

AN OVERVIEW OF TEXAS COMMUNITY PROPERTY LAW

1. INTRODUCTION

Texas is one of eight community property law jurisdictions in the United States.¹ The law of each jurisdiction is based upon Spanish community property law (with the exception of Louisiana which is based upon the Napoleonic Code), but rules vary widely among the jurisdictions with regard to the character of separate property (“SP”) and community property (“CP”), the income therefrom and the management thereof. However, the underlying rationale of all community property systems is that the benefit and ownership of property acquired during marriage, whether as the results of the spouses’ efforts or from the earnings or increases in their investments, should inure to the benefit of both spouses. This paper will deal with the community property system of Texas for purposes of determining ownership, management and disposition during life and at death. It will deal only incidentally with issues on dissolution of the marriage by divorce.

2. CONSTITUTIONAL BASIS

The foundation of the Texas CP system is found in its Constitution, which is supplemented by statutory and common law. Article XVI, Section 15 of the Constitution reads, in part, as follows:

All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property....

2.1 DEFINITION OF COMMUNITY PROPERTY. Note that community property itself is not defined, but rather consists of any property acquired after marriage that does not

¹The other jurisdictions are Louisiana, Arizona, New Mexico, California, Washington, Idaho, and Nevada. Wisconsin has adopted the Uniform Marital Property Act which closely approximates community property law. Alaska has an ersatz community property system designed solely for federal income tax law, and is not regarded by the author as having a community property system.

meet the Constitutional definition of SP.² There is a presumption that all property held by the spouses is CP, unless the spouse asserting the separate character of the property can prove its separate character by clear and convincing evidence.³

(a) **INCOME AND INCREASES IN VALUE.** Income from both CP and SP is CP, because income acquired after marriage, from whatever source, is not acquired by gift, devise or descent and thus is not SP.⁴ Increases in value of SP on the other hand, are not income, but are treated as simply a change in value. Thus, the sales proceeds of SP are regarded as a mutation in the form of the property that does not affect the character of the property. If IBM shares are held as SP, the cash dividends are income, and thus CP. If the stock is sold, the cash received for the value of the shares remains SP.

(b) **INCEPTION OF TITLE.** Unlike California, Texas is an “inception of title” state, meaning that the character of property as CP or SP is determined at the time of its acquisition and by the character of the assets used to acquire such property.⁵ Thus if, on the day before marriage, one of the spouses acquires property, that property is and always will be SP. If a spouse uses SP during the marriage to acquire property, the acquired property will be SP. Thus, in the example above, if the cash received from the sale of the IBM stock is used to purchase Dell Computer stock, and such purchase is traceable to the sales proceeds of the IBM stock, the Dell stock will also be SP.

(l) **Tracing.** The community presumption noted above is very strong, but can be overcome if the spouse claiming that property is SP can trace the acquisition of such

²TEX. FAM. CODE §3.002

³TEX. FAM. CODE §3.003

⁴Arnold v. Leonard, 114 Tex. 535, 273 S.W. 779 (1925).

⁵Welder v. Lambert, 91 Tex. 510, 44 SW. 281 (1898).

property either to a time before marriage or to its acquisition with SP, meeting the clear and convincing standard of proof. For example, if the cash received for the sale of IBM is placed into a non-interest bearing account clearly labeled as the spouse's SP, assets paid for from such account will be SP. However, if the account is interest bearing, the interest will be CP and thus the account is mixed and tracing rules must be applied to determine what property, or portion thereof, is SP and what is CP.⁵ A common tracing rule is the "community first out rule," meaning that if there are both CP and SP in an account, then any expenditure will be presumed to come from CP.⁶ The result of this rule in the above example is that the Dell stock will be partly CP and partly SP because the interest (CP) will be presumed to have some out first.⁷ Note that the need to trace CP and SP arises not only at the dissolution of the marriage by divorce, but also upon the death of a spouse, since a determination must be made at that time for purposes of what is includible in the deceased spouse's estate that is subject to administration and for federal estate tax purposes.

