

## COMMUNITY PROPERTY AND THE PROBLEM OF MIGRATION

The community property system, which governs almost one fourth of our population,<sup>1</sup> is a system of property classification that treats each spouse as having an undivided one-half interest in marital income<sup>2</sup> and equal management and control<sup>3</sup> in the "community property".<sup>4</sup> The rationale behind the community property system is that the non-wage earning spouse's contribution to the family is as important as the wage earning spouse's<sup>5</sup> contribution. Protecting the non-wage earning spouse from disinheritance is a major function of the community property sys-

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1. See ALMANAC OF THE 50 STATES 442 (1986). Currently, nine states have some form of community property systems: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

2. See LA. CIV. CODE ANN. art. 2336 (West 1985); NEV. REV. STAT. § 123.225 (1987). See also J. DUKEMINIER & S. M. JOHANSON, WILLS, TRUSTS, AND ESTATES 417 (1984) [hereinafter DUKEMINIER & JOHANSON]. Under the community property system each spouse obtains ownership rights to the property immediately upon acquisition of that property. In common law states, the elective share available to a surviving spouse does not give the surviving spouse any rights in the property of the other spouse until the latter's death. *Id.*

The common law elective share does not give the non-wage earning spouse any interest in the wage earning spouse's property during the wage earning spouse's life. The elective share is no more than an expectancy in the decedent spouse's estate. *In re O'Connor's Estate*, 218 Cal. Rptr. 518, 525, 23 P.2d 1031, 1034 (1933).

3. See ARIZ. REV. STAT. ANN. § 25-214 (1976); CAL. CIV. CODE § 5125 (Deering 1984); IDAHO CODE § 32-912 (1983); LA. CIV. CODE ANN. art. 2346 (West 1985); NEV. REV. STAT. § 123.230 (1985); N.M. STAT. ANN. § 40-3-14 (1978); TEX. FAM. CODE ANN. § 5.22 (Vernon 1975); WASH. REV. CODE ANN. § 26.16.030 (1986); WIS. STAT. ANN. § 766.51 (West 1987).

4. Community property consists of the earnings of either spouse during the marriage. ARIZ. REV. STAT. ANN. § 25-211 (1976); CAL. CIV. CODE § 5110 (Deering 1984); IDAHO CODE § 32-906 (1983); LA. CIV. CODE ANN. art. 2338 (West 1985); NEV. REV. STAT. § 123.220 (1985); N.M. STAT. ANN. § 40-3-8(b) (1978); TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975); WASH. REV. CODE ANN. § 26.16.030 (1986); WIS. STAT. ANN. § 766.31(1) (West 1986).

5. See, e.g., *Hughes v. Hughes*, 91 N.M. 339, 343, 573 P.2d 1194, 1198 (1978). ("[T]he labor, pain, and drudgery required of the mother in sustaining the home, giving birth to and rearing the children will often more than offset the contribution of the father to the family budget.") *Id.*

The *Hughes* court further states:

[T]he bare legal principle . . . that a wife has no interest in the wages, earnings, and profits of the husband or in the property accumulated by his efforts, can be characterized as a relic of the dark ages that should have equal place with the ancient cliché that "a woman's place is in the home, barefoot and pregnant."

*Id.* at 1197-98.

In addition, the Uniform Marital Property Act functions "to recognize the respective contributions made by men and women during marriage." Marple and Quillan, *The Uniform Marital Property Act for Texas*, 47 TEX. B.J. 906 (1984). The Act attains this purpose by making the

tem.<sup>6</sup> Thus, upon the death of one spouse, the deceased spouse's half of the community property is distributed by will<sup>7</sup> or intestacy.<sup>8</sup> The other half belongs solely to the surviving spouse.<sup>9</sup>

Problems can occur, however, if a couple migrates from a common law state<sup>10</sup> to a community property state. This situation usually arises when a one wage earner couple lived in a common law state during wage earning years, but moved to a community property state for retirement. The non-wage earning spouse may receive nothing from the wage earner's estate.<sup>11</sup>

This Note focuses on the problem of one wage earner couples moving from common law to community property states. Part I of this Note presents an overview of the various states' community property systems. Part II outlines the problem of migration from common law states to community property states. Part III presents solutions to the migration problem suggested by commentators and courts. This Note concludes in Part IV, with the author's proposed solution to this problem.

