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Washington's New Quasi-Community Property Act: Protecting the Immigrant Spouse

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IN 1986, WASHINGTON followed the lead of several other community property jurisdictions by adopting quasi-community property legislation.[1] The act is designed to prevent a spouse who has onerously acquired property during marriage while the couple resided in a common law state from disinheriting his or her surviving spouse as to that property after moving to Washington. It has significant implications not only for married couples contemplating a move to Washington, but also for those who have moved to Washington from common law jurisdictions in the past. This article explains why the risk of disinheritance arises, describes the provisions of Washington's legislation, including recent technical amendments,[2] and discusses problem areas that may arise for migrating couples and their attorneys under the act.

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BACKGROUND

The problem

In all but a few common law jurisdictions, when one spouse domiciled there dies, the surviving spouse has a nonbarrable right to elect a share of the decedent's estate in lieu of his or her share under the decedent's will.[3] This forced "elective share" is, of course, designed to protect the surviving spouse from disinheritance by the decedent-spouse. In the ordinary case, this danger of disinheritance is not present in a community property state. Community property rights vest in each spouse on acquisition of the property, with the result that each spouse has an undivided half-interest in all community property and each has testamentary power over only his or her half of the community.[4] Consequently, community property states have traditionally not considered it necessary to provide a forced elective share comparable to that provided in common law jurisdictions.

An important gap in the protective cover afforded by common law and community property regimes has existed, however, where a couple has changed its domicile from a common law jurisdiction to a community property state.[5] The gap has resulted from the interplay of two choice-of-law principles that have traditionally been applied by community property states when dealing with couples who have migrated from another state, bringing property with them. First, the states have looked to the law of the state where the property was acquired to determine who owns it. Since common law states do not generally permit the acquisition of property as community property, all property acquired in the common law state would be classified as the separate property of the acquiring spouse, regardless of whether it was acquired by labor or gratuitously.[6]

Second, the states have applied the law of the new domicile to determine the rights of the surviving spouse to a share of the decedent's property. Since the community property states have traditionally not provided a forced elective share against the decedent's separate property, the law of the couple's new domicile did not protect a share of the decedent's common law separate property for the surviving spouse. Conversely, the migrating spouse had lost the protection of the forced elective share provided by the common law state where the property was acquired.

It is difficult to gauge how serious this problem really has been in Washington. The risk of disinheritance as a result of migration from a common law jurisdiction could have been dealt with by the spouses by means of an agreement to convert separate property to community property, either in advance, as a condition for the move, or by a standard community property agreement after the move.[7] A contract under which the acquiring spouse agreed to will the common law separate property to the nonacquiring spouse would also have offered protection. Such conscious planning, of course, presupposes both that the nonowning spouse is prudent enough to consult an attorney before such a move and that the attorney is sophisticated enough to foresee the dangers and to know how to avoid them. This combination of circumstances probably occurs rarely, except with quite wealthy couples.

Even absent such conscious planning, the actual occurrence of such disinheritance has probably been relatively infrequent. It is much more common for spouses to leave the bulk of their property to the surviving spouse than to disinherit them, unless there are tax

considerations in play.[8] It is also common for migrant spouses to commingle common law separate property with community property, giving rise to the presumption that it is community property.[9] Finally, many married persons die intestate and under the Washington laws of intestate succession, the surviving spouse receives at least half of the decedent-spouse's separate property and more if there are no issue.[10]

Whatever the actual frequency of disinheritance, only two cases have been reported in Washington in which the possible disinheritance of a migrating spouse has arisen. In each, the impact on the nonacquiring spouse was avoided through application of the presumption of community property and the commingling doctrine.[11] Nevertheless, the possibility for disinheritance remained a real one in the absence of remedial action by the courts or the legislature.

The solution

The Washington courts or the legislature might have dealt with this potential for disinheritance by borrowing the elective share law of the common law state from which the couple migrated.[12] Precedent for such a borrowed-law approach can be found in Arizona, New Mexico, Nevada, and Idaho, where such an approach was taken to deal with the problem of migration at divorce.[13] As a practical matter, however, that would have required Washington courts and attorneys to be familiar with the laws of each of the common law states as to what elective share was available.

An alternative would have been for the legislature to create a uniform statutory elective share as to such property, regardless of the common law jurisdiction in which it had been acquired. This is what has been done in Wisconsin, which gives the surviving spouse a right to elect to take one-half of the decedent's quasi-community property (called "deferred marital property" in Wisconsin) in lieu of what the decedent has provided the survivor by will or otherwise.[14]

Instead of adopting either of these alternatives, the Washington legislature elected to adopt the pure quasi-community property approach, which is to treat common law property at death as it would have been treated had it been acquired while the couple was domiciled in Washington.[15] This approach has the advantage of familiarity, since it treats quasi-community property in much the same way as community property at the death of the first spouse. Moreover, the approach has been tested in California for 25 years (70 years, if one includes California's earliest attempts at this approach).[16] Finally, the quasi-community approach has now been adopted for decedents' estates not only in California,[17] but also in Idaho[18] and Wisconsin.[19] It has also been adopted for purposes of divorce in California,[20] Arizona,[21] and Texas.[22,23] As a result, there should be a body of interpretive case law from other jurisdictions on which Washington lawyers and courts may draw for guidance.