(ii) Property Acquired with Debt. Under the inception of title rule, the character of property acquired, whether outright or by debt, is determined at the time of its acquisition or by the source of the funds for its acquisition. Property acquired by debt before marriage remains SP even though all or a portion of the debt is paid after marriage. (See discussion as to reimbursement, *infra*.) If assets are acquired by debt after marriage, then the debt is presumed to be community debt even if signed by only one spouse, unless the signing spouse can show that there was an agreement *by the creditor* to look solely to that spouse's SP for repayment.⁸ The fact that a recourse debt

⁶Sibley v. Sibley, 286 S.W.2d 657 (Tex. Civ. App. - Dallas 1955).

⁷A detailed discussion of tracing principles is beyond the scope of this paper.

⁸Cockerham v. Cockerham 527 S.W.2d 162 (Tex. 1975) (citing, Broussard v. Tian, 156 Tex. 371, 295 S.W.2d 405 (1956))

is secured by SP does *not*, in itself, provide the agreement to look solely to separate property for repayment.⁹

(iii) Business Entities. Inception of title becomes particularly critical with respect to business entities. It is clear that this principle does not apply to sole proprietorships since the spouse owning the business is also deemed to own the assets, and most assets are replaced using income from the business, making tracing virtually impossible.¹⁰ However, entities create a different problem. In two leading Texas cases, husband owned stock in a corporation prior to marriage, making such stock his separate property.¹⁰ In each case, the corporation increased dramatically in value during the course of the marriage. The wife claimed that the increase in value of the stock was community property because the increase was created by the time, toil and effort of the husband during the marriage (the 'community efforts doctrine' discussed *infra*). The Supreme Court affirmed the sanctity of the inception of title doctrine, holding that the stock was the SP of the husband and therefore remained his SP. The Court characterized the issue not as one of ownership, but rather as an issue of reimbursement.¹¹

2.2 DISSOLUTION OF MARRIAGE. Upon dissolution of the marriage by divorce, the Court may allocate the CP of the parties in the manner that it determines to be just and right,¹² and may consider, among other things, the separate property and earning

⁹*Jones v. Jones*, 890 S.W.2d 471 (Tex. App. - Corpus Christi 1994).

¹⁰*Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982) [involving a well known Houston, Texas restaurant]; and *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984) [which was the third Texas Supreme Court opinion in that case, and is sometimes referred to as '*Jensen III*']. These cases also involve the right of reimbursement discussed *infra*.

¹¹California would reach the opposite result if the increase in value was, in fact, due to the efforts of the husband, since California is not an inception of title state. See [\[Cite here my ACTEC journal article with Jerry Kasner.\]](#)

¹²TEX. FAM. CODE §7.001.

capacity of the parties. The court has no power to divide the SP of the parties.¹³ For purposes of dissolution on divorce, property acquired by one spouse as that spouse's SP which would have been CP had it been acquired in Texas during the marriage, is treated as CP for purposes of the just and right division.¹⁴

2.3 DISPOSITION AT DEATH. Each spouse has the power to dispose of all of that spouse's SP and one-half of the CP, whether such property is joint management or subject to the sole management of one or the other spouses.¹⁵ Unlike divorce, there is no quasi community property at death.¹⁶ This creates the anomalous situation that 'quasi community property' is divisible between the spouses on divorce, but the 'non-property' spouse has no claim on such property at the death of the other spouse. On the death of a spouse, both halves of the community property receive a new basis for federal income tax purposes.¹⁷

2.4 TITLE TO PROPERTY. The style of ownership of the property is immaterial except as it may affect management rights discussed *infra*. Thus, property may be held in the name of either spouse or both spouses without affecting the character of the property as separate or community.¹⁸ Texas, as do most CP states, allows spouses to hold CP with a right of survivorship by agreement.¹⁹

¹³*Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977). See also, *Cameron v. Cameron*, 641 S.W. 2d 210 (Tex. 1982).

¹⁴TEX. FAM. CODE §7.002, which creates a form of 'quasi community property' in the divorce context.

¹⁵TEX. PROB. CODE §58.

¹⁶*Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987).

¹⁷§1014(b)(6), Internal Revenue Code of 1986, 26 U.S.C. §1014(b)(6). It is this result that caused Alaska to create its 'community property.'

¹⁸*Dawson v. Dawson*, 767 SW. 2d 949 (Tex. App. - Beaumont 1989).

¹⁹TEX. PROB. CODE §451.

