

MEMORANDUM

To: Uniform Disposition of Committee Property Rights at Death Revision Committee

From: Ronald J. Scalise Jr., Reporter

Date: October 8, 2019

Re: Issues Memorandum for First Committee Meeting

For the first meeting of the Uniform Disposition of Community Property Rights at Death Act Revision Committee (the “Committee”), the Reporter has prepared the below memorandum to guide the Committee in its discussion. It collects and summarizes various policy issues that the Committee may want to consider before drafting can begin in earnest.

I. *Background, Benefits, and Barriers to Adoption.* The Uniform Disposition of Community Property Rights at Death Act (the “Act”) was approved by the Uniform Law Commission in 1971. The 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 Act, 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 Act. Five states enacted the Act in the 1970s, shortly after its approval.² Another nine estates enacted the Act in the 1980s.³ One state enacted it in the 1992,⁴ and two states – Utah and Minnesota – enacted Act in 2012 and 2013, respectively.⁵

As an initial question, it may be worth considering why the Act has not been more successful in achieving enactment in the other non-community property states. Several possibilities suggest themselves: (1) Did the original Act have sufficient promotion such that states realized the benefits of adoption? (2) Were there substantive concerns with the content of the original Act? (3) Did states believe that the subject matter of the original Act was sufficiently addressed by their existing conflicts of law rules? (4) Did non-community property states fully understand the benefits of the Act? Answering this threshold question can ensure that the

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.

Committee addresses any issues that potentially may have been problematic under the original Act, and it can ensure the Committee is attentive to stumbling blocks that may have been encountered in the adoption of the original Act.

Although the Committee will undoubtedly want to reconsider some of the policy decisions made in the original Act, the Act offers substantial benefits for citizens in non-community property states that have adopted the Act. Americans are more mobile today than ever before. It is estimated that in 2016 that 7.5 million people moved one state to another.⁶ 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.”⁷ In fact, “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.”⁸ The Prefatory Note to the Act notes that this is both a matter of policy “and probably a matter of constitutional law.”⁹ Under traditional conflicts 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.¹⁰ The Restatement (Second) of Conflicts notes 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.”¹¹ Nevertheless, non-community property states do often prescribe procedures for holding or treating community property once the decedent has relocated to the non-community property state. These policies vary in content and may not always suit the desires or needs of the migrating couple.

Moreover, there is some evidence to suggest that adoption of the Act by a State may produce significant tax benefits for those who move from community property states to non-community property states. It has long been the case that community property states receive favorable tax benefits upon the death of one spouse. Specifically, Section 1014(b)(6) of the Internal Revenue Code provides that upon the death of either spouse, the entire community receives a step-up in basis, not just the half attributable to the decedent spouse.¹² When spouses move from community property states to non-community property states, however, many states “force[] a couple to change ownership from community property to some form of joint ownership or to a resulting trust, [which] ... almost certainly destroys the ability to take advantage of the full step up.”¹³ In attempt to achieve the benefits of a community property jurisdiction in a common

⁶ State-to-State Migration Flows: 2016, available at <https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html>

⁷ In re Marriage of Moore & Ferrie, 18 Cal. Rptr. 2d 543 (Court of Appeal, First District, Division 2, 1993).

⁸ William Q. De Funiak, *Conflict of Laws in the Community Property Field*, 7 ARIZ. L. REV. 50, 51 (1966).

⁹ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, Pref. Note (1971).

¹⁰ Sarah N. Welling, *The Uniform Disposition of Community Property at Death Act*, 65 KY. L. J. 541, 545 (1977).

¹¹ RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 259 (1971).

¹² I.R.C. § 1014(b)(6).

¹³ Jeremy T. Ware, *Section 1014(B)(6) and the Boundaries of Community Property*, 5 NEV. L. J. 704, 718 (2005).

law state, some states have enacted community property trust laws, which among other things, endeavor to provide a full step up in basis for couples upon the death of one spouse.¹⁴

Commentators have suggested that states that have adopted the Act may benefit from community property tax benefits. Specifically, some argue that “section 1014(b)(6) should determine the basis of the surviving spouse’s one-half interest in property covered by the Uniform Act.”¹⁵ Others have noted that “[i]n common law states that have adopted the Uniform Act the full step up for couples moving to those states may be preserved.”¹⁶ In fact, a Field Service Advisory (FSA) from the IRS has indicated that the full step up is available for the relevant parties in states that adopted the Act.¹⁷ Specifically, an FSA from 1993 addressed a situation of a couple who had sold their community property home in California and used the proceeds to buy a replacement residence in Oregon. When the husband died, the FSA indicated that “the wife’s basis in the property would be ...the fair market value of the property at her husband’s date of death.”¹⁸ In explaining its conclusion, the FSA noted that because Oregon had adopted the Act, the proceeds of the sale in California are “presumed to remain community property for purposes” of the relevant Oregon law.¹⁹ Consequently, the “property in Oregon acquired by the husband and wife with the proceeds from the sale of the California property will retain the character of community property, even though, in Oregon, the husband and wife held the converted property in a joint tenancy with right of survivorship.”²⁰