As has been aptly pointed out recently by Professor Symeonides, however, the pure quasi-community property approach is not without its drawbacks.[24] It may substantially overprotect or underprotect the surviving spouse relative to what he or she would have received had the couple remained domiciled in the common law jurisdiction, depending on the elective share allowed and the nature of the property accumulated. Suppose, for example, that the common law state provided an elective share of one-third and that all the property acquired would be the common law separate

property of the spouse who dies first. The surviving spouse would therefore have been entitled to one-third of the decedent's property had the couple remained in that state. If, however, they moved to Washington, the protection would depend on how much of the property would now be classified as quasi-community property. If all the property brought to Washington was so classified, the survivor would take one-half under the new act, overprotecting the survivor by one-sixth relative to the state of acquisition. If none of the property brought to Washington was quasi-community property, the survivor would take nothing under the new act, underprotecting the survivor by one-third relative to the state of acquisition.[25] On the other hand, the pure quasi-community approach does provide the surviving spouse with approximately the same protection that would have been afforded to a spouse who had been domiciled for the whole marriage in Washington.[26] Whether the appropriate standard is the protection that would have been afforded by the original domicile or that would have been provided by the new domicile will depend on one's assumptions about "the role and importance of spousal expectations."[27] But regardless of one's viewpoint, the different results under the typical common law elective share and under the quasi-community property approach make an awareness of Washington's new act crucial to those contemplating a move to Washington.

The pure quasi-community property approach provides the surviving spouse with approximately the same protection that would be accorded to a spouse who had been domiciled for the whole marriage in Washington.

STATUTORY SCHEME

Key features

Essentially, the new act secures for the surviving spouse a half-share of any personal property wherever located and real property located in Washington,[28] provided either type of property was acquired by the decedent-spouse while the couple was domiciled in a common law state, the property would have been community property had it been acquired while the decedent was domiciled in Washington, and the decedent either dies owning the property or has given the property away less than three years before death without the spouse's consent but has retained beneficial enjoyment or powers. The key features are described below.

Act defers community property treatment of quasi-community property until death of acquiring spouse

In Washington, as in other community property jurisdictions, each spouse has testamentary control over his or her half of the community property.[29] The other half of the community belongs to the survivor, and it cannot be disposed of by the first to die without the consent of the survivor. If a spouse dies without a will, the laws of intestate succession provide that the surviving spouse will receive all the decedent's half-interest in the community property.[30] The quasi-community property act provides that the same shall be true of quasi-community property.[31]

Quasi-community property, however, is not to be treated the same as community property in other respects. First, the spouse who did not acquire the property (the "nonacquiring" spouse) has no rights in the

quasi-community property during the life of the acquiring spouse, testamentary or otherwise. The act expressly provides that

> [t]he characterization of property as quasi-community property under this chapter shall be effective solely for the purpose of determining the disposition of such property at the time of a death, and such characterization shall not affect the rights of the decedent's creditors.[32]

Moreover, by definition, "quasi-community property" refers only to property acquired by the "decedent" in a common law jurisdiction.[33] It follows that the nonacquiring spouse is not entitled to manage the quasi-community property, that his or her creditors may not reach it prior to the death of the acquiring spouse, and that the act does not purport to effect disposition of property at divorce. Finally, the acquiring spouse is free to give away, sell, exchange, or encumber the property during his or her life without the consent of the nonacquiring spouse.[34] The rights in quasi-community property are therefore deferred until the death of the acquiring spouse, whereas each spouse's rights to community property vest on acquisition of the property.[35]

Why has there been such a limited response to the problem? If the property at issue would have been community property had the couple been domiciled in Washington when it was acquired, why not simply reclassify it as community property when a couple moves to Washington? The answer lies in the perceived constitutional limits of the state to affect vested property rights. For regardless of who would have owned the property had it been acquired while domiciled in Washington, the property was not acquired in Washington, but somewhere else, under law giving the acquiring spouse exclusive rights to the property.

If the state reclassified the property as community property on a move to Washington, it would be tantamount to a deprivation of the owner's rights over at least half the property, and to an extent, over all the property.[36] For that reason, when the California legislature attempted in 1917 to address this very problem of the migrating couple by reclassifying common law property as community property on establishment of a new domicile in California, the California Supreme Court struck down the legislation as an unconstitutional denial of due process and as an abridgement of the privileges and immunities of the citizen.[37] An early Washington case also suggests that such a reclassification would be unconstitutional.[38]

It is, of course, one thing to recognize that such a reclassification would constitute a deprivation of property rights, and quite another to conclude that it is not within the power of the state to do so. Generally the state may deprive citizens of property rights if it accords due process, and if the governmental purpose is sufficiently weighty. An argument can be made that the state has a strong governmental interest in protecting spouses who have established a domicile within its borders and who, as a result, have lost valuable rights accorded them in their prior abode. The continuing force of the early California and Washington decisions holding reclassification beyond the state's power may therefore be open to question under modern theories of constitutional jurisprudence.[39]

But whatever the continuing validity of those decisions, the state's power to divest property rights at divorce and at death, rather than on a mere change of domicile, is well accepted.[40] In particular, quasi-community property legislation that reclassifies common law property at either divorce or death has been upheld wherever challenged.[41] The Washington legislation, however, does not

even go this far. As noted, it purports only to affect property rights at the death of the acquiring spouse. Its constitutionality should therefore not be a serious question.[42]