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contributions defined, shared, and enforceable property rights at the time the contributions are made.' *Id.*

For a history of the Uniform Marital Property Act, see Cantwell, *The Uniform Marital Property Act: Origin and Intent*, 68 MARQ. L. REV. 383, 383-89 (1985).

6. Historically, the common law protected the non-wage earning spouse through the practice of dower and curtesy. Dower gave the wife a life estate in one-third of all land the husband was seized of during marriage. The husband could not sell the land free of the wife's interest. Curtesy gave the husband a life estate in all land the wife was seized of during marriage if their children were born from the marriage.

Today curtesy is no longer used and dower has been almost completely abolished. The majority of states now use the elective share, or forced share, system. The elective share system gives the surviving spouse a choice of either taking by the deceased spouse's will or taking a statutory share of the deceased spouses probate estate (typically one third).

7. See, e.g., NEV. REV. STAT. § 123.250 (1987). See also DUKEMINIER & JOHANSON, *supra* note 2, at 417.

8. If the spouse dies intestate, then the intestacy statutes of the decedent's domicile at death determine personal property distribution. For example, the Uniform Probate Code's intestate sections provide in general that \$50,000 plus one half of the estate goes to the surviving spouse and the other half of the estate is divided among the children. See Uniform Probate Code §§ 2-101, 2-102, 2-103, 2-105, 2-106, and 2-107 (1982). About one-third of the states have adopted the Uniform Probate Code. It also has served as a catalyst for probate reform in many other states. See DUKEMINIER & JOHANSON, *supra* note 2, at 89.

9. DUKEMINIER & JOHANSON, *supra* note 2, at 417.

10. This Note refers to non-community property states as common law states. In a common law state each spouse owns his or her individual earnings.

11. See *infra* notes 38 through 60 and accompanying text. California, Idaho, and Washington have protections for the non-wage earning spouse.

## I. THE COMMUNITY PROPERTY SYSTEMS

### A. Classification of Property

Although substantial differences exist between the community property systems among the states,<sup>12</sup> all the systems have a common underlying principle:<sup>13</sup> the earnings of each spouse during marriage are community property and thus are owned equally in undivided shares by both spouses.<sup>14</sup> However, any property acquired by one spouse before marriage, or during marriage by gift, bequest, devise, or descent is that spouse's separate property.<sup>15</sup>

Additionally, all community property states follow a presumption that property acquired during marriage is community property.<sup>16</sup> This presumption may be rebutted, with the burden of proof on the spouse claiming that the property is separate.<sup>17</sup> The various community property states differ on the level of proof required to rebut this presumption.<sup>18</sup>

12. *DUKEMINIER & JOHANSON, supra* note 2, at 416.

13. *Id.*

14. *See* ARIZ. REV. STAT. ANN. §§ 25-211, 25-213 (1976); CAL. CIV. CODE §§ 5107, 5108, 5110 (Deering 1984); IDAHO CODE §§ 32-903, 32-906 (1983); LA. CIV. CODE ANN. art. 2338, 2341 (West 1985); NEV. REV. STAT. § 123.220 (1987); N.M. STAT. ANN. § 40-3-8 (1978); TEX. FAM. CODE ANN. § 5.01 (Vernon 1975); WASH. REV. CODE ANN. §§ 26.16.010, 26.16.020, 26.16.030 (1986); WIS. STAT. ANN. § 766.31 (West 1986).