In short, the movement of Americans from community property to non-community property jurisdictions is a significant issue that would behoove non-community property states to address. The Act provides a relatively simple solution that should be appealing to states not only because of the clarity it provides in an otherwise murky area of law but also because of the potential favorable tax benefits for its citizens.

II. [Section 1] *Applicable Property.* In brief, Section 1 of the Act provides that all personal property acquired by either spouse while domiciled in a community property state is subject to the Act as well as all real property in the enacting state that was acquired with proceeds of community property.

Characterization as Community Property. Under Section 1, the central question becomes what property – real or personal – was “acquired as or became, and remained, community property under the laws of another jurisdiction.”²¹ This formulation clearly covers the situation in which a community asset is moved from a community property state to another state that does not recognize community property. As Professor Boxx has noted, however, “what constitutes community property varies significantly from state to state.”²² The variation is only exacerbated

¹⁴ Alaska Stat. § 34.77.100; S. Dak. Cod. Laws 55-17-1; Tenn. Code § 35-17-101.

¹⁵ Jonathan G. Blattmachr, Howard M. Zaritsky, & Mark L. Ascher, *Tax Planning with Consensual Community Property: Alaska’s New Community Property Law*, 33 REAL PROP. PROB. & TR. J. 615, 628 (1999).

¹⁶ Ware, *supra* note 13, at 713.

¹⁷ IRS Field Service Advisory, 1993 WL 1609164 (Nov. 24, 1993).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 1.

²² Letter from Karen E. Boxx to Joint Editorial Board for Uniform Trust and Estate Acts 1 (September 6, 2012).

when one considers an asset that is acquired with both community and separate property. In some jurisdictions, a “pro rata” approach is employed, which provides for a combination of community and separate ownership based in proportion to the payments contributed by either the community or the spouses separately.²³ The Act accommodates this approach by not requiring an “all or nothing” classification of community property. Rather, the Act is applicable when “all or the proportionate part” of property would be community property. The Act further notes the complexity that is often associated with apportioning or allocating interests in property as part separate and part community, but indicates that “the matters simply [should] be left to court decision as to what portion would, under applicable choice of law rules, be treated as community property.”²⁴

Not all jurisdictions, however, employ the above “pro rata” approach. In some community property states, an “inception of title” theory is used, such that the characterization of the property is dependent upon the characterization of the right at the time of acquisition. For example, a house acquired in a credit sale before marriage would remain separate property under this theory even if the vast majority of the payments were made after marriage and with community funds. The community maintains a claim for reimbursement for the amount of funds expended for the separate property of the acquiring spouse. Should the Act protect the spouse’s claim for reimbursement?

Tracing. Subsections (1)(1)(iii) and (1)(2) of the Act apply to property that is “traceable to community property.” Stated simply, “tracing” is the concept that property may change form without changing character.²⁵ Thus, property given in exchange has the same character as property received. Tracing, however, becomes more complex when community and separate property are comingled. Other parts of Section 1 of the Act make clear that the Act applies not only to community property but also to “the proportionate part of ... property acquired ... in exchange for ... community property.” It is assumed that the provision on tracing for personal property in Subsection (1)(1)(iii) applies in the context of comingled property where only a part of the asset is traceable to community property, although the language does not explicitly state. If it does, should some standard or burden of persuasion be adopted in demonstrating that comingled property is traceable to community property. In community property jurisdictions, all property is ordinarily presumed to be community and parties are faced with the task proving that separate property was used to acquire community property. In this context, however, the situation is reversed insofar as it is the community property that is traceable to other property. As drafted, the Act does not impose upon any party the obligation to demonstrate the traceability of the community property, although Sections 4 and 5 of the Act (discussed below) do seem to impose some duty to investigate upon the personal representative once “written demand” is made. Some commentators have noted that if property is indistinguishably comingled, courts could (1) “characterize all property as community property” since all community property maintain that presumption; (2) “proceed on an inferred intent theory,” treating the current form of the property

²³ For a general discussion of the characterization of property acquired over time, see WILLIAM A. REPPY, CYNTHIA A. SAMUEL, AND SALLY BROWN RICHARDSON, COMMUNITY PROPERTY IN THE UNITED STATES 91-92 (2015).