The decision not to adopt the quasi-community approach at divorce apparently resulted from a perception that it was not necessary to do so in Washington. The Washington courts have broad discretion at divorce to "make such disposition of the property . . . of the parties, *either community or separate*, as shall appear just and equitable" (emphasis added) after considering, inter alia, the nature and extent of the community property and the separate property.[43] This power to give some or all of one spouse's separate property to the other at divorce apparently was thought to eliminate the problem that is experienced by the migrating spouse at death. That perception is clearly accurate to this extent: The courts' statutory authority is broad enough to permit a court to consider whether there is any separate property that would have been community had it been acquired while domiciled in Washington, and to divide it as it would community property where it is found. Whether this will routinely be done, in view of the adoption of the quasi-community approach at death, remains to be seen. But the legislature might have been wise to mandate that the divorce courts look to see whether there is such quasi-community property and then treat it as it would community property where it is found.[44]

One consequence of this "deferred" community property approach for quasi-community property is that the federal gift, estate, and income tax laws will apply to the quasi-community property as they will to any other separate property of the acquiring spouse.[45] Thus, the whole of the quasi-community property will be included in the gross estate of the acquiring spouse.[46] The unlimited marital deduction will apply to as much of the property as goes to the surviving spouse.[47] And, as with community property, the entire quasi-community property will receive a stepped-up (or stepped-down) basis at the death of the acquiring spouse.[48] The converse of these points, of course, is that if the nonacquiring spouse dies first, none of the quasi-community property will be includable in that spouse's gross estate and no step-up (or step-down) in basis will be obtained.

Act covers only property that would have been community property in Washington

The act generally will not affect property acquired in another jurisdiction before marriage, or after marriage by gift, bequest, devise, or descent. This follows from the fact that the act only covers property that would have been community property had it been acquired in Washington. Property brought into marriage or acquired thereafter gratuitously is generally outside Washington's statutory definition of community property.[49]

There are, of course, classification problems in Washington, as in other community property jurisdictions. These usually arise from application of the presumption that property acquired during marriage will be considered community property absent clear and convincing proof to the contrary, and from application of various presumptions relative to the status of property that is a commingled mixture of separate and community property.[50] As originally enacted, the act did not expressly indicate whether the standard classification presumptions for community property would also be applied in determining what "would have been" community property under the act. If, for example, a couple has kept common law property separate from their community

property, but has commingled gifts and earnings from the common law jurisdiction, it is important to know whether a presumption analogous to the community property presumption will be applied.[51] Similarly, if husband and wife bring to Washington common law earnings held as joint tenants with right of survivorship, will Washington's statute treating joint property presumptively as community property apply to such a tenancy in determining whether the property is quasi-community property?[52] And will the Washington rules dealing with the classification of separate property that has been improved by community labor apply?[53]

This uncertainty was remedied by the 1988 amendments, which provided that

> all legal presumptions and principles applicable to the proper characterization of property as community property under the laws and decisions of this state shall apply in determining whether property would have been the community property of the decedent and the surviving spouse [under the Act].[54]

It should be clear, therefore, that the same set of rules for classifying quasi-community property will apply as have been developed for classifying community property, complete with their strengths and weaknesses.[55]

Typically, property subject to the act (i.e., that was not treated as community property by the state where it was acquired) will have been acquired in a common law jurisdiction that does not use the community property approach. Occasionally, however, such property may have been acquired in a community property state whose definition of community property is narrower than Washington's. If, for example, Washington classified something as community property that would not have been so classified by the community property jurisdiction where the property was acquired, the act should reclassify such property as quasi-community property.[56]

Conversely, the act applies only to property that is not community property.[57] It has no effect on property acquired in another community property jurisdiction that would have been community property if acquired in Washington. The legislation does not need to cover such property, since Washington should fully respect the community property status of the property when it is brought here. More interesting is what happens to property that was community property in the jurisdiction where it was acquired but would be treated as community property had it been acquired in Washington. Wisconsin, Idaho, Louisiana, and Texas, for example, classify the income from separate property earned during marriage as community property, whereas Washington does not.[58] Similarly, some foreign jurisdictions have a so-called "universal community property" system that classifies all property acquired during marriage as community property.[59] Washington's new quasi-community property act clearly does not purport to cover such imported community property. Under standard conflicts of law principles, however, Washington should look to the law of the state where such property was acquired to classify it.[60] Thus, the community property status of such property should be fully respected, with the result that it will be treated as Washington community property would be treated.

Act covers personal property wherever located, and some real property

The act covers "all personal property wherever situated" as long as it would have been community property had it been acquired while domiciled in Washington or that is derived from or has been exchanged

for such property.[61] The act also covers real property located in Washington, including leaseholds, that would have been community property had it been acquired while domiciled in Washington or that is derived from or has been exchanged for such property.[62] Suppose, for example, that a couple domiciled in Portland, Oregon, invests some of the husband's earnings in real estate in Washington, and the couple then moves to Washington. That real estate will be treated as quasi-community property if the husband dies while domiciled in Washington.