15. *E.g.*, ARIZ. REV. STAT. ANN. § 25.213 (1976). The statute provides in pertinent part:

All property, real and personal, of each spouse, owned by such spouse before marriage, and that acquired afterward by gift, devise or descent, and also the increase, rents, issues and profits thereof, is the separate property of such spouse;

TEX. CODE ANN. § 5.01, which provides in pertinent part:

(a) A spouse's separate property consists of . . .

(2) the property acquired by the spouse during marriage by gift, devise, or descent

. . . .

16. *Bender v. Bender*, 123 Ariz. 90, 597 P.2d 993 (Ariz. Ct. App. 1979); *Matter of Messer's Estate*, 118 Ariz. 291, 576 P.2d 150 (Ariz. Ct. App. 1978); *Suchan v. Suchan*, 106 Idaho 654, 682 P.2d 607 (1984); *Eliason v. Fitzgerald*, 105 Idaho 234, 668 P.2d 110 (1983); *Madsen's Estate v. CIR*, 97 Wash.2d 792, 650 P.2d 196 (1982); CAL. CIV. CODE § 4800.1(b) (Deering 1984); LA. CIV. CODE ANN. art. 2340 (West 1985); NEV. REV. STAT. § 123.220 (1984); N.M. STAT. ANN. § 40-3-12 (1978); TEX. FAM. CODE ANN. § 5.02 (Vernon 1975).

17. *See, e.g.*, *Somps v. Somps*, 250 Cal. App. 2d 328, 58 Cal. Rptr. 304 (1967); *See v. See*, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 88 (1966); *Suchan v. Suchan*, 106 Idaho 654, 682 P.2d 607 (1984); *Eliason v. Fitzgerald*, 105 Idaho 234, 668 P.2d 110 (1983); *Wierzchula v. Wierzchula*, 623 S.W.2d 730 (Tex. Ct. App. 1981); *Contreras v. Contreras*, 590 S.W.2d 218 (Tex. Ct. App. 1979); *Schreiner v. Schreiner*, 502 S.W.2d 840 (Tex. Ct. App. 1973); *Madsen's Estate v. CIR*, 97 Wash.2d 792, 650 P.2d 196 (1982).

18. For example, Arizona, Nevada, Texas, and Washington require clear and convincing evidence to rebut the presumption. Louisiana, Idaho, and New Mexico require only a preponderance of the evidence.

*Burdick v. Pope*<sup>19</sup> offers an illustration of this general rule. In *Burdick* a third party conveyed a parcel of land to a married woman.<sup>20</sup> A clause in the deed stated the land was her "sole and separate property."<sup>21</sup> She died several years later and bequeathed \$2500 to her husband and the residue of her estate to her daughter.<sup>22</sup> Three years later the husband died and his estate's executor brought an action for declaratory relief requesting the parcel of land be declared community property.<sup>23</sup> The Nevada Supreme Court agreed with the husband's executor. The court held that the phrase "her sole and separate property" was insufficient to rebut the presumption that property acquired during marriage is community property.<sup>24</sup>

### B. *Management and Control of Community Property*

All community property states give both spouses equal powers of management and control.<sup>25</sup> Either spouse, however, can manage and control his own separate property and may acquire, manage and control the couple's community property.<sup>26</sup>

States do restrict one spouse's ability to bind the community property. Many states require the consent of both spouses to bind or convey certain

19. 90 Nev. 28, 518 P.2d 146 (1974).

20. *Id.* at 29, 518 P.2d at 146.

21. *Id.*

22. *Id.*

23. *Id.* If the parcel of land were community property, the husband's estate would get one half of the land.

24. *Id.* at 30, 518 P.2d at 147.

25. In the early years of community property, the husband had sole management powers. *See R. MENNELL & T. BOYKOFF, COMMUNITY PROPERTY IN A NUTSHELL* 232-33 (1988).

26. *See, e.g., ARIZ. REV. STAT. ANN. § 25-214* (1976), which provides in pertinent part:

A. Each spouse has the sole management, control and disposition rights of his or her separate property.

B. The spouses have equal management, control and disposition rights over their community property, and have equal power to bind the community.