²⁴ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 1 cmt.

²⁵ REPPY, SAMUEL, AND RICHARDSON, *supra* note 14, at 161 (quoting W.BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 134 (1964)).

as evidence of the parties' intent with respect to its character; or (3) attempt to segregate the interest of the parties at the time they entered the state from the subsequent accretions.²⁶

"Rents, Issues, or Income of ... community property." Professor Featherston observes that Section 1 of the Act applies not only to property that was classified as community property under the laws of another jurisdiction but also to "the rents, issues, or income of" that property. He questions whether this phrase is redundant, as community property jurisdictions already classify as community property the "rents, issues, and income of" community property. The inclusion of this phrase in Subsection (1)(2) does appear redundant as it applies to "real property ... acquired with rents, issues or income of ...community property ... or property traceable to that community property." By definition, rents, issues, or income of community property are already community property. As used in Subsection (1)(1)(ii), however, the phrase appears to mean something different because it pertains to "property acquired with the rents, issues, or income of ..." personal property "wherever situated ... which was acquired as ... community property under the laws of another jurisdiction." In other words, in Subsection (1)(1)(ii), the phrase "rents, issues or income" appears to include the rents, issues, and income that are generated from personal property (which was previously classified as community) after a couple has moved to a non-community property state. Without the inclusion of this phrase in Subsection (1)(1)(ii), a court might not treat the "rents, issues or income" of such personal property as community property.

Undivided Interests in Each Asset. Professor Featherston has observed that the Act could be clarified to more appropriately address the application of community property concepts by courts in jurisdictions that are not accustomed to dealing with community property matters. Specifically, he notes that the Act by its terms applies to "all personal property" and to "all or the proportionate part of any real property" acquired with community funds. He correctly observes that in community property jurisdictions, the spouses own equal undivided shares in each asset of the community rather than equal shares in the aggregate value of the community assets. He suggests this could be clarified by noting that the Act applies to "each item of personal property" and "each item or a proportionate part of each item of real property" acquired with community funds.

III. [Section 1] To Whom Does the Act Apply? Because the original Act was approved in 1971, it was drafted at a time long before same-sex marriage. By its terms, the original Act "applies to the disposition at death of the following property acquired by a *married* person."²⁷ Obviously, the Act would apply today to property acquired either by same-sex or opposite-sex married couples, but some community property states also allow community property to be acquired pursuant to domestic or registered partnerships. Two community property states – California and Nevada – allow for community property to be acquired via registered domestic partnerships.²⁸ Washington also provides in a more limited sense that certain domestic partners

²⁶ Welling, *supra* note 10, at 556-57.

²⁷ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, Sec. 1 (emphasis added).

²⁸ 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 (same).

may acquire community property as well.²⁹ As Professor Karen Boxx notes, “The Act should be revised to reflect that.”³⁰

IV. [Section 2] *Rebutting the Presumptions of Community Property.* Section 2 of the Act creates a “rebuttable presumption” of community property for “property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property.”³¹ The comments note that “[i]t may be shown, of course, that such property was the separate property of the spouse and the law of the state of domicile may furnish the rule.”³² As Professor Boxx has noted, the Act “does not indicate the standard of proof necessary to rebut the presumption.”³³ Some community property states allow the presumption to be rebutted by a mere “preponderance of the evidence.”³⁴ Others require clear and convincing evidence.³⁵ Idaho reasons proof by “reasonable certainty and particularity.”³⁶ Should the law of the applicable community property jurisdiction provide the standard for rebutting the presumption?

It is also worth noting that the Act does not require that the parties have a “marital domicile” in a community property state for the Act to apply. Rather, if either spouse is domiciled in a community property jurisdiction, a presumption arises that property acquired during marriage by that spouse will be subject to the Act.³⁷

V. [Section 3] *Dispositions Upon Death.* This Section is the heart of the Act and provides simply that for all property to which the Act applies, only one-half is the property of the decedent is subject to his testamentary disposition or distribution of his estate under the laws of succession.³⁸ The other half belongs to the surviving spouse.³⁹ In *Estate of Bach*, a New York court applied the corresponding provision of New York law and held that a widow whose community property interest originated under the laws of Bolivia was entitled to receive one-half of her husband’s estate as community property after his death in New York.⁴⁰ Section 3 also provides that the rights of dower, curtesy, and the elective share do not apply to the half of the property that belongs to the decedent. Although some of the language needs to be updated in this section, the general rule and approach seem commendable.