As originally enacted, this was the full extent of the act's coverage of real estate. The limitation to real property located in Washington was apparently based on a perception that it is inappropriate for one state to attempt to control the disposition of real property located elsewhere.[63] Certainly the usual conflicts rule is to apply the law of the situs of real property to determine succession to that property at the owner's death.[64] But the 1988 amendments to the act extend its coverage to "[r]eal property situated outside this state if the law of the state where the real property is located provides that the law of the decedent's domicile at death shall govern the rights of the decedent's surviving spouse to a share of such property."[65] This change was prompted by a desire to take advantage of the conflicts rules of some jurisdictions that look to the state of a decedent's domicile to determine the succession to real property located in the nondomiciliary state.[66] The Uniform Probate Code, for example, contains such a conflicts rule.[67]

Under the act certain quasi-community property rights must be waived or disclaimed or they will vest automatically

At least one-half, and in the case of the intestacy, all of quasi-community property automatically "belongs to" the surviving spouse merely by virtue of having survived.[68]

Although this automatic feature of the act is designed to protect surviving spouses, there are bound to be cases in which the surviving spouse will not need or want this protection. The automatic half-share of the quasi-community property may, for example, result in undesirable federal estate tax liability for the surviving spouse. If the couple is advised of this consequence before the death of the spouse who acquired the quasi-community property, the husband and wife are permitted to "waive, modify, or relinquish any quasi-community property right...by signed written agreement."[69] If such a waiver is not executed prior to the death of the acquiring spouse, the surviving spouse needs to follow the required procedure for making a valid disclaimer for an interest in property within nine months of the spouse's death.[70]

Since community property rights may be waived, surrendered, or modified in Washington, it is quite appropriate to recognize the rights of the parties to contract out of the quasi-community property regime as well.[71] But the waiver provision of the act raised an important issue as originally enacted. The original act failed to make clear whether preexisting agreements would qualify as a waiver of the new quasi-community property. No question would arise as to preexisting community property agreements that converted separate property to community.[72] But suppose, for example, the spouses had some other kind of preexisting agreement that did not convert the common law separate property to community property but did contemplate a different result than would obtain under the new act at death. Would the preexisting agreement waive the rights created under the act?

The issue is of some importance. The spouses may, for example, have entered into

a prenuptial agreement in a common law state in which one or both spouses waived any right to a share in the other's property at death. Alternatively, they may have entered into an agreement in Washington that provides for the disposition of separate property (some of which turns out to have been quasi-community property) at the death of the owning spouse and the nonowning spouse.[73] Under the act as originally adopted, an argument could have been made that the preexisting agreement should not be deemed to have waived quasi-community property rights because those rights had not yet been created and the contracting parties could not, therefore, have intended to waive them. The counterargument, of course, was that the quasi-community property approach does not convert property to community but leaves the acquiring spouse's property separate until death. Therefore, if the agreement was broad enough to waive elective share rights in the decedent spouse's separate property, it should be deemed to have waived quasi-community property rights, which are simply Washington's equivalent to an elective share.

Regardless of which argument is more persuasive, the question seems to have been settled by the 1988 amendments, which provide for waiver by signed written agreement "wherever executed, before or after June 11, 1986 [the effective date of the original Act], including without limitation, community property agreements, prenuptial and postnuptial agreements, or agreements as to status of property."[74] This amendment clearly expresses the legislature's choice of the counterargument. This result has the advantage that couples with preexisting prenuptial agreements or separate property agreements will not need to alter them to cover the new quasi-community property rights expressly, provided the agreements are sufficiently broad to encompass those rights. Nevertheless, it would seem to be prudent estate planning to refer expressly to quasi-community property rights in any agreement entered into hereafter that in any way might affect those rights. Failure to refer to those rights might not be disastrous, provided that there is evidence that the nonacquiring spouse was aware of them; but the express mention of the rights is surely prima facie evidence that there was an intentional and knowing waiver or modification of the rights.

Couples with preexisting prenuptial agreements or separate property agreements will not need to alter them to cover the new quasi-community property rights expressly, provided that the agreements are sufficiently broad to encompass those rights.

Act allows surviving spouse to recapture some quasi-community property

Since the quasi-community property approach defers protection of the nonacquiring spouse until the death of the acquiring spouse, there remains a risk that the acquiring spouse may seek to deprive the survivor of his or her share of the quasi-community property by giving it away while the acquiring spouse is still alive. This is a problem that the quasi-community property approach shares with the elective share approach taken in most common law states.[75] It is not a problem that is usually present in a community property jurisdiction. A Washington spouse

who has acquired an interest in community property, for example, cannot be deprived of that interest without his or her consent because both spouses must join in any inter vivos gift of the community property.[76]

The Washington act, following the example of California and Idaho, has addressed this problem by allowing the surviving spouse to recapture some quasi-community property interests transferred inter vivos without adequate consideration.[77] But there are a number of preconditions before the recapture rights arise.

First, the property must have been transferred within three years of death. Second, it must have been transferred without the consent of the surviving spouse. Third, it must have been transferred without adequate consideration. Fourth, if the property was purchased (presumably for inadequate consideration), it may not be recaptured if the purchaser believed in good faith that the property was the separate property of the decedent and not quasi-community property. Fifth, and finally, the transferring spouse must have retained, at the time of death, one or more of the following enumerated interests in the property: (1) possession, (2) enjoyment, (3) right to income, (4) power to revoke, consume, invade, or dispose of the principal for his or her benefit, or (5) right of survivorship.[78] Provided that the specified conditions are all met, the surviving spouse may require the transferee of such property to restore half of it (or half the proceeds or value if the transferee has transferred it).[79] "All property restored to the decedent's estate under this section shall belong to the surviving spouse . . . as though the transfer had never been made."[80] Although these recapture provisions provide some protection against disinheritance by inter vivos gifts, in several important respects they provide less protection than would be available for community property.

