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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 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 estates enacted the UDCPRDA in the 1980s. N.C. Gen. Stat. § 31C-1; N.Y. Est. Powers & Trusts Law § 6-6.1; Ark. Code. Ann. § 28-12-101; Va. Code § 64.1-197; Alaska Stat. § 13.41.005; Wyo. Stat. § 2-7-720; Conn. Gen. Stat. Ann. § 45a-458; 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, “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

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

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

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

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

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

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

1 make proof of application of the act too difficult, given the passage of time, the absence of records,
2 and the fading of memories between the time when the property was originally acquired and the
3 time of death of the decedent.

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

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

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

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

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

7
8 (4) *Person*. The definition of “person” is based upon the standard Uniform Law
9 Commission definition.

10
11 (5) *Spouse*. The term “spouse” is defined expansively to include not only married
12 persons, of either sex, but also partners in other arrangements, such as domestic or registered
13 partnerships, under which community property may be acquired. *See, e.g.*, Cal. Fam Code §
14 297.5 (stating that domestic partners “have the same rights, protections and benefits, and are
15 subject to the same responsibilities, obligations and duties under law, whether derived from
16 statutes, administrative regulations, court rules, government policies, common law, or any other
17 provisions or sources of law, as are granted to and imposed upon spouses”); Nev. Rev. Stat. §
18 122A.200. The term also encompasses putative spouses. The putative spouse doctrine is a
19 remedial doctrine recognized in many states that allows a person in good faith to enjoy
20 community property and other civil effects of marriage, despite not being a party to a legally
21 valid marriage. *See, e.g.*, Unif. Marriage & Div. Act § 209. Although few, if any, community
22 property states recognize common law marriage, Texas does recognize “informal marriages” and
23 thus parties to such an arrangement should also be included in the definition of a “spouse” under
24 this act. *See, e.g.*, Tex. Fam. Code § 2.401.

25
26 (6) *State*. The definition of “state” is based upon the standard Uniform Law Commission
27 definition.

28
29 **SECTION 3. SCOPE** This [act] applies to the following property of a spouse who
30 formerly was domiciled in a jurisdiction where property could be acquired as community
31 property, irrespective of how the property currently is titled or held:

32 (1) if a decedent is domiciled in this state at the time of death, all or a proportionate part
33 of each item of personal property, wherever located, that was community property under the law
34 of the jurisdiction where the decedent or the surviving spouse of the decedent was domiciled at
35 the time of acquisition;

36 (2) whether or not a decedent is domiciled in this state at the time of death, all or a
37 proportionate part of each item of real property located in this state that was community property

1 under the law of the jurisdiction where the decedent or the surviving spouse of the decedent was
2 domiciled at the time of acquisition;

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

5 (4) property traceable to property described in paragraph (1), (2), and (3).

6 **Comment**

7
8 This section makes the act applicable to spouses who were formerly domiciled in a
9 community property jurisdiction. The term “jurisdiction” is used, rather than the narrower term
10 “state,” to be clear that this act would apply to a spouse who was domiciled in foreign
11 jurisdictions where community property may be acquired. The term “formerly domiciled” is
12 used to indicate that the act will be applicable whenever a spouse was domiciled at any time in
13 the past in a community property jurisdiction, has acquired property there, and has moved to
14 another jurisdiction. Thus, if A and B were married in state X (a community property state) and
15 acquired property there, but then moved to state Y (a non-community property state) prior to
16 moving again to state Z (also a non-community property state) where A eventually dies, state Z
17 should apply this act to the property acquired by A and B in state X.

18
19 Under subsection (a), the act applies to all personal property that was originally classified
20 as a community property by the state at the time in which it was acquired. The current location
21 of the personal property is not relevant for application of this act. Thus, if A and B were married
22 in state X (a community property state), acquired a car there, and eventually moved to state Z (a
23 non-community property state) where A eventually dies, then the car would be subject to this act,
24 even if the car was left in storage in state Y.

25
26 Under subsection (b), this act adopts the traditional situs rule for real estate and is made
27 applicable to all real estate located in a state where this act has been adopted, irrespective of
28 whether the party to whom the act applies is domiciled in the enacting state. Thus, if A and B,
29 while domiciled in a state X (a community property state) acquire real estate with community
30 funds in state Y (a non-community property state), but then move to state Z (also a non-
31 community property state), where A eventually dies, then this act will apply to the real estate in
32 state Y, assuming state Y has enacted this act. Whether or not state Z has enacted this act will be
33 important in ascertaining how the personal property of A is distributed, but not in the disposition
34 of the real estate, located in state Y.

