

MEMORANDUM

TO: Uniform Community Property Disposition at Death Act Committee
FROM: Ronald J. Scalise Jr.
DATE: November 4, 2020
RE: Issues Memo for November 10, 2020 Committee Meeting

The below memo provides a brief rationale for the changes made to the current draft from the draft considered at the August 18, 2020 Informal Reading and at the September 12, 2020 First Reading.

Section 1:

Change: No change

Rationale: No change

Section 2:

Change: Deletion of the term “domicile.”

Rationale: A succinct and generally acceptable definition of term “domicile” has proven elusive. The intent of initially including a definition of domicile was to refer to the generally accepted definition of domicile for conflicts of law purposes. Commissioners raised a variety of good points regarding “intent” for purposes of ascertaining domicile as well as various other possible formulations of the definition, such as reference to one’s “principal place of residence” in place of “primary residence.” It was also noted that the draft of the Restatement (Third) of Conflicts contains a new definition of the term “domicile” and that the Uniform Commercial Code also contains a lengthy provision addressing the “location of the debtor,” which might be helpful. See, e.g., UCC 9-307(b)(2).

Writing a very detailed definition defining domicile risks creating inconsistency with the law and treatment of domicile under the adopting state’s general law. The term “domicile” is used throughout the Uniform Probate Code but is not defined. In light of the above, it is suggested that the term “domicile” be deleted and the UCPDDA defer entirely to the adopting state for a definition of this term.

- Change:* Expansion of comments regarding the term “jurisdiction.”
- Rationale:* Although the definition of the term “jurisdiction” is retained unchanged, an example from a Florida case involving a Cuban couple has been included in the comments in response to observations from Commissioners that the comments make clear the applicability of the UCPDDA to foreign jurisdictions that maintain community property.
- Change:* Modification of the definition of the term “spouse” and revision of comments.
- Rationale:* The definition of term “spouse” was modified in response to concerns about the meaning of the phrase “recognized as valid in this state.” The intent of this definition is to capture marriages that were valid in the state in which they were contracted and which are recognized as valid in the adopting state under traditional conflicts of law principles. See, e.g., Restatement (Second) of Conflict of Laws § 283 (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”). The revised definition more explicitly conveys that meaning.

Section 3

- Change:* The new draft clarifies this section without intended to effectuate a substantive change.

- Rationale:* First, the revision changes language in Paragraph (2) to make clear the applicability of this act to real property in an adopting state that was acquired with community property. The phraseology in the prior draft was unclear insofar as it made the act applicable to real property in the adopting state “that was community property under the law of the jurisdiction [where the parties] were domiciled at the time of acquisition.” The new draft applies simply to real property that was acquired with or traceable to community property at the time of acquisition.

Second, the new draft rephrases Paragraph (2) for better application of the provision. The prior draft made the act applicable to property “traceable” to real property located in the adopting state that was considered community property. On further reflection, such as provision seems unnecessary, as the concept of traceability is already built into Section 3(1)(C) and (2)(A).

Finally, this draft, like the prior drafts, opts not to adopt a particular approach for allocating community property interests that were acquired with both community and separate property. As the comments to Section 3 indicate, there is great diversity amount community property states regarding how to address this issue and even within a particular community property state apportionment approaches can differ depending upon the particular asset being apportioned. An attempt to

adopt a particular approach for allocation would likely prove too controversial to be workable.

Section 4

Change: Substitution of the phrase “has paid or has transferred property” in place of the phrase “allows for its payment or transfer.”

Rationale: This section was changed to make clear that the mere “holding” of property in a form that pays on transfer on death is not itself a partition. Rather, the holding of property in such a form that actually has paid or transferred upon death is the appropriate action of partition.

Section 5

Change: Expansion of the comments

Rationale: The comments to this section were expanded in response to recommendations from Commissioners to consider “opt in” community property states, such as Alaska, Tennessee, and South Dakota. The text of Section 5 is broad enough to capture both traditional “opt out” states in addition to “opt in” states, as the text establishes a rebuttable presumption only if community property could “then be acquired” as community property. In “opt out” states, the act would be applicable to married parties only and then to those who have not opted out of community property. In “opt in” states, this would include married persons who have affirmatively opted in to community property, as only parties who have “opted in” could have “then ... acquired” community property.

Section 6

Change: Only minor semantic changes were made to this section and its comments

Rationale: The comments to this section were expanded in response to recommendations from Commissioners.

Section 7

Change: Substitution of the word “formerly” in Section 2 in place of the phrase “at the time of the act under paragraph (1).”

Rationale: This section was modified to make clear that the legal and equitable remedies provided by Section 7 apply to actions by spouses that occurred both before and after the move from a community property to a non-community property state.

Section 8

Change: Only minor semantic changes were made to this section and its comments.

Rationale: The comments to this section were expanded in response to recommendations from Commissioners.

Section 9

Change: Expansion of the comments

Rationale: The comments to this section were amended to make them more consistent with the Uniform Trust Code and the Uniform Commercial Code. Specifically, the reference to “actual knowledge” was deleted to accommodate the concept of “notice” as a basis for knowledge. See, e.g., Unif. Trust Code 104.

Section 10:

Change: No change

Rationale: No change

Section 11:

Change: No change

Rationale: No change

Section 12:

Change: No change

Rationale: No change

Section 13

Change: No chance

Rationale: 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.

One could argue whether the adoption of the UCPDDA would not create new substantive rights in the adopting states for couples that have previous moved from

a community property to a non-community property state. Under some rationales, a result similar to that provided under the UCPDDA should obtain under general conflicts of law principles and principles of constitutional law regarding vest property rights. On the other hand, Section 7 of this act could be viewed as a new substantive right that may not have existed in a state prior to the adoption of this Act, even if a state had previously adopted the prior version of this Act. To that extent, retroactive application may present complex issues. The current draft does not address this issue, but the Committee's input is invited.