Transferor Must Have Retained a Beneficial Interest

The most important of the conditions for recapture is the requirement that the decedent must have retained some beneficial interest in the property. It follows that the spouse who acquired the quasi-community property is free to make an absolute gift of it at any time to anyone and thus to disinherit the other spouse as to any interest in such property. This recapture provision is based on, but not identical to, provisions in the California and Idaho statutes, both of which seem to be based on the Uniform Probate Code concept of the augmented estate.[81] Idaho follows the Uniform Probate Code and, in addition to the retained interests covered in Washington, allows for recapture of absolute gifts in excess of $3,000 if made within two years of death.[82] California allows recapture of transfers with retained interests such as Washington protects, but it exempts insurance and pensions payable to someone other than the spouse from its recapture provisions.[83] Washington's recapture provision is also similar to that adopted by Wisconsin in 1985, but Wisconsin would prevent the surviving spouse from taking more than one-half of the decedent's property if the decedent has otherwise provided for the survivor.[84] Washington's provision does not do this. The Washington recapture provision is also similar to sections 2036 through 2038 of the Internal Revenue Code, but it is not quite so broad.[85]

The drafters of the act explained that the purpose here was "to equate quasi community property with community property by preventing one spouse from eliminating the other spouse's inchoate interest in the quasi community property by gift when the transferor retains one of the enumerated rights or powers."[86] But clearly the recapture provision does not equate gifts of quasi-commu-

nity property with Washington's treatment of gifts of community property, since the latter are void absent consent of both spouses, regardless of whether the donor retained beneficial interests.[87] What really seems to be going on here is a balancing of three sets of interests: those of the transferor, those of the transferee, and those of the surviving spouse. The transferring spouse has an interest in disposing of property that is, after all, still his or separate property. The transferee has an interest in being free from any danger of divestment. The surviving spouse has an interest in reaching property that would have been community property had it been acquired in Washington. As the drafters of the Uniform Probate Code noted in attempting to justify a comparable trade-off in the augmented estate, "[w]hat kinds of transfers should be included here is a matter of reasonable difference of opinion."[88] But unlike the drafters of the Uniform Probate Code, the Washington legislature had the community property laws as its intended model. A right to recapture property given away inter vivos with no strings attached by the donor would have much more closely approximated the treatment of true community property.

Transfer Must Have Been Within Three Years of Death

The decision to allow recapture only of transfers made within three years of death means that even where the transferor has retained beneficial interests, the transfer will defeat quasi-community property rights, provided the transferor lives long enough. This is a departure from the California and Idaho approaches. California, by contrast, has no time limit but protects only against transfers made after the couple establishes a domicile in California.[89] Idaho has no general time limit or cutoff such as those in the Washington or California statutes.[90] The three-year cutoff seems to have been drawn from the Internal Revenue Code section that provides for recapture, for federal estate tax purposes, of certain property in which the decedent retained various kinds of beneficial interests.[91] But the drafters of the Washington legislation do not explain why they thought it appropriate to include a three-year rule modeled on the tax code when the purposes of the quasi-community property legislation are not the same as those of the tax code. No similar time limit would apply in Washington to attempted gifts of community property.

Surviving Spouse Must Not Have Consented

The condition that a surviving spouse who has consented to the inter vivos transfer will lose his or her right to recapture one-half of the transferred property seems reasonable enough. This is consistent with the treatment of gifts of community property. But a question remains as to what will constitute consent by the surviving spouse.[92] Washington's community property statute allows for either "express or implied consent."[93] Case law has extended this provision to allow consent by authorization before the fact, or ratification or estoppel after the fact.[94] Will these species of consent be allowed for gifts of quasi-community property? A close reading of the act suggests the contrary. First, the act does not, by its terms, allow for implied consent, as does the community property statute. Second, the act elsewhere provides that spouses may "waive, modify, or relinquish any community property right" granted by the act "by signed

written agreement." While the language does not say rights may be waived "only" by a signed written agreement, that meaning seems implicit. Moreover, interpreting the consent requirement strictly would seem justified in view of the fact that the spouse may lose recapture rights rather easily even in the absence of consent.

Transfer Must Have Been Without Adequate Consideration to One with Reason to Know Property May Be Quasi-Community

Another condition that must be satisfied before the recapture right will exist is that the transfer must have been without "adequate consideration."[95] Again, this condition is sensible since the surviving spouse's quasi-community property rights extend into the proceeds of quasi-community property that has been sold or exchanged.[96] Assuming that the consideration supplied by the transferee is still owned by the decedent at death, it will be considered part of the quasi-community property, half of which belongs to the survivor. But litigation is bound to arise over what constitutes adequate consideration. There is little help given in the act.[97]

This condition must be read in the context of the protection given in the act to "good faith purchasers." As originally enacted, the act protected against recapture the property of "a transferee who purchases property . . . from a decedent *for value* while believing in good faith that such property is the separate property of the decedent and does not constitute quasi-community property" (emphasis added).[98] In 1988, however, this language was amended by striking out the words "for value."[99] Moreover, the good faith purchaser clause was moved to make this an entirely separate ground for defeating a spouse's recapture rights.[100] The effect of these changes seems literally to be that good faith purchasers are protected regardless of whether they paid adequate consideration or even value for the property.[101] Indeed, if the intent was only to protect those who purchased for adequate consideration, such purchasers would already be protected by the words "adequate consideration," and there would have been no need to protect good faith purchasers expressly.