3. **MANAGEMENT OF PROPERTY**

3.1 MANAGEMENT OF SEPARATE PROPERTY. A spouse has the absolute right to manage, control and dispose of that spouse's SP.²⁰

3.2 MANAGEMENT OF COMMUNITY PROPERTY. In contrast to SP, CP may be managed by the wife, the husband or jointly.²¹ Prior to 1967, the husband was the sole manager of the community, but this was changed by the Matrimonial Property Act of 1967. The general rule is that CP is subject to the joint management of both spouses unless the spouses agree differently in writing. However, each spouse has the sole management, control, and *disposition* of CP which such spouse would have owned if single. This includes that spouse's (1) personal earnings, (2) revenue from separate property, (3) recoveries for personal injuries, and (4) 'the increase and mutations of, and the revenue from, all property subject to the spouse's sole management, control and disposition.' If sole management CP (often referred to as 'special community') becomes commingled with joint management CP, then it becomes joint management CP absent a written agreement between the spouses to the contrary.

(a) **RIGHTS OF MANAGERIAL SPOUSE.** It is important to note that in addition to the right of the managerial spouse to manage and control the special community, that spouse also has a power to *dispose* of such property during that spouse's life. This right of disposition is not unlimited, but is circumscribed by the injunction that such disposition must not be a fraud on the community.²² This doctrine does not require that all transfers be for full and adequate consideration, so that, for example, reasonable gratuitous transfers may be made to natural objects of the spouse's bounty, but large

²⁰TEX. FAM. CODE §3.101

²¹TEX. FAM. CODE §3.102

²²*Belz v. Belz*, 667 SW. 2d 240 (Tex. App. - Dallas 1984).

gifts to strangers to the family are subject to question.²³ There is no separate cause of action for fraud on the community available to the non-managerial spouse, but it may be raised for consideration of the court in its ‘just and right’ division of the CP on divorce.²⁴ Although it would seem that a claim for fraud on the community should exist at the death of the managerial spouse, at least one court has held that there is no such cause of action, leaving the defrauded spouse with no remedy. This result would seem to be clearly erroneous.²⁵

(b) **EFFECTS OF MANAGEMENT RULES.** The effect of these management rules is that the non-managerial spouse’s ownership in the other spouse’s special community is essentially an inchoate right until that spouse’s death, when such spouse has a full power of disposition. Likewise, upon dissolution of the marriage by divorce, the court divides the entire community without regard to management rights.²⁶

4. RIGHT OF REIMBURSEMENT²⁷

4.1 **EQUITABLE RIGHT OF REIMBURSEMENT.** The doctrine of reimbursement of the community has its roots in the common law of Texas, and is based upon the concept that if CP is used to benefit the SP estate of one of the spouses, the community should be reimbursed if such reimbursement would be fair.²⁸ For example,

²³*Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App. - Dallas 1987). See also, *Loaiza v. Loaiza*, 130 S.W. 3d 894 (Tex. App. - Ft. Worth 2004)

²⁴*Schlueter v. Schlueter*, 975 S.W.2d 584, 41 Tex. Sup. Ct. J. 1064 (1998).

²⁵*Harper v. Harper*, 8 S.W.3d 782, (Tex. App. - Ft. Worth 1999). The facts in this case were extremely unusual, although that hardly justifies the result.

²⁶TEX. FAM. CODE §3.001. The term, “estates of the parties,” means the community (or quasi community) estate, and does not comprehend SP.

²⁷Note that the claim cannot be enforced until divorce or the death of one of the spouses. There is no enforcement of a claim for reimbursement or for contribution during the existence of the marriage.

²⁸While reimbursement is usually framed in terms of reimbursement of the community for expenditure of CP on one spouse’s SP, it also permits reimbursement to the separate estate if separate funds are expended for community purposes other than support.

if wife owns a ranch as her SP, but community funds are used to maintain the improvements on the ranch, then the community should apparently be reimbursed for such expenditures. However, if the family goes out to the ranch for weekends and enjoys the use of the ranch, then the funds have also been spent for the benefit of the community, and any reimbursement would be limited to the excess of the expenditures over the value received. If, however, community funds were expended for the maintenance or leasing of husband's hunting camp which only he used, reimbursement would be proper. There is no right of reimbursement for SP funds spent on support items, since each spouse has a duty under Texas law to provide support to the family.²⁹

