

MEMORANDUM

TO: Uniform Law Commission

FROM: Ronald J. Scalise Jr., Reporter of the Uniform Community Property Disposition at Death Act Committee, and David English, Committee Chair

DATE: September 1, 2020

RE: Issues Memorandum

For the meeting of the September 12, 2020 meeting of the Uniform Law Commission, the Reporter of the Uniform Community Property Disposition at Death Act (UCPDDA) and drafting committee chair have prepared this memorandum, which summarizes and highlights the main provisions of the act. This memo replaces the August 14, 2020 memo produced for the informal reading held on August 18, 2020 and incorporates comments and suggestions received at that meeting from Commissioners. The Committee has meetings scheduled for in the fall of 2020, where revisions to the draft will be made.

I. BACKGROUND

The original Uniform Disposition of Community Property Rights at Death Act (the “UDCPRDA”) was approved by the Uniform Law Commission in 1971. That act establishes a system for non-community property states to address the treatment of property that was community property before the spouses moved from a community property state to the non-community property state. According to the 1971 UDCPRDA, its purpose “is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their ‘community’ rights.”¹ To date, 17 states have enacted the UDCPRDA. Five states enacted it in the 1970s, shortly after its approval.² Another nine estates enacted the UDCPRDA in the 1980s.³ One state enacted it in the 1992,⁴ and two states – Utah and Minnesota – enacted it in 2012 and 2013, respectively.⁵

This UCPDDA revises and updates the 1971 UDCPRDA. Like its predecessor, the UCPDDA preserves the community property character of property acquired by spouses while

¹ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, Pref. Note, at 3 (1971).

² 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.

³ 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.

⁴ Fla. Stat. Ann. § 732.216.

⁵ Utah Code § 75-2b-101; Minn. Stat. § 519A.01.

domiciled in a community property jurisdiction, even after a move to a non-community property state. Unlike its predecessor, however, the UCPDDA:

- (1) broadens the Act to recognize the non-probate revolution that has occurred over the past 50 years; the 1971 UDCPRDA applied only to probate assets.
- (2) broadens the Act to expressly preserve 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.
- (3) addresses numerous uncertainties and ambiguities that have arisen over time concerning the specific language of the 1971 UDCPRDA.

II. SUBSTANCE OF THE UCPDDA AND COMMENTS FROM COMMISSIONERS RECEIVED AT THE AUGUST 12, 2020 INFORMAL READING

The substance of the proposed UCPDDA is discussed below.

Sections 1 and 2: Sections 1 contains the short title of the act. Section 2 contains some standard and some particularized definitions of terms that are used throughout the UCPDDA.

Comments Received by Commissioners at the Informal Reading and to be Considered by the Committee:

- (a) Section 2(1) “Domicile”: There was much discussion regarding the proposed definition of the term “domicile.” Commissioners recommended the following: consideration of the phrase “principal place of residence” in place of “primary residence”; consideration of UCC 9-307(b)(2); consideration of “intent” for purposes of ascertaining domicile; and consultation of the draft of the Restatement (Third) of Conflicts.
- (b) Section 2(2) “Jurisdiction”: Commissioners recommended providing examples in the comments involving foreign jurisdictions to be clear that the term applies to community property jurisdictions other than U.S. states.
- (c) Section 2(3) “Partition”: Commissioners recommended consideration of whether survivorship clauses in community property agreements would qualify as a partition under the act.
- (d) Section 2(5) “Spouse”: There was also much discussion regarding the proposed definition of the term “spouse.” Specifically, commissioners recommended consideration of the following: treatment of non-married cohabitants; treatment of putative spouses; consideration of same-sex couples married prior to *Obergefell*; and reconsidering the phrase “recognized as valid in this state.”

Section 3: Section 3 sets forth the scope of the 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. This Section is similar to Section 1 of the UDCPRDA.

Comments Received by Commissioners at the Informal Reading and to be Considered by the Committee:

- (a) *“is” to “was”*: Some Commissioners suggested changing the phrase “is domiciled in this state at the time of death” to “was domiciled in this state at the time of death.”
- (b) *“all or a proportionate part”*: Some Commissioners recommended that the Committee consider adopting a particular approach to allocating property interests that are partly acquired with community property and partly with separate property. The current draft allows courts to ascertain the appropriate “proportionate part” of an asset that is to be apportioned between community and separate property interests.