Whether a person could qualify as a "purchaser," let alone a good faith purchaser, if he or she had not paid value is not made clear in the act. In other legal contexts, a "purchaser" might include a person who has taken an interest in property by gift.[102] Thus, it may be that the recapture provisions will be limited to property transferred without adequate consideration to a person who actually believed, or had reason to believe, that the property was either community property or quasi-community property.[103]

Surviving Spouse May Lose Recapture Rights by Inaction

Another important feature of the recapture provision, which distinguishes it from the survivor's rights to quasi-community property still owned by the decedent at death, is that the recapture provisions are not self-implementing. They require affirmative action by the surviving spouse, and they can be lost by nonaction. In order to exercise the right to recapture property transferred by the decedent before death, the survivor must file a claim against the decedent's estate within the four-month nonclaims period provided for all creditors.[104] If the surviving spouse serves as personal representative and (as is unlikely) closes the estate in less than four months without having filed a claim to recover such property, this will constitute a

waiver of the recapture rights.[105] The surviving spouse may also affirmatively waive the recapture rights "by written instrument filed in the probate proceeding."[106]

Act applies to property acquired both before and after its effective date

The original act became effective June 11, 1986, and applies on the death of any person domiciled in Washington. Does the act apply to the estates of decedents who died before the effective date that have not yet been closed? The statute does not say. The rule in Washington is that "[w]here a retroactive application is not expressly provided for in a statute . . . generally it should not be judicially implied. . . . Statutes generally operate prospectively unless remedial in nature. A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right."[107] It seems unlikely that the quasi-community property act would fall into the category of merely remedial statutes that can be given retroactive effect in the absence of clear legislative guidance.The act has a significant impact on property owners' right to dispose of property that the act reclassifies. Accordingly, it seems quite clear that the act should not be applied to the estates of any decedents dying before its effective date. As a practical matter, of course, this makes sense as to closed estates because the legislature obviously never intended that closed estates be reopened to give effect to the new act. It also makes sense as to estates of persons dying before the effective date that are still open, since such persons would not have been on notice prior to death to the need to modify spousal rights as permitted by the act.

A more interesting issue was raised by the original legislation as to property acquired before its effective date. The act reclassified as quasi-community property the described property "that *was* acquired: (a) By the decedent while domiciled elsewhere and that *would have been* the community property of the decedent ... *had* the decedent *been domiciled* in this state at the time of its acquisition" (emphasis added).[108] Did this language mean that the act applied to all property acquired while the parties were domiciled elsewhere, regardless of whether it was acquired before the effective date of the act, or only to property acquired after the effective date? As the emphasized language shows, the statute used the past tense in the definitional portion. But this language was susceptible to two interpretations: It could mean property whenever acquired or it could mean property acquired after the effective date of the act. There was nothing on the face of the statute, or in the legislative history, which disclosed which interpretation was the correct one, and the issue has been one of considerable difficulty in other jurisdictions that have adopted quasi-community property legislation.[109]

The 1988 amendments clarify that the quasi-community property statutes are to be applied to all property, whether acquired before or after the date of original enactment.

This uncertainty was remedied by the 1988 amendments. As amended, the act covers all property "heretofore or hereafter acquired" in the manner specified.[110] This is the same language that is contained in the Idaho and California statutes, and its retroactive effect has been confirmed in Califor-

nia.[111] Moreover, the legislative history of the 1988 amendments confirms that the purpose of the amendment was "to clarify that the quasi-community property statutes are to be applied to all property, whether acquired before or after the date of original enactment."[112] Given this clarification, the only question that might remain is whether the legislature had the constitutional power to affect vested rights in such property. There is, however, ample case law from California, Arizona, and Texas that confirms states' constitutional power to apply quasi-community property legislation retroactively.[113]

Act does not affect creditors' rights

The creation of a whole new type of property interest at death might have introduced significant confusion into Washington's creditor-debtor laws. Washington is a so-called "community debt" state. Creditors' rights differ depending on whether a debt is classified as a community debt or a separate debt.[114] Generally speaking, an obligation incurred by one spouse for a community purpose or benefit creates a community debt for which not only the debtor-spouse's separate property but also all the community property will be liable.[115] Conversely, a separate contractual obligation of either spouse cannot be satisfied out of any of the community property while both spouses are alive, and at the death of the debtor-spouse, it can be satisfied only out of the debtor's half of the community.[116] The reclassification of separate property as quasi-community property at death could have presented a problem for separate creditors of a decedent whose claims had not been satisfied at the time of decedent's death. Since the act provides that one-half of the quasi-community property belongs to the survivor, it might have been argued that the survivor's half should be immune from the decedent's creditors. This would have paralleled the treatment of community property at death.[117]

As enacted, however, the act forecloses this argument by stating that "characterization [as quasi-community property] shall not affect the rights of decedent's creditors."[118] It follows that separate creditors of the decedent will be entitled to reach all the quasi-community property, including the half that is said to belong to the survivor. This seems fair given the threshold decision, for other purposes, to continue to treat the property at issue as the acquiring spouse's separate property up until his or her death. It would be unfair to cut off, at the debtor's death, separate creditors who had relied on the separate status of the property in extending credit during that spouse's life. But this is one more illustration of the way the act fails to equate the treatment of quasi-community property with that of community property at death.