4.2 CLAIMS FOR ECONOMIC CONTRIBUTION AND REIMBURSEMENT. Until 1999, equitable reimbursement was the standard applied to all claims for reimbursement. In 1999, the Texas legislature created a new class of claims for economic contribution. The first attempt was impossibly convoluted, so the legislature tried again in 2001, and created a system that was merely convoluted instead of impossibly so. Basically, this new regime, codified in Tex. Fam. Code §§3.401, *et seq.*,³⁰ applies to certain debts and capital improvements to property.³¹ A claim for economic contribution applies to both community funds expended on SP and separate funds expended on CP or the other spouse's SP³². The distinguishing characteristic of the claim for economic contribution is that such claim is a matter of right determined by

²⁹*Norris v. Vaughan*, 152 Tex. 491, 260 SW. 2d 676 (1953). See, TEX. FAM. CODE §2.501 (duty to support other spouse), TEX. FAM. CODE §151.001 (duty to support children).

³⁰This is the only statute of which I am aware that is preceded by comments of the sponsor *and examples*. See Sampson and Tindall's *Texas Family Code*, August, 2002, pp. 38-41.

³¹TEX. FAM CODE §3.408, codifies equitable claims for reimbursement also, and makes clear that claims for economic contribution are applicable only to specific claims, and that equitable claims still exist in other situations.

³²The statute applies only in situations in which there is a husband who is a man and a wife who is a woman, and specifically excludes same sex partners even if their relationship is sanctioned by the laws of another state.

formula, and is not subject to equitable considerations. This approach represents a significant incursion into the inception of title doctrine by creating, in effect, proportional ownership of certain kinds of community property.

(a) APPLICATION. The statute applies only to certain types of expenditures, as follows, and does not apply to expenditures for ordinary maintenance and repair or to community efforts³³ (*see infra*):

(1) the reduction of the principal amount of a debt secured by a lien on property owned before marriage to the extent the debt existed at time of marriage;

(2) the reduction of the principal amount of a debts secured by a lien on property received by a spouse by gift, devise or descent during marriage to the extent the debt existed at the time the property was received;

(3) the reduction of the principal amount of that part of a debt, including a home equity loan, incurred during the marriage, secured by a lien on that property, and incurred for the acquisition of, or for capital improvements to the property;

(4) the reduction of the principal amount of that part of a debt incurred during the marriage, secured by a lien on property owned by a spouse for which the creditor agreed to look solely to the separate marital estate of the spouse on whose property the lien attached, and incurred for the acquisition of, or for capital improvements to the property;

(5) the refinancing of the amount described in subdivisions (1) through (4), above, to the extent the refinancing reduces the principal amount in a manner described by the appropriate subdivision; and

³³TEX. FAM. CODE §3.402(b).

(6) capital improvements to property other than by incurring debt.³⁴

(b) **FORMULA.**³⁵ The formula is the product of the equity of the benefitted estate in the property at date of divorce, death or disposition of the property and a fraction, the numerator of which is the value of the economic contribution and the denominator of which is the sum of (1) the economic contribution of the contributing estate, (2) the equity in the property at the time of marriage or, if later, the date of the first economic contribution, and (3) the economic contribution of the benefitted estate. This formula, in effect, grants a proportional ownership to the contributing estate in the increase in equity during the period specified in the statute, although, to avoid the constitutional strictures defining SP, the statute grants a ‘claim’ against the property and creates an ‘equitable lien’, but specifically negates the creation of an ownership interest.

4.3 **COMMUNITY EFFORTS DOCTRINE.** The community efforts doctrine recognizes that the time, toil and efforts of the spouses during marriage belong to the community estate. The most frequent application of this doctrine is in the business entity area, and it is the approach the Texas Supreme Court chose in dealing with increases of value during marriage.³⁶ In both those cases, the Court remanded for determination by the trial court whether the community had been adequately compensated for the time, toil and efforts of the husband/employee/shareholder. In determining adequate compensation, the burden of proof is on the spouse asserting reimbursement, and all forms of compensation count in the determination – salary, retirement benefits, fringe benefits, *etc.* To the extent the husband was not adequately

³⁴TEX. FAM. CODE §3.402(a).

³⁵ A detailed analysis of the formula is beyond the scope of this paper (and, to some extent, beyond the author’s comprehension). TEX. FAM. CODE §3.403.