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

Comments Received by Commissioners at the Informal Reading and to be Considered by the Committee:

“Survivorship Clauses”: Commissioners recommended that the Committee consider this provision in light of community property agreements that contain survivorship clauses.

Section 5: Section 5 assists courts and the parties in evidentiary matters of proof in applying the UCPDDA. Specifically, even if two spouses are married under a community regime in a community property state, they may still acquire separate property that is owned individually and is not part of their community regime. 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 and not that the property was acquired while domiciled in a community property jurisdiction *and* that the relevant property was not acquired separately. It is believed that any other rule would make proof of the applicability of the act too difficult, given the passage of time, the absence of records, and the fading of memories between the time when the property was originally acquired and the time of death of the decedent. Section 5 is similar to Section 2(1) of the UDCPRDA. Unlike the UDCPRDA, the UCPDDA does not impose a presumption against the applicability of this act for property acquired in a non-community property state and held in a form that creates rights of survivorship.

Comments Received by Commissioners at the Informal Reading and to be Considered by the Committee:

“Opt-In” Community Property States: Commissioners recommended that the Committee consider this provision in light of states, such as Alaska, which allow parties to “opt in” to community property.

Section 6: Section 6 is the core of the UCPDDA. It provides that upon the death of one spouse, half the property to which this act applies belongs to the decedent and the other half to the surviving spouse. This is the same result that would be achieved at the death of one spouse in a community property jurisdiction. This Section is similar to Section 3 of the UDCPRDA, although the terminology and concepts have been updated.

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

Comments Received by Commissioners at the Informal Reading and to be Considered by the Committee:

- (a) Actions that were committed outside of adopting state. Commissioners recommended that the Committee consider acts committed by spouses that occurred after the move from a community property to a non-community property state.
- (b) Other Community Property Claims. Some Commissioners recommended that the Committee consider the applicability of this act to other claims that can be raised by spouses in community property jurisdictions, such as compensation for “time, toil, and talent.”

Section 8: Section 8 provides a procedure by which spouses can act to preserve rights under this act. It is similar to Sections 4 and 5 of the UDCPRDA. Unlike the UDCPRDA, however, this act also provides limitations periods within which a party must act to preserve rights under this act.

Comments Received by Commissioners at the Informal Reading and to be Considered by the Committee:

- (a) Title: Commissioners noted that the Title to Section 8 refers to parties in the plural, whereas the text of the section refers to parties in the singular.
- (b) Time Periods: Some Commissioners suggested that the Committee consider clarifying Section 8 to make clear that the 3-year time period is an absolute statute of limitation on bringing claims under the act but that the 6-month period

is applicable only if a party raises a claim with a personal representative of the deceased.

Section 9: Section 9 protects third persons who have transacted in good faith and for value. Otherwise, third persons could be subject to claims by a spouse under Section 7 if the other spouse had engaged in acts of bad faith management of community property while alive. Similarly, in some instances, Section 8 grants beneficiaries of the decedent or the surviving spouse of the decedent rights against third persons for unauthorized alienations. Section 9 ensures that in most instances third persons will be protected from these claims. This Section has no analogue in the UDCPRDA.

Comments Received by Commissioners at the Informal Reading and to be Considered by the Committee:

“Good Faith,” “Notice,” and “Knowledge”: Commissioners recommended amendment to the comments to make them more consistent with the Uniform Trust Code and the Uniform Commercial Code. Specifically, the reference to “actual knowledge” should be deleted to accommodate the concept of “notice” as a basis for knowledge.

Sections 10, 11, 12, and 13: Section 10 provides for uniform application of the act. Section 11 is a standard section regarding electronic signatures. Section 12 contains an optional provision for states that adopt the UCPDDA to repeal the UDCPRDA. Section 13 provides for the effective date of this act.

Comments Received by Commissioners at the Informal Reading and to be Considered by the Committee:

Effective Date and Retroactivity: Commissioners questioned to what extent the UCPDDA would apply retroactively and therefore affect individuals who had moved from community property to non-community property states before the adoption of the act. Some questioned whether the effective date should be different for states that had adopted the prior version of the act, the UCPDDA.