UNANSWERED QUESTIONS

The new quasi-community property legislation answers many questions, but many more are bound to arise for which an answer under the statute is not readily available. Two such problems, which seem particularly important, are discussed below.

The problem of unmarried cohabitants

In 1984, the Washington Supreme Court held in *Marriage of Lindsey* that parties to a meretricious relationship are entitled to a "just and equitable disposition" of property that was acquired during the relationship.[119]

This means that property disposition in meretricious relationship cases will now be treated similarly to that long recognized for innocent relationships where one party believed in good faith that there was a valid marriage.[120]

Although *Lindsey* was a marital dissolution case, its effect should extend to disposition of property rights when the meretricious relationship is ended by the death of one of the parties. In announcing its new rule in *Lindsey*, the court cited with approval two earlier decisions that had foreshadowed the new rule, and these cases were, themselves, decedent's estate cases.[121] More important, it would not seem fair to treat such relationships that end in the death of one party differently from those that break up prior to death. The survivor of such a relationship that continued until death should not be worse off than a party to one that has dissolved from other causes. The courts long ago recognized that parallel treatment at death and dissolution was appropriate in the case of innocent relationships.[122] It should follow from *Lindsey*, therefore, that the surviving party of a meretricious relationship that is ended by the death of one of the parties will be entitled to a just and equitable disposition of the property accumulated during the relationship. In all likelihood, the courts will look to the community property laws, by analogy, to determine what such a just and equitable disposition should look like.[123]

Does this mean that the new quasi-community property act will also be applied to meretricious relationships? Certainly the act gives no guidance regarding this issue. By its terms, it creates rights only in surviving spouses. Nor is the surviving party to a meretricious relationship in the same equitable posture as a surviving spouse. Such a party, had he or she remained in a common law jurisdiction, would not have had elective share rights on the death of the other party. Nevertheless, the act attempts to approximate the community property system at death and attempts an equitable solution to a problem that has existed in legal marital relationships. Since the rationale for the holding in *Lindsey* was to provide for an equitable resolution of property questions for unmarried cohabitations, it would seem appropriate for the courts to look to the new act, by analogy, for an equitable basis on which to divide property accumulated by an unmarried couple in a common law jurisdiction before coming here.[124]

The problem of the widow's election

As noted earlier, the new act does not expressly require the surviving spouse to elect between a half-share of the quasi-community property and some other provision made in the decedent's will. Instead, the act contemplates that the decedent may give his or her share of the quasi-community property to the surviving spouse in addition to the half that already belongs to the survivor by virtue of survival.[125] (It dictates this result in the event of intestacy.) But what happens if the acquiring spouse attempts to make a testamentary gift of more than one-half of the quasi-community property? Will the surviving spouse then be put to an election?

Under the leading Washington case, *In re Patton's estate*,[126] before a widow's election will be required,

> there must appear on the face of the . . . will a clear and unmistakable intention to dispose of property which is not in fact [the testator's] own and which was not within his power of disposition. . . . [but] it is immaterial whether the testator knew the property he purported to dispose of in his will was not within his power of disposition.[127]

A broad reading of *Patton's Estate* would suggest that whenever the terms of the decedent's will purported to leave to someone other than the spouse more than one-half of any item of the decedent's separate property, and this item happened to be quasi-community property, the surviving spouse would be put to an election, since that would be property that was not within his or her power of disposition. Since it is not uncommon that the first spouse dies leaving all of his or her separate property to someone other than the surviving spouse, this reading of *Patton's Estate* would require many more elections than previously.[128]

It is questionable, however, whether *Patton's Estate* is good law.[129] The courts may therefore conclude that a decedent must expressly attempt to dispose of the survivor's share of the quasi-community property to put the survivor to an election. Alternatively, the courts might conclude that no election is required on the theory that the property disposed of by the acquiring spouse was still that spouse's own at the time the will was executed. Since the nonacquiring spouse has no rights in the quasi-community property prior to the acquiring spouse's death, the acquiring spouse's bequest of his or her separate property arguably lacks the clear and unmistakable intention to dispose of property that is not in fact his or her own required by *Patton's Estate* to trigger an election.[130]

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Washington's new quasi-community property legislation falls considerably short of treating property brought to Washington by immigrant spouses as it treats true community property. Nevertheless, the act goes a long way toward correcting an inequity that has existed in Washington for at least 100 years. But it may also disturb settled expectations, particularly those of couples who moved to Washington from a common law jurisdiction before the act was adopted. Since the act, by its terms, applies to property acquired both before and after it became law, it will be necessary for all couples who have moved to Washington to reexamine their estate plans to determine whether they need to be changed. It will also be important for estate planners around the country to take the act into consideration when advising couples planning a move to Washington.