C. Either spouse separately may acquire, manage, control or dispose of community property, or bind the community, except that joinder of both spouses is required in any of the following cases:

1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year.

2. Any transaction of guaranty, indemnity or suretyship.

*See also* CAL. CIV. CODE § 5125 (Deering 1984); IDAHO CODE §§ 32-904, 32-912 (1983); LA. CIV. CODE ANN. art. 2346 (West 1985); NEV. REV. STAT. §§ 123.170, 123.230; N.M. STAT. ANN. § 40-3-14 (1978); TEX. FAM. CODE ANN. §§ 5.21, 5.22 (1975); WASH. REV. CODE ANN. § 26.16.030 (1986); WIS. STAT. ANN. §§ 766.51 (West 1987).

types of property.<sup>27</sup> All community property states, except Texas and Wisconsin, require joint spousal approval for the conveyance of community real property.<sup>28</sup> States also place various restrictions on a spouse's ability to make a gift of community property. California,<sup>29</sup> Nevada,<sup>30</sup> and Washington<sup>31</sup> require both spouses' approval to make a gift of community personal property to a third party. Similarly, Wisconsin,<sup>32</sup> and Louisiana,<sup>33</sup> require both spouses' approval unless the gift is reasonable or ordinary in amount. On the other hand, Arizona,<sup>34</sup> Idaho, Texas, and New Mexico allow one spouse alone to make a gift of community property to a third party.<sup>35</sup>

## II. THE PROBLEM OF MIGRATION

Although the community property system has a benevolent purpose,<sup>36</sup> one problem is the possible disinheritance of the non-wage earning spouse if a couple migrates from a common law state to a community property state.<sup>37</sup>

In probate cases when an estate has property acquired in more than one state, courts use conflict of laws principles to determine which state's laws to use. The problem of migration arises out of the application of

27. CAL. CIV. CODE § 5125 (Deering 1984) states in pertinent part:

(c) A spouse may not sell, convey, or encumber community personal property used as the family dwelling, or the furniture, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community or personal property, without the written consent of the other spouse.

*Id.* See also IDAHO CODE §§ 32-904, 32-912 (1983); LA. CIV. CODE ANN. art. 2346 (West 1986); NEV. REV. STAT. §§ 123.170, 123.236 (1985); N.M. STAT. ANN. § 46-3-14 (1976); TEX. FAM. CODE ANN. §§ 5.21, 5.22 (1978); WASH. REV. CODE ANN. § 26.16.030 (1986); WIS. STAT. ANN. § 766.51 (West 1986).

28. ARIZ. REV. STAT. ANN. § 25-214(c)(1) (1976); CAL. CIV. CODE § 5127 (Deering 1984); IDAHO CODE § 32-912 (1983); LA. CIV. CODE ANN. § 2347 (West 1985); NEV. REV. STAT. § 123.230(3) (1985); N.M. STAT. ANN. § 40-3-13 (1986); WASH. REV. CODE ANN. § 26.16.030(3) (1986).

29. CAL. CIV. CODE § 5125(b) (Deering 1984).

30. NEV. REV. STAT. § 123.230(2) (1985).

31. WASH. REV. CODE ANN. § 26.16.030(2) (1986).

32. WIS. STAT. ANN. § 766.53 (West 1986).

33. LA. CIV. CODE ANN. art. 2347 and 2349 (West 1985).

34. ARIZ. REV. STAT. ANN. § 25-214 (1976). Arizona uses the "reasonable gifts" rule. That is, one spouse can make a gift to a third person if it is reasonable. W. REPPY & W. DEFUNIAK, COMMUNITY PROPERTY IN THE U.S. 338-39 (1975).