35
36 Under both section (a) and (b), this act applies to “all or a proportionate part” of property
37 that was acquired with community property. In other words, when an asset is acquired partly
38 with community property and partly with separate property, at least some portion of the property
39 should be characterized as community property. The issue of apportionment and commingling,
40 however, is a complex one with many state variations applicable to different types of assets.

1 In some community property states, an “inception of title” theory is used, such that the
2 characterization of the property is dependent upon the characterization of the right at the time of
3 acquisition. For example, a house acquired in a credit sale before marriage would remain separate
4 property under an “inception of title” theory even if the vast majority of the payments were made
5 after marriage and with community funds. In this instance, the community would have a claim for
6 reimbursement for the amount of funds expended for the separate property of the acquiring spouse.
7 Section 7 of this act accommodates reimbursement claims, if such a claim would be appropriate
8 under the law of the relevant jurisdiction. In other jurisdictions, a “pro rata” approach is employed,
9 which provides for a combination of community and separate ownership based in proportion to
10 the payments contributed by either the community or the spouses separately. The act
11 accommodates this approach by not requiring an “all or nothing” classification of community
12 property. Rather, the act is applicable when “all or the proportionate part” of property would be
13 community property according to the law of a jurisdiction in which the spouse was formerly
14 domiciled at the time of acquisition.

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

26 Under subsection (c), income, rents, or profits derived from community property are also
27 subject to this act, as well as appreciations or other increases in community property. This
28 section should be read to include net income, rather than gross income, from community
29 property, as well as things produced from community property (i.e., “appreciations and other
30 increases”), even if not technically revenue producing. Thus, if a \$500,000 house were
31 purchased completely with community funds and increased in value to \$700,000 after spouses
32 moved to a non-community property state, then the entire house, not merely \$500,000 in value,
33 is classified as community property. Similarly, crops produced from a community property farm
34 and foal produced from a horse that is owned as community property are also considered to be
35 community property.

36
37 Subsection (c) also applies not only income, rents, and profits from community property
38 produced prior to moving to a non-community property jurisdiction, but also after the move.
39 Indeed, in the former case, such a rule would be unnecessary as all community property states
40 already characterize income, rents, or profits derived from, as well as appreciations or other
41 increases in, community property as community property. The rule is subsection (c), however, is
42 necessary to be clear that even after spouses move to a non-community property state, the
43 incomes, rents, and profits produced by community property acquired prior to the move are still
44 community property after the move to a non-community property state. Thus, interest produced

1 from a community property savings account is still community property after A and B move
2 from state X (a community property state) to state Z (a non-community property state),
3 irrespective of the location of the account.
4

5 Under subsection (d), this act also applies to any property that is a traceable to property in
6 subsections (a) or (b). Simply stated, property is “traceable” to community property if the
7 property changes form without changing character. WILLIAM A. REPPY, CYNTHIA A. SAMUEL,
8 AND SALLY BROWN RICHARDSON, COMMUNITY PROPERTY IN THE UNITED STATES 161 (2015)
9 (quoting W. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 134 (1964)). By way of
10 illustration, if after moving from a state X (a community property state) to state Z (a non-
11 community property state), A and B transfer money from a community property bank account
12 opened in state X to a bank in their new domicile, state Z, then the bank account in state Z is
13 subject to this act because it is traceable to community property. Similarly, if A and B are
14 married in state X (a community property state), open a bank account there funded solely with
15 community property and buy a car with that money after moving to state Y (a non-community
16 property state), then the car would still be subject to this act because it is traceable to community
17 property. The same result would obtain even if A and B moved again from state Y to state Z
18 (another non-community property state) and exchanged their prior car for a new one in state Z.
19 The new car would still be subject to this act because it is traceable to the community property
20 originally acquired in state X.
21

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

23 (a) This [act] does not:

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

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

26 apply; or

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

28 (b) A unilateral act by a spouse of holding property in a form, including a revocable trust,
29 that allows for its payment or transfer on death to a third person is not a partition of the property
30 or an agreement waiving rights granted under this [act]. Holding property to which this [act]
31 applies in a form, including a revocable trust, that allows for its payment or transfer on death to
32 the surviving spouse of the decedent is presumed to be a partition of the property or an
33 agreement waiving rights granted under this [act]. The presumption may be rebutted by clear and
34 convincing evidence.