²⁹ Wash. Rev. Code tit. 26, § 26.60.100(3); *Id.* tit. 26, § 26.60.015. Although most domestic partnerships in Washington automatically converted into marriages, this is not the case for opposite sex couples in which one member is 62-years old or older. *Id.* tit. 26, § 26.60.100(3)

³⁰ Boxx, *supra* note 22, at 1.

³¹ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 2.

³² *Id.* cmt.

³³ Boxx, *supra* note 22, at 2.

³⁴ See *Talbot v. Talbot*, 864 So. 2d 590 (La. 2003); *Marriage of Ettefagh*, 59 Cal. Rptr. 3d 419 (Cal. App. 2007); *Brandt v. Brandt*, 427 N.W.2d 126 (Wis. Ct. App. 1988); *Sanchez v. Sanchez*, 748 P. 2d 21 (N.M. App. 1987).

³⁵ Tex. Fam. Code § 3.039(b); *Sommerfield v. Sommerfield*, 592 P.2d 771 (Ariz. 1979); *Pryor v. Pryor*, 734 P.2d 718 (Nev. 1987); *Marriage of Muller*, 167 P.3d 568 (Wash. App. Ct. 2007).

³⁶ *Reed v. Reed*, 44 P.3d 1100 (Idaho 2002).

³⁷ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 2; *see also* 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 10.21[G][4] (2008).

³⁸ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 3.

³⁹ *Id.*

⁴⁰ *Estate of Bach*, 145 Misc. 2d 945 (N.Y. Sur. Ct. 1989).

VI. [Sections 4 and 5] *Fiduciary Duties of Personal Representative.* Under sections 4 and 5 of the Act, applicability of the Act is premised upon a “written demand” being made by the surviving spouse or by heir, devisee, or creditor of the decedent asserting that the Act is applicable to particular property.⁴¹ The Act further makes clear that neither “[t]he personal representative [of the decedent] nor the court in which the decedent’s estate is being administered has a duty to discover or attempt to discover whether property held by the decedent is property to which this Act applies....”⁴² Professor Boxx questions whether this matter should be revisited by the Committee. Although the approach of the Act is obviously designed to protect the personal representative of the decedent from both liability and burdensome obligations, Professor Boxx rightly notes that “ascertaining the decedent’s property is a basic fiduciary duty of the” decedent’s personal representative.⁴³ Under the Uniform Probate Code, “[a] personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this [code], and as expeditiously and efficiently as is consistent with the best interests of the estate.”⁴⁴

Moreover, although the personal representative is not under a duty to independently investigate the character of the property, the procedures for perfecting title differ under Sections 4 and 5. Under Section 4, if the surviving spouse seeks to perfect title in herself, the appropriate procedure is to provide written notice to the personal representative, which then triggers a duty to investigate if property held by the decedent is subject to the Act.⁴⁵ Under Section 5, however, if an heir or devisee seeks to perfect title to property held by the surviving spouse, he may independently “institute an action to perfect title to the property.”⁴⁶ In addition, he may provide written notice to the personal representative, which then triggers a duty to investigate if property held by the surviving spouse is subject to the Act. As some have noted, “the Act would appear to allow for two or more separate actions, one by the personal representative, and one or more others by heirs and devisees, to be proceeding at the same time.”⁴⁷ A creditor of the decedent, however, who seeks to perfect title does not have a right to institute an action on his own, but his only remedy is to provide a written demand to the personal representative of the decedent.⁴⁸ Should the policy underlying this provision be revisited?

VII. [Section 6] *Rights of Third-Party.* Section 6 of the Act addresses the situation in which purchasers or lenders take a security interest for value after the death of the decedent from someone with apparent title to the property.⁴⁹ Subsection (a) applies to purchasers or lenders who acquire an interest from a surviving spouse, and Subsection (b) addresses the corresponding situation in which the same parties acquire an interest from the personal representative, heir, or devisee of the decedent.⁵⁰ In both cases, the Act provides that “a purchaser for value or a lender taking a security

⁴¹ *Id.* at sec. 4 & 5.

⁴² *Id.*

⁴³ BOXX, *supra* note 22, at 2.

⁴⁴ UNIF. PROB. CODE. § 3-703.

⁴⁵ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 4. New York law requires that notice be provided to all parties entitled to be served with process. NY EST. POWERS & TRUST § 6-6.4.

⁴⁶ *Id.* at sec. 5.

⁴⁷ 1 SCHOENBLUM, *supra* note 37, at 10.21[G].

⁴⁸ *Id.*

⁴⁹ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 6 cmt (1971).