³⁶See discussion of *Vallone* and *Jensen*, *supra*.

compensated, the community estate would have an equitable right of reimbursement.

5. **MARITAL PROPERTY AGREEMENTS**

5.1 CONSTITUTIONAL BASIS. Article XVI, Section 15, quoted in part *supra*, goes to provide:

[P]ersons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse...and spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses' community property.

5.1 PREMARITAL AGREEMENTS. Texas has adopted the Uniform Premarital Agreement Act which is codified in TEX. FAM. CODE §§4.001 through 4.010. §4.03 of the Act allows persons about to marry to agree as to the character of property acquired after marriage. It is interesting to note that the Uniform Premarital Agreement Act does not refer to a 'partition and exchange' which is the constitutional requirement for the rights of spouses to enter into this agreement as to property (including income) to be acquired in the future. The agreement is enforceable unless (1) the party seeking to set the agreement aside can show that such party did not sign the agreement voluntarily, or (2) that the agreement was unconscionable when signed and that, prior to signing, the party was not provided with adequate financial disclosure. Unconscionability is a question of law for the court, and the defenses listed in the statute are exclusive.

5.2 POSTMARITAL AGREEMENTS. After marriage, the spouses, by written agreement may agree to partition and exchange their CP so that it becomes the

separate property of the spouse to which it is partitioned. Spouses may further agree that income from SP shall be the SP of the owner. Present law creates a presumption that a partition and exchange of property also causes the income or earnings from such property to be the SP of the spouse to whom partitioned unless the spouses agree otherwise in writing.³⁷

5.3 AGREEMENT TO CONVERT SEPARATE PROPERTY TO COMMUNITY

PROPERTY. Unbelievably enough, until a constitutional amendment effective January 1, 2000, while spouses could agree to convert CP to SP, they could not agree to do the reverse and create CP by agreement. Now, there is constitutional and statutory³⁸ authority which allows spouses to create CP from SP. Because of the rule that income from SP is CP, which creates commingling problems in identifying the character of property, this is a particularly valuable ability for retirees with long term marriages who move from a common law jurisdiction to Texas. And, of course, such spouses get the additional federal estate tax advantage of having half of the community estate taxed irrespective of which spouse dies first and the new basis in both halves of the community estate. The spouses may likewise specify managerial rights over the converted CP.

5.4 GIFTS BETWEEN SPOUSES. Article XVI, Section 15 also creates the presumption that a gift of community property to a spouse as that spouse's SP makes future income and earning from that property the SP of the donee spouse.³⁹

³⁷TEX. FAM. CODE §4.102. HB 202, presently pending in the Texas Legislature would reverse that presumption.

³⁸TEX. FAM. CODE §§4.201, *et seq.*

³⁹Thus, under current law, the presumption as to gifts and partitions is the same. However, if HB 202 passes, income from a gift will be presumed to be SP, but income from a partition will be CP. And, since there can be an unequal partition (even to the extent of 100% to 0%), the character of the income from such complete transfer will be governed by the form if there is no agreement in writing as to income.

6. **LIABILITY OF MARITAL PROPERTY FOR DEBTS**⁴⁰

6.1 LIABILITY OF SEPARATE PROPERTY. The separate property of the spouse is liable for that spouse's liabilities whether incurred before or during marriage, and whether tortious or by contract.

6.2 LIABILITY OF COMMUNITY PROPERTY. The liability of community property depends upon the source of such liability and/or managerial control.

(a) **TORT LIABILITY.** The SP of the tortfeasor spouse as well as all of the CP of both spouses are liable for the torts of a spouse.

(b) **CONTRACTUAL LIABILITY.** The SP, special CP and all of the joint management CP is liable for the contractual debts of a spouse if only one spouse incurs the contractual liability. The special or sole management CP of the other spouse is not liable for such a contractual debt. If the contractual obligation is incurred by both spouses, then all property of both spouses, whether SP, joint management CP or sole management CP. If the debt is for 'necessaries', then the entire community estate is liable for such debt regardless of which spouse incurred such liability.

7. **ASSETS HELD IN TRUST**

7.1 TRUSTS CREATED BY THIRD PARTIES. It is clear under Texas law that the principal of trusts created for the benefit of a spouse by third parties, whether created before marriage (under the inception of title rule) or after marriage (as a gift or devise), are the separate property of the beneficiary spouse.⁴¹ What is not quite as clear is the status of income, whether distributed or accumulated in the trust.