35. IDAHO CODE § 32-913 (1983); TEX. FAM. CODE ANN. § 5.24(b) (Vernon 1975); N.M. STAT. ANN. § 40-3-13 (1978).

36. See *supra* note 5, and accompanying text.

37. See *infra* note 47 through 62 and accompanying text.

three general conflict of laws principles.<sup>38</sup> First, the laws of the couple's domicile at the time of property acquisition determine the property ownership.<sup>39</sup> Second, moving the property to another state or changing domicile does not change a person's legal interest in that property.<sup>40</sup> Third, the laws of the state of domicile at the time of death govern the disposition of property.<sup>41</sup>

Therefore, if a single wage earner couple lived in a common law state, all the income would be classified as the sole wage earner's separate property.<sup>42</sup> A subsequent move to a community property state would not change this classification.<sup>43</sup> Additionally, upon one spouse's death, the community property state law will govern the property disposition.<sup>44</sup>

The interaction of these principles causes a problem if the couple earns no more money after moving to the community property state. As previously stated, the community property state gives the non-wage earning spouse one half of the property earned in that state. But if the wage earner earns nothing while domiciled in the community property state, the non-wage earner will collect nothing. Furthermore, the non-wage earning spouse no longer has the protection of the elective share system of the common law state.<sup>45</sup> Thus, the non-wage earning spouse may fall into the gap between the two systems.<sup>46</sup>

The Texas Supreme Court illustrated the harshness of this problem in *Estate of Hanau v. Hanau*.<sup>47</sup> In *Estate of Hanau*, a couple married in Illinois in 1974. While the couple lived in Illinois the husband accumulated a large amount of stock. Illinois law classified the stock as the husband's separate property. In 1979 the couple moved to the community property state of Texas. The husband died in 1982.<sup>48</sup> The wife filed an

38. See generally Comment, *Migrating Couples and Wisconsin's Marital Property Act*, 68 MARQ. L. REV. 488, 492 (1985).

39. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258 (1971). See also *In re Nicoll's Estate*, 164 Cal. 368, 129 P. 278 (1912).

40. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259 (1971).

41. *Id.* at §§ 260, 263 and 285. § 285 applies only to divorce cases. See also *DUKEMINIER & JOHANSON*, *supra* note 2, at 418.

42. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258 (1971).

43. *Id.* at § 259. See also *Reeves v. Schulmeier*, 303 F.2d 802, 806-07 (5th Cir. 1962); *Hughes v. Hughes*, 91 N.M. 339, 343, 573 P.2d 1194, 1195 (1978); Comment, *supra* note 38, at 493 n.39.

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 260, 263 (1971).

45. *Id.* For a discussion of the elective share system see *supra* note 6.

46. This possibility is lessened somewhat in those community property states that classify the earnings of separate property as community property.

47. 730 S.W.2d 663 (Tex. 1987).

48. *Id.* at 664.

inventory and appraisal that listed, among other things, the stock that the husband accumulated in Illinois as community property even though acquired in a common law state.<sup>49</sup> The Texas Supreme Court held the stocks were the husband's property and that the wife had no interest in them.<sup>50</sup> The court did recognize that its holding would leave a surviving spouse "without the protection afforded by either common law or community property statutory schemes in certain situations."<sup>51</sup> The court urged the legislature to change this "illogical and potentially inequitable" result.<sup>52</sup>

Two early California cases also illustrate the possible inequitable result of the migration problem. In *In re Boselly's Estate*,<sup>53</sup> the husband left his wife in California and moved to New York.<sup>54</sup> He spent thirteen years outside of California during which he accumulated his whole estate.<sup>55</sup> The couple never obtained a divorce. The husband returned to California and died shortly thereafter.<sup>56</sup> The wife petitioned for one half of the husband's estate, which she claimed was community property. The California Supreme Court held that the husband's earning while domiciled in a common law state were his separate property, and the wife had no interest in that property.<sup>57</sup>

Similarly, the California Supreme Court in *In re Niccoll's Estate*<sup>58</sup> held that property acquired by a couple in Illinois who later moved to California was not community property.<sup>59</sup> This led to the result that upon the husband's death, the wife had no entitlement to one half of the property.<sup>60</sup>

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49. *Id.* at 664-65.

50. *Id.* at 665.

51. *Id.* at 667.