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Comment

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

The mere taking of title to property that was previously acquired as community property in the form of a transfer-on-death deed, does not operate as a partition or waiver. For example, if 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.

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Comment

This section adopts a blanket presumption in favor of treating all property acquired by a spouse while domiciled in a community property jurisdiction as community property, provided, of course, that the laws of the community property state allowed community property to “then be acquired by that person.” In other words, the presumption applies only to those persons who could acquire community property under the laws of the relevant jurisdiction. 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.

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

1 during marriage by either husband or wife, or both, is presumed to be community property.”);
2 Wisc. Stat. § 766.31(2) (“All property of spouse is presumed to be marital property.”); Tex. Fam.
3 Code § 3.003(a) (“Property possessed by either spouse during or on dissolution of marriage is
4 presumed to be community property”); La. Civ. Code art. 2340 (“Things in the possession of a
5 spouse during the existence of a regime of community of acquets and gains are presumed to be
6 community, but either spouse may prove they are separate property.”); Cal. Fam. Code § 760;
7 Unif. Marital Prop. Act. § 4(a) (“All property of spouses is marital property except that which is
8 classified otherwise by this Act.”).

9
10 Despite the above presumption, a party may prove that the relevant property was
11 separate, even though acquired during the existence of a community regime, such as by
12 demonstrating that the property was acquired by inheritance. Although different community
13 property states provide different standards for rebutting the relevant presumption of community
14 property, this act adopts a preponderance standard for rebutting the presumption, as have a
15 number of community property states. *See, e.g., Marriage of Ettefagh*, 59 Cal. Rptr. 3rd 419
16 (Cal. App. 2007); *Talbot v. Talbot*, 864 So. 2d 590 (La. 2003); *Brandt v. Brandt*, 427 N.W. 2d
17 126 (Wisc. App. 1988); *Sanchez v. Sanchez*, 748 P.2d 21 (N.M. App. 1987); *But see* Tex. Fam.
18 Code § 3.03(b) (“The degree of proof necessary to establish that property is separate property is
19 clear and convincing evidence.”); *Reed v. Reed*, 44 P.3d 1100 (Idaho 2002) (requiring
20 “reasonable certainty and particularity” to rebut the presumption).

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

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

33
34 (a) Except as otherwise provided in subsection (b), one-half of the property to which this
35 [act] applies belongs to the surviving spouse of the decedent and is not subject to disposition by
36 the decedent at death.

37 (b) If, at death, the decedent purports to dispose of property belonging to the surviving
38 spouse to a third person and disposes of other property to the surviving spouse, the court may
39 require the surviving spouse to elect between retaining the disposition to the surviving spouse or

1 asserting rights under this [act].

2 (c) One-half of the property to which this [act] applies belongs to the decedent and is
3 subject to disposition by the decedent at death. The property that belongs to the decedent is not
4 subject to elective-share rights of the surviving spouse. This section does not limit the rights of a
5 surviving spouse to a [homestead, exempt property, or family] allowance.

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

8
9 **Comment**

10
11 Under subsection (a), at the death of one spouse, one-half the property to which this act
12 applies belongs to the surviving spouse. This is universal approach of community property
13 states. As a result, the decedent cannot dispose of the property belonging to the surviving spouse
14 by will or intestate succession. An attempt to do so would be ineffective.

15
16 If, however, the decedent disposes of property subject to this act by non-probate transfer
17 in favor of the third person, Section 7, rather than this section, would apply. In other words, this
18 act, like community property states, provides that reimbursement or equitable claims may be
19 available to a surviving spouse when a decedent improperly alienates the interest of a spouse by
20 means of a non-probate transfer. *See, e.g., T.L. James & Co. v. Montgomery*, 332 So. 2d 834
21 (La. 1975). If, however, the decedent disposes of property subject to this act by non-probate
22 transfer in favor of the surviving spouse, a partition of that property is presumed under Section 4
23 of this act.

24
25 If the decedent disposes of the decedent's share of property under this act but transfers
26 other property to the surviving spouse, a court may require the surviving spouse to make an
27 equitable election to retain the disposition from the decedent or assert rights under this act.