⁵⁰ *Id.*

interest in the property takes his interest in the property free of any rights of the” competing parties, whether they be surviving spouse, personal representative, heir, or devisee of the decedent.⁵¹ This provision seems to be at odds with other provisions of general law insofar as “there is no requirement of good faith.”⁵² In other words, even a party who has knowledge of the rights of another may still acquire his interest “free of any rights” of competing parties. Section 6(c) makes clear that “[a] purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.”⁵³ In fact, the Act “fails to distinguish between bona fide purchasers and those complicit[] in efforts to deprive the decedent’s estate of its property.”⁵⁴ The text of the statute itself also makes no provision as to the amount of value that need be given, referencing only a “purchaser for value.”⁵⁵ The comment, however, suggests otherwise in stating a preference to protect third parties where “adequate consideration is paid.”⁵⁶ In the end, however, the Act protects third parties at the expense of spouses or successors of the decedent, but it does treat the proceeds of the transaction with the third party as subject to the Act, which is some acknowledgment of the rights of the spouse or successor.⁵⁷ After all, spouses in some community property jurisdictions can also unilaterally transfer community assets to the detriment of the other spouse in a way similar to the authority in Section 6.⁵⁸

VIII. [Section 7] *Rights of Creditors.* Section 7 of the Act provides simply that “[t]his Act does not affect rights of creditors with respect to property to which the Act applies.”⁵⁹ In other words, it purports to provide that creditors rights are unaffected by the application of the Act and thus the continued treatment of property as community property under the Act does not alter the rights of a creditor. But this provision seems contrary to Section 5 of the Act, which curtailed creditors rights insofar as they cannot proceed on their own behalf to perfect title in property but are required to file a “written demand” with the personal representative of the decedent in order to ensure protection of their rights. This section is also at odds with Section 6, which seems to expand creditor rights insofar as they are preferred to the interests of a surviving spouse or successors, even in the absence of good faith or proof of their character as a bona fide purchaser.⁶⁰ Does the Committee wish to revisit this section?

IX. [Section 8] *Severance or Alteration of Community Property.* Section 8 of the Act provides that “[t]his Act does not prevent married persons from severing or altering their interests in property to which this Act applies.”⁶¹ The Act itself, however, does not specify what constitutes a severance or alteration of community under Section 8. Rather, it merely notes that the various “rights, and procedures[] ... vary markedly among the community property states.”⁶² An issue for consideration is whether the Committee would like to flesh out, in any way, this section.

⁵¹ *Id.* (a) & (b).

⁵² *Id.* cmt.

⁵³ *Id.* (c).

⁵⁴ 1 SCHOENBLUM, *supra* note 37, at 10.21[G][7].

⁵⁵ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 6 (a) & (b).

⁵⁶ *Id.*; 1 SCHOENBLUM, *supra* note 37, at 10.21[G][7].

⁵⁷ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 6 (d).

⁵⁸ 1 SCHOENBLUM, *supra* note 37, at 10.21[G][7], note 501.

⁵⁹ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 7.

⁶⁰ *See generally* 1 SCHOENBLUM, *supra* note 37, at 10.21[G][8].

⁶¹ UNIF. COMM. PROP. RIGHTS AT DEATH ACT, SEC. 8 (1971).

⁶² *Id.* cmt.

Commentators have questioned whether the mere act of taking title to former community property as joint tenants with the right of survivorship is sufficient to create an inference that the parties agreed to sever their community interest.⁶³ It has been noted that some courts have found that similar arraignments created an implied severance, and “[n]othing in the Act precludes this inference.”⁶⁴ Moreover, Florida law provides that “[t]he reinvestment of any property to which these sections apply in real property located in this state which is or becomes homestead property creates a conclusive presumption that the spouses have agreed to terminate the community property attribute of the property reinvested.”⁶⁵ Should the revision be more directive in what does and does not constitute a severance or termination?

X. [Section 9] *Testamentary Dispositions.* Section 9 of the Act provides that “[t]his Act does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.” The content of this provision is not entirely clear, and no comments exist to aid in its interpretation. It is presumed that this provision means that “even if the Act recognizes a community property interest of a spouse that could ordinarily be disposed of by will, this disposition will not be allowed if the property is held in trust, joint tenancy, or similar valid testamentary substitute.”⁶⁶

XI. *Outdated Language.* Because the Act was approved in 1971, it contains some terms and phrases that are either outdated or inaccurate, some of which have been noted by Professors Boxx and Featherston. The Committee will need to pay particular attention to these matters during the drafting process.

⁶³ Welling, *supra*, note 10, at 559.

⁶⁴ *Id.*

⁶⁵ Fla. Stat. Ann. §732.225.

⁶⁶ 1 SCHOENBLUM, *supra* note 37, at 10.21[G][10].