52. *Id.* (Spears, J., concurring).

53. 178 Cal. 715, 175 P. 4 (1918).

54. *Id.* at 717, 175 P. at 4.

55. *Id.* at 717-18, 175 P. at 4-5. The husband began working for Royal Baking Powder Company in New York at a low level position with a small salary. He then rose rapidly through the corporation and became president of the corporation in seven years. *Id.* at 719, 175 P. at 5.

56. *Id.*

57. *Id.* at 720, 175 P. at 6.

58. 164 Cal. 368, 129 P. 278 (1912).

59. *Id.* at 371, 129 P. at 278.

60. *Id.*

### III. POSSIBLE SOLUTIONS

#### A. *The Common Sense Approach*<sup>61</sup>

Some courts have responded to the aforementioned problem by using the law of the state where the couple was domiciled when they acquired the property to govern the property disposition at death or divorce.<sup>62</sup>

The rationale for this common sense approach turns on the fact that community property states have a much narrower definition of "separate property" than common law states. Common law states define separate property as one spouse's property or earnings. Community property states, however, define separate property as property acquired before marriage or during marriage by gift, inheritance, or bequest.<sup>63</sup> Thus it is unfair to apply community property principles to property classified as separate property by the common law system.<sup>64</sup>

Applying the common sense approach, if a couple were domiciled in a common law state when they acquired the property, then the court would use the common law state's elective share statute. Generally, elective share statutes give the surviving spouse the choice of taking by the deceased spouse's will or taking one third of the deceased spouse's probate estate.<sup>65</sup> Hence, this approach would protect the non-wage earning spouse from disinheritance.<sup>66</sup>

*Rau v. Rau*<sup>67</sup> is an example of the "common sense" approach. In *Rau*, the husband used the income from his Illinois farm, which was classified as his separate property, to purchase a farm in Arizona.<sup>68</sup> The couple then moved to Arizona and several years later obtained a divorce.<sup>69</sup> Applying Illinois law, the Arizona Court of Appeals awarded the wife one half of the farm as community property.<sup>70</sup>

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61. See Comment, *supra* note 38, at 494.

62. *Rau v. Rau*, 6 Ariz. App. 362, 432 P.2d 910 (1967); *Berle v. Berle*, 97 Idaho 452, 546 P.2d 407 (1976); *Stephens v. Stephens*, 93 N.M. 1, 595 P.2d 1196 (1979) (Determine distribution of the spouses' property upon divorce according to the law of the state where the benefits were acquired); *Hughes v. Hughes*, 91 N.M. 339, 573 P.2d 1194, 1201 (1973).

63. See *supra* note 15, and accompanying text.

64. See *Berte*, 97 Idaho at 455, 546 P.2d at 409; *Hughes*, 91 N.M. at 346, 573 P.2d at 1201.

65. See *supra* note 6.

66. For a discussion of the elective share system, see *supra* note 6.

67. 6 Ariz. App. 362, 432 P.2d 910 (1967).

68. *Id.* at 364, 432 P.2d at 912.

69. *Id.*

70. *Id.* Illinois law allows the court to divide property at divorce as is "fit, reasonable, and just." ILL. ANNOT. STAT. ch.40, ¶ 19 (Smith-Hurd 1961). In similar cases, Illinois courts have



The common sense approach is appealing because it is consistent with the spouses' expectations about property distributions. The couple expects distribution of property acquired while domiciled in a common law state to be governed by that state's laws. The only problem with this approach is that it contradicts the conflict of laws principle that the laws of the state of the couple's domicile at the time of death govern the property's disposition.<sup>71</sup>

### B. *Quasi-Community Property*

Three community property states have responded to the migration problem by labeling property acquired in common law states as "quasi-community property."<sup>72</sup> These states define quasi-community property as property acquired by the husband or wife while domiciled in a common law state, which would have been community property if the couple had been domiciled in a community property state when they acquired

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construed this statute to allow equal property divisions in situations similar to the instant case. 6 Ariz. App. at 365, 432 P.2d at 913.