(a) **ACCUMULATED INCOME AS TO WHICH THERE IS NO RIGHT TO COMPEL DISTRIBUTION.** In all probability, the state of the law is that the gift made by creating the trust includes the income earned on trust property which is not distributed from the

⁴⁰TEX. FAM. CODE §§3.201-3.203

⁴¹*Cleaver v. Cleaver*, 935 S.W.2d 491 (Tex. Civ. App. – Tyler 1996).

trust (and as to which the beneficiary spouse has no right to compel a distribution) is not community property.⁴² The theory is that the property has not been “acquired” by the spouses and thus it cannot be characterized as either separate or community property.

(b) **UNDISTRIBUTED INCOME AS TO WHICH A POWER TO COMPEL DISTRIBUTIONS EXISTS.** It seems that Texas law is also fairly clear that income which the beneficiary is entitled to receive, whether distributed or not, is the SP of the beneficiary spouse.⁴³ However, to the extent that the undistributed SP income inside the trust earns income, that income is CP since it would have been CP had the income been distributed.⁴⁴

7.2 TRUSTS CREATED BY THE SPOUSE BENEFICIARY. If a spouse creates a trust for the benefit of such spouse before marriage, Texas law seems very confused. In the “leading” case,⁴⁵ husband established a trust for himself ‘as sole beneficiary’ prior to marriage with a third party trustee. The court’s recitation of the distribution standard under the trust is, ‘the trustee has the sole discretion to distribute as much of the trust income and corpus as the trustee deems appropriate for [beneficiary’s] health, education, maintenance and welfare needs.’ (The trust also contained a spendthrift provision which is clearly invalid since the trust is self settled.⁴⁶) Perhaps the court was influenced by the fact that the trust had made distributions during the marriage in excess of its income, but the court nonetheless found that the trust was totally discretionary and thus the beneficiary had no right to compel income. The fact is, of course, that the trust was a support trust from which the beneficiary could compel

⁴²*In re Marriage of Burns*, 573S.W.2D 555 (Tex. Civ. App. – Texarkana)1978.

⁴³*Cleaver*, at 493.

⁴⁴*Id.*, 494, citing *In the Matter of the Marriage of Long*, 542 S.W.2d. 712, 717 (Tex. Civ. App. – Texarkana 1976, no writ).

⁴⁵*Lemke v. Lemke*, 929 S.W.2d 662 (Ct. App. Tex. – Fort Worth 1996).

⁴⁶Texas Trust Code §112.035(d).

distributions, and further the beneficiary could anticipate his interest in the trust since the spendthrift provision was invalid.⁴⁷

In *Burns, supra*, the husband also created three trusts for his own benefit which did not contain spendthrift clauses and the two trusts created before marriage⁴⁸ were, as far as can be determined from the opinion, purely discretionary trusts with a third party trustee. The *Burns* court nonetheless held that the undistributed income had not been acquired by either party and therefore did not constitute marital property which could be characterized as CP. This even though husband had an absolute right to anticipate his interest by assignment. This holding with respect to the third trust is even more inexplicable.

8. THE MIGRATORY CLIENT AND RELATED PROBLEMS

8.1 CONFLICTS OF LAWS. The United States is a highly mobile society, and many times persons will relocate from a community property state to a common law (or separate property) jurisdiction, or *vice-versa*. In those cases, questions arise as to the character of property brought into the new jurisdiction and property acquired in the new jurisdiction with funds brought into that jurisdiction. The issues are basically conflicts of laws issues, in which states will usually apply their total law as opposed to “local law”: *i.e.*, the state will also apply its conflicts of laws rules to determine whether to apply its own law or the laws of another jurisdiction.⁴⁹

(a) MOVABLES. The closest thing there is to consensus as to applicable law is Section 258 of the *Restatement (Second) of Conflict of Laws*, which applies the “significant contacts” or “dominant interest principle. That principle holds that the law of

⁴⁷In fact, under Texas law (and the common law of most states), if the husband in fact was the sole beneficiary as the court stated, he had the power to revoke the trust.

⁴⁸There was a third trust created by the husband which provided for no distributions until it terminated in his favor in a few years.