28
29 Under subsection (b), at the death of one spouse, one-half the property to which this act
30 applies belongs to the decedent. Again, this is universal approach of community property states.
31 As a result, the decedent can dispose of that property by any probate or non-probate mechanism.
32 Elective share rights that are common in non-community property states do not apply in
33 community property states, at least not with respect to community property in those states.
34 Consequently, a surviving spouse does not have elective share rights against the decedent's share
35 of the property under this act. Subsection (b), however, does not limit a surviving spouse's claim
36 for other statutory allowances, such as homestead allowances, allowances for exempt property,
37 and family allowances. *See, e.g., UPC §§ 2-402, 2-403, and 2-404.*

38
39 In addition, this section provides that one-half of the property covered by this act is
40 included in the decedent's intestate estate. Assuming a decedent dies intestate, this act will
41 likely result in half the property subject to this act belonging to the surviving spouse, whereas the

1 intestate law of most states awards to the surviving spouse a lump sum plus at least one half of
2 the remainder of the property to which this act does not apply.

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

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

24 **SECTION 7. OTHER LEGAL AND EQUITABLE REMEDIES AVAILABLE AT**

25
26 **DEATH.** With respect to property to which this [act] applies, at the death of the decedent, the
27 personal representative of the decedent or the surviving spouse may bring an action for legal or
28 equitable relief if the action:

29 (1) arises out of an:

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

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

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

Comment

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

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

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

The rights granted by this section are operable at the death of an individual and may not be asserted during the existence of the marriage. This approach is consistent with the law of various community property jurisdictions. *See, e.g., La. Civ. Code art. 2358* ("A claim for

1 reimbursement may be asserted only after termination of the community property regime, unless
2 otherwise provided by law.”). *But see* Uniform Marital Property Act § 13 (allowing claims for
3 breach of the duty of good faith and for an accounting to be brought by spouses during an
4 ongoing marriage). The relief sought under this section may, however, be for actions of a spouse
5 taken either during life or that take effect at death. For instance, a spouse may use community
6 funds to augment a separate property asset. Moreover, a spouse during the marriage have
7 inappropriately donated property to a third person. Similarly, at the death of the decedent, the
8 decedent may have inappropriately transferred property belonging to the surviving spouse to a
9 third person by non-probate transfer. Although community property states generally enforce such
10 transfers, they correspondingly grant a claim for damages, recovery, or reimbursement to the
11 surviving spouse. Of course, the application of this section must yield when appropriate to
12 federal law. See, e.g., Employment Retirement Security Act, 29 U.S.C. Section 1001 et seq.;
13 *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding that ERISA pre-empted state community property
14 law and remedies, even though the relevant ERISA-governed retirement plan was funded with
15 community property).

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

32 33 **SECTION 8. RIGHTS OF SURVIVING SPOUSE, HEIRS, BENEFICIARIES,** 34 **AND CREDITOR.**

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

37 (b) A surviving spouse may send a demand in a record to a personal representative of the
38 decedent asserting a right under this [act]. The demand must be sent not later than six months
39 after the appointment of a personal representative. If the spouse does not send the demand, the

1 personal representative does not have a duty to apply this [act].

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

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

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

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

10 **Comment**

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

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

30
31 The time periods provided in this section are generally borrowed from other areas of law.
32 Specifically, a six-month period is not an uncommon period for a non-claim statute for creditors
33 and the three-year period is adapted from claims challenging revocable trusts and for contesting
34 nonprobated wills. See Unif. Trust Code § 604; Unif. Prob. Code § 3-109.
35

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

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

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

5 (A) with a spouse; or

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

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

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

12 **Comment**

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

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

1 by A with respect to the property because C gave value and provided C is in good faith and does
2 not know that A improperly transferred property belonging to B. To the extent B has a
3 cognizable claim under Section 7 of this act, it will be solely against A, not C. On the other
4 hand, if A donated a community asset to C, C would not be protected by this section and B's
5 claim under Section 7 of this act could be cognizable against A or C or both.

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

19
20 **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
21 applying and construing this uniform act, consideration must be given to the need to promote
22 uniformity of the law with respect to its subject matter among states that enact it.

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

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

31 ***Legislative Note:** A state should repeal its existing Uniform Disposition of Community*
32 *Property Rights at Death Act, or comparable legislation, to be replaced by this act.*
33

1

Comment

2

3

4

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

5

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