71. See *supra* note 41 and accompanying text.

72. California, Idaho, and Washington have adopted quasi community property legislation. California's Civil Code provides in pertinent part:

As used in this part, "quasi-community property" means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

- (a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.
- (b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged has been domiciled in this state at the time of its acquisition.

CAL. CIV. CODE § 4803 (Deering 1984). Idaho's Code provides in pertinent part:

(a) Upon death of a married person domiciled in this state, one-half (1/2) of the quasi-community property shall belong to the surviving spouse and the other one-half (1/2) of such property shall be subject to the testamentary disposition of the decedent and, if not devised by the decedent, goes to the surviving spouse.

(b) Quasi-community property is all personal property, wherever situated, and all real property situated in this state which has heretofore been acquired or is hereafter acquired by the decedent while domiciled elsewhere and which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time of its acquisition plus all personal property, wherever situated, and all real property situated in this state, which has heretofore been acquired or is hereafter acquired in exchange for real or personal property, wherever situated, which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired, provided that real property does not and personal property does include leasehold interests in real property, provided that quasi-community property shall include real property situated in another state and owned by a domiciliary of this state if the laws of such state permit descent and distribution of such property to be governed by the laws of this state.

the property.<sup>73</sup> These states treat quasi-community property as separate property while both spouses are alive. When the acquiring spouse dies, however, the non-acquiring spouse receives one half of the quasi community property in addition to one half of the community property.<sup>74</sup>

The divorce case *Sample v. Sample*<sup>75</sup> applied the principles of quasi-community property. In *Sample* the husband acquired stock<sup>76</sup> while the couple lived in Nebraska. The couple later moved to Arizona and subsequently divorced.<sup>77</sup> The Arizona Court of Appeals held the stock, classified under Nebraska law as the husband's separate property, quasi-community property and awarded each spouse half.<sup>78</sup>

The quasi-community property approach avoids the conflict of laws problem inherent in the common sense approach<sup>79</sup> because the spouses' domicile at death governs the property disposition.

Although commentators consider the quasi-community property the most legally efficient approach,<sup>80</sup> it has a major shortcoming. Its application clashes with the couple's expectations about property distribution upon their death. In a common law state the couple expects the non-

IDAHO CODE § 15-2-20(a) (1983).

See also WASH. REV. CODE ANN. §§ 26.16.220-50 (West Supp. 1988).

Wisconsin originally had a quasi-community property provision but repealed it because it conflicted with other statutory provisions which dealt with property distribution.

Note also that Arizona has a quasi-community property type statute but it only take effect in divorce cases, not in cases of death. See ARIZ. REV. STAT. ANN. § 25-318 (1976).

73. See *supra* note 72.

74. Early quasi-community property legislation treated the property in question as community property during the marriage instead of just upon dissolution of marriage. The California Supreme Court in *In re Thornton's Estate*, 1 Cal. 2d 1, 33 P.2d 1 (1934) held this legislation violated the fourteenth amendment of the United States Constitution because it took property vesting in one spouse and gave it to the other spouse without due process of law.

Later attempts by the California legislature treated quasi-community property as community property upon the death of a spouse or divorce. Thus "no vested rights are taken from either spouse except upon the happening of a certain event—dissolution of the marriage." Comment, *supra* note 38, at 498. Marriage dissolution triggers the state's police powers allowing the state to interfere with vested rights "whenever reasonably necessary to the protection of the health, safety, morals and general well being of the people." Armstrong, *Prospective Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?*, 33 CAL. L. REV. 476, 495-96 (1985) (quoting *Addison v. Addison*, 62 Cal. 2d 558, 566, 399 P.2d 897, 902, 43 Cal. Rptr. 97, 102 (1965)). For these reasons, the court held the new law constitutional. See Comment, *supra* note 38, at 497-99.

75. 135 Ariz. App. 599, 663 P.2d 591 (Ariz. Ct. App. 1983).

