caused by fraud or bad faith in the management of the community property."). In
30 addition to damages and equitable relief, some community property states statutorily grant courts
31 authority to add the name of a spouse to a community asset titled solely in the name of the other
32 spouse in order to protect the interest of the previously unnamed spouse. *See, e.g., Cal. Fam.*
33 *Code § 1101 (c); Wisc. Stat. § 766.70(3).* This section provides the court with broad authority to
34 grant damages or to craft any other appropriate equitable remedy necessary to protect a spouse.

35
36 The rights granted by this section are operable at the death of an individual and may not
37 be asserted during the existence of the marriage. This approach is consistent with the law of
38 various community property jurisdictions. *See, e.g., La. Civ. Code art. 2358* ("A claim for
39 reimbursement may be asserted only after termination of the community property regime, unless
40 otherwise provided by law."). *But see* Uniform Marital Property Act § 13 (allowing claims for
41 breach of the duty of good faith and for an accounting to be brought by spouses during an
42 ongoing marriage). The relief sought under this section may, however, be for actions of a spouse
43 taken either during life or that take effect at death. For instance, during life, a spouse may use
44 community funds to augment a separate property asset. Moreover, a spouse during the marriage
45 may have inappropriately donated property to a third person. Similarly, at the death of the
46 decedent, the decedent may have inappropriately transferred property belonging to the surviving

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

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

27 SECTION 8. RIGHTS OF SURVIVING SPOUSE, ~~HEIRS, BENEFICIARIES~~

28 HEIR, BENEFICIARY, AND CREDITOR.

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

31 (b) A surviving spouse of the decedent may send a demand in a record to ~~the~~ personal
32 representative of the decedent asserting a right under this [act]. The demand must be sent not
33 later than six months after the appointment of ~~the~~ personal representative. If the surviving
34 spouse does not send the demand, the personal representative does not have a duty to apply this
35 [act].

36 (c) An heir, beneficiary, or creditor of the decedent may send a demand in a record to

1 ~~athe~~ personal representative of the decedent asserting a right under this [act]. The demand must
2 be sent not later than six months after the appointment of ~~athe~~ personal representative.

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

5 (1) an action by ~~athe~~ surviving spouse against an heir, beneficiary, or transferee of
6 the decedent; and.

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

8 **Comment**

9
10 Subsection (~~ab~~) of this section allows a surviving spouse to protect rights under this act
11 and provides a statute of limitation for doing so. Namely, a surviving spouse must institute an
12 action against the successors of the decedent within three years of the date of death of the
13 decedent. Although not required, a surviving spouse may also file a written demand with the
14 personal representative of the decedent. Unless the surviving spouse does so within six months
15 of the opening of decedent's estate, the personal representative has no fiduciary duty to
16 investigate or to attempt to ascertain whether this act applies to any property owned by the
17 decedent.

18
19 Subsection (~~bc~~) of this section allows the personal representative, an heir, or a beneficiary
20 of the decedent to protect rights under this act and provides a statute of limitation for doing so.
21 Namely, an action must be instituted against the surviving spouse within three years of the date of
22 death of the decedent. Although not required, the heirs, beneficiaries or creditors of the decedent
23 may attempt to protect their interests by filing a written demand with the personal representative
24 of the decedent within six months of the opening of decedent's estate. Unlike in subsection (~~ab~~)
25 of this section, the personal representative of the decedent has an obligation to attempt to ascertain
26 whether the decedent has property rights that should be protected under this act. See, e.g., Unif.
27 Prob. Code §§ 3-703 (general duties) & 3-706 (duty to prepare an inventory).

28
29 The time periods provided in this section are generally borrowed from other areas of law.
30 Specifically, a six-month period is not an uncommon period for a non-claim statute for creditors
31 and the three-year period is adapted from claims challenging revocable trusts and for contesting
32 nonprobated wills. See Unif. Trust Code § 604; Unif. Prob. Code § 3-~~109~~108.

33 **SECTION 9. PROTECTION OF THIRD PERSON.**

34
35 (a) A person is not liable under this [act] to the extent the person, with respect to property
36 to which this act applies:

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

2 (A) with a spouse; or

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

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

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

9 **Comment**

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

23 This section protects third persons in two different situations. First, during life, both
24 spouses may engage in a variety of transactions with third parties concerning the property to
25 which this act applies. This section protects third persons who deal with either spouse
26 concerning property to which this act applies, provided the third person gives value, is in good
27 faith, and does not have knowledge that the spouse who is a party to the transaction is improperly
28 exercising authority over property. Although third persons are ordinarily allowed to deal with a
29 spouse who has apparent title concerning a marital asset during the existence of the marriage, no
30 good reason could be found for protecting bad faith third parties with knowledge of the
31 commission of fraud on the rights of the other spouse. For example, if A retitles community
32 property belonging partly to B solely in A's name and sells it to C, C is protected from any claim
33 by A with respect to the property because C gave value and provided C is in good faith and does
34 not know that A improperly transferred property belonging to B. To the extent B has a
35 cognizable claim under Section 7 of this act, it will be solely against A, not C. On the other
36 hand, if A donated a community asset to C, C would not be protected by this section and B's
37 claim under Section 7 of this act could be cognizable against A or C or both.
38

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

13
14 **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
15 applying and construing this uniform act, consideration must be given to the need to promote
16 uniformity of the law with respect to its subject matter among states that enact it.

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

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

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

27
28 **Comment**

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

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