⁴⁹See *Restatement (Second) Conflict of Laws*, Section 6 (1971).

the state of the marital domicile⁵⁰ at the time of acquisition controls *as between the spouses*, even though the movable is transferred to another state and even though that change results from a change of marital domicile.⁵¹ Thus, securities acquired by spouses domiciled in a community property jurisdiction are CP, even though the securities are purchased from and held by a broker in a non-CP jurisdiction.⁵² The nature of the ownership in the securities is not changed even if the spouses move to the jurisdiction in which the securities are held or another non-CP jurisdiction. However, once the marital domicile changes, the income from the property is governed by the law of the new domicile, although changes in forms from sales or other trades should not be. On the other hand, if determination of rights involve third parties in the non-marital domicile, the jurisdiction is more likely to apply its local law.

If, because of commingling, the CP can no longer be identified, it loses its identity as such.

(b) IMMOVABLES. Immovables such as real estate present a more difficult issue, but the better rule would seem to require that the source of funds should also determine the character of the property.⁵³ Thus, if spouses domiciled in Texas acquire property in Colorado, the property in Colorado should be community property even though Colorado does recognize that form of ownership. Is the character of the property affected if the property is acquired by debt, the spouses later move to Colorado with a portion of the debt outstanding, and the debt is then paid with earnings in Colorado? Although the answer is anything but clear, it would seem that, because Texas is an

⁵⁰A discussion of the questions concerning the determination of domicile is beyond the scope of this paper.

⁵¹*Id.*, Section 259.

⁵²The converse would be true also, except that California has a concept of "quasi-community property" which does alter the character of property when the spouses remove their domicile to California.

⁵³*Id.*, Section 234.

'inception of title' state, the property should remain CP with the economic contribution rules applied. However, if the couples had been domiciled in California at the time of the acquisition, the debt repayment after moving to Colorado would probably convert a portion of the character of the property to the SP of the spouse providing the funds to pay the debt, apply California law.

The method of taking title should not affect the character of the property as to CP or SP. However, if the spouses domiciled in a CP jurisdiction take title to property in a common law jurisdiction as tenants by the entirety or as joint tenants with right of survivorship, does that destroy the CP nature of the property? There is no answer to this question, but the Uniform Disposition of Community Property Rights at Death Act (National Conference of Commissioners on Uniform State Law, 1971), discussed *infra*, creates a rebuttable presumption that such property loses its CP character as property subject to the act.⁵⁴ The reasoning expressed is that this would carry out the expectations of the parties. However, the author's experience in real estate transactions is that the spouses pay little or no attention to the form in which title is taken. Logic would dictate that the form of title should not be determinative.

If the rights of third parties are involved, then it is more likely that the state will apply its local law, particularly involving use restrictions or power to convey.

8.2 ADVISABILITY OF MAINTAINING COMMUNITY CHARACTER. In many cases, there are definite advantages to maintaining the community character of the property, primarily the new basis (presumably an increased basis) in both halves of the CP at the death of the first spouse. Additionally, it assists both spouses in utilizing their respective unified credits since each one owns their one-half, and thus there is no less-propriety spouse because ownership is automatically equalized.

8.3 UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH

⁵⁴Section 2, Subsection (2) of the Act.

ACT. This Act has been adopted in 14 states.⁵⁵ The purpose of this Act, as set forth by the Commissioners, is to 'preserve the rights of each spouse in property that was community property before the spouses moved to the non-community property state, unless they have severed or altered the community property rights.' In summary, the Act creates presumptions as to which property is community in character and therefore subject to the act If subject to the Act, the property is treated as CP solely for the purpose of transmission at death.

9. **CONCLUSION**

The community property system prevails in two of the most populous state of the union, and although the systems differ in many respects, the basic underpinning of both is that property acquired during marriage should be treated as having been acquired by the marital community and not by either member. Texas law recognizes different management rights of the spouses, but maintains the marital property concept at divorce and death. Because CP was an agrarian based system, and because wealth in our society today is largely financial, there still, after more than a century of use, many unanswered questions remain, and new issues are created because of mobility of clients and their willingness to acquire property in other jurisdictions. However, despite its difficulties, the community property system of marital property seems to the author to be more equitable than any other system.

⁵⁵Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Montana, New York, North Carolina, Oregon, Virginia, and Wyoming