76. The husband acquired over \$950,000 worth of stock. *Id.* at 592, 663 P.2d at 600.

77. *Id.*

78. *Id.* at 596, 663 P.2d at 604.

79. See *supra* note 41 and accompanying text.

80. Comment, *supra* note 38, at 496.

wage earning spouse to receive an elective share<sup>81</sup> of the decedent spouse's estate. Under the community property system the surviving spouse gets one half of the community property. Hence, the distribution to the surviving spouse exceeds the expectations of a couple that lived in a common law state.

#### IV. PROPOSED SOLUTION—THE ELECTIVE SHARE APPROACH

This Note proposes that community property states adopt an elective shares statute to combat the migration problem. The statute would give the surviving spouse a choice of taking by the decedent spouse's will, or by intestacy if there is no will, or one half of the couple's community property, or one third of the decedent spouse's augmented estate as in common law elective share schemes.

The proposed statute would read: *Disinheritance Through Migration—Elective Share*

(1) If a married person domiciled in this state dies, the surviving spouse has the choice of taking according to the decedent spouse's will (or by intestacy if the decedent spouse had no valid will), taking one-half of the couple's community property, or taking one-third of the decedent spouse's augmented estate if all the following conditions are met:

- (a) The married couple lived in a non-community property state during their marriage;
- (b) The married couple subsequently moved to and became domiciled in this state;
- (c) The wage earning spouse died; and
- (d) At the time the wage earning spouse died, the couple's community assets were less than the decedent spouse's augmented estate computed as if the decedent died in a state that has adopted the Uniform Probate Code.

#### (2) *Definitions*

- (a) *Augmented Estate*: For purpose of section 1, a decedent's augmented estate shall be computed under the Uniform Probate Code's definition of Augmented Estate.<sup>82</sup>
- (b) *Wage Earning Spouse*: For purposes of section 1, wage earning

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81. For a discussion of the elective share system, see *supra* note 6.

82. The augmented estate equals the probate estate less expenses plus certain types of transfers from decedent to third parties plus transfers from decedent to the surviving spouse, DUKEMINIER & JOHANSON, *supra* note 2, at 408-14.

spouse means a spouse who, while the couple was domiciled in the common law state, earned wages.

Sections 1(a), (b), (c), and (d) in essence define the migration situation and are conditions which must be met in order to use section (1).

The proposed statute protects the non-wage earning spouse from being partially or totally disinherited if a couple migrate from a common law state to a community property state, and the wage earning spouse dies while the couple's community assets are less than the wage earning spouse's augmented estate.

The elective share approach is the best solution to the migration problem because it protects against disinheritance while not offending either conflict of laws principles<sup>83</sup> or the couple's expectations.<sup>84</sup>

First, unlike the common sense approach,<sup>85</sup> the elective share approach does not clash with the conflict of laws principle that the law of the state where the couple is domiciled at the time of death govern the property disposition. Under the elective share approach the spouse's domicile at death governs the property disposition. Additionally, a judge has complete discretion in determining whether or not to apply the common sense approach. Thus, this equitable doctrine does not guarantee in all cases that migration will not result in disinheritance. The elective share approach does guarantee this because it is statutorily mandated.

Second, whereas the quasi-community property approach is inconsistent with the couple's expectations about property distribution upon death,<sup>86</sup> the elective share approach protects the couple's expectations because it is similar to the elective share statutes adopted by most common law states.<sup>87</sup>

## V. CONCLUSION

When couples migrate from common law states to community property states, the non-earning spouse risks disinheritance. Three possible solutions to this problem attain the goal of preventing disinheritance.

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83. See *supra* note 41 and accompanying text.

84. See *supra* notes 6 and 40 and accompanying text.

85. See *supra* note 40 and accompanying text.

86. See *supra* note 61 and accompanying text.

87. See *supra* note 6.

The best solution, however, is the elective share approach because it accomplishes the goal of preventing disinheritance while also being consistent with conflict of laws principles and the couple's expectations.

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