NOTES

1. 1986 Wash. Laws Ch. 72, §§ 1–5, now codified at Wash. Rev. Code §§ 26.16.220-.250 (1987) (Revised Code of Washington (1987) hereinafter referred to as RCW). The governor signed the bill into law on March 12, 1986. The Washington State Constitution provides that ordinarily, bills become effective 90 days after being signed into law. The effective date of the original legislation is therefore June 11, 1986. Wash. State Const. Art. II, §41 (Amend. 26). Thus, Professor Reppy's observation in the October 1986 issue of this journal that Washington was probably the strongest foothold for the traditional approach came a little too late to be accurate any longer. Reppy, Viewpoint: Louisiana's Proposed "Hybrid" Quasi-Community Property Statute Could Cause Unfairness, Community Prop. J., October 1986, 1, 2 n.5.

2. The act has recently been amended to take account of several ambiguities that are discussed below. 1988 Wash. Laws, Ch.34, §§ 1–5, 1988 Wash. Legis. Service 61-63 (West) (here-

inafter referred to as "1988 amendments").

3. *See generally* 1 W.J. Bowe and D.H. Parker, *Page on Wills* 768–73 (rev. ed. 1960).

4. E.g., RCW § 26.16.030(1). *See* W.S. McClanahan, *Community Property Law in the United States* 511–12 (1982).

5. *See generally* Gilchrist, *Washington Disinherits the Non-native Wife,* 46 Wash. L. Rev. 283 (1971); H. March, *Marital Property in Conflict of Laws* 224–39 (1952); McClanahan, *supra* note 4, at 574–91.

6. The Washington courts have long considered that property acquired during marriage in another domicile retains whatever status it has on acquisition, even after it is brought into Washington. *Brookman v. Durkee,* 46 Wash. 578, 583, 90 P.914 (1907); *Meyers v. Albert* 76 Wash. 218, 135 P. 1003 (1913); *In re Gulstine's Estate,* 166 Wash. 325, 6 P.2d 628 (1932); *Rustad v. Rustad,* 61 Wash.2d 176 (1963). As Marsh pointed out, this traditional classification by community property jurisdictions of common law property as the "separate property" of the acquiring spouse was by no means necessary and really involves a problem of semantics. The words "separate property", which mean something quite different in a common law state than they do in a community property state, are treated as having the same meaning. H. Marsh, *supra* note 5, at 224.

Spouses in a common law jurisdiction may, of course, and often do, acquire property as joint tenants, tenants by the entireties, or tenants in common. None of these common law co-tenancies is the equivalent of community property. *See* McClanahan, *supra* note 4, at 50–52. The effect of community property laws on common law co-tenancies at death after a change of domicile will depend on what is done with the property after the move and on what kind of property it is. If the co-tenancy is a bank account, it may still be possible for one spouse to acquire sole ownership of the whole account and thus to disinherit the other as to this property. If the co-tenancy is stock or other personal property, each spouse may have a right to prevent the other from appropriating at least one-half and thus may prevent disinheritance as to that one-half. If the co-tenancy is a tenancy by the entirety, a change of ownership form will require the consent of both spouses, thus precluding disinheritance. But since only land can be held in this form, it will continue to be controlled by the law of the situs, despite a move to a community property jurisdiction.

7. Cross, *The Community Property Law in Washington,* 61 Wash. L. Rev. 13, 100–107.

8. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction,* 50 Wash. L. Rev. 227, 283, 311–12 (1975).

9. *Rustad v. Rustad,* 61 Wash.2d 176, 377 P.2d 414 (1963); *In re Gulstine's Estate,* 166 Wash. 325, 6 P.2d 628 (1932).

10. RCW § 11.04.015. *But see* Price, *supra* note 8, at 295 (in a sample of 211 decedents, only 21% of those for whom estate proceedings were opened had died intestate).

11. *Rustad,* 61 Wash.2d 176, 377 P.2d 414 (1963); *In re Gulstine's Estate,* 166 Wash. 325, 6 P.2d 628 (1932).

12. Marsh, *supra* note 5, at 29, 51; Gilchrist, *supra* note 5, at 304–5.

13. *Hughes v. Hughes,* 91 N.M. 339, 573 P.2d 1194 (1978); *Berle v. Berle,* 97 Idaho 452, 546 P.2d 407 (1976); *Braddock v. Braddock,* 91 Nev. 735, 542 P.2d 1060 (1975); *Rau v. Rau,* 6 Ariz. App. 362, 432 P.2d 910 (1967). The Louisiana State Law Institute will apparently propose to that state's legislature a solution to the problem of migratory spouses that will depend, in part, on a borrowed-law approach. *See Reppy, supra* note 1, and Symeonides, *In Search of New Choice-of-Law Solutions to Some Marital Property Problems of Migrant Spouses: A Response to the Critics,* Community Prop. J., October 1986, 11.

14. Wis. Stat. §§ 851.055, 861.02–861.17 (West 1987 pocket part). Wisconsin gives the right of election against both the decedent's probate estate and an "augmented" estate that includes property transferred by the decedent before death. *Id.* It also bars the right of election if the survivor has received at least one-half of the decedent's property under specified circumstances. *Id* at § 861.13.

15. The proposal that Washington adopt the quasi-community property concept dates at least to 1971 when it was made by Gilchrist in a law

review article. Gilchrist, *supra* note 5, at 306. The legislation was drafted by the Washington State Bar Real Property, Probate and Trust Committee. The Drafting Committee published the proposed bill along with comments later submitted to the legislature in its November 1985 Real Property, Probate and Trust Newsletter. Real Prop., Prob., and Trust Newsletter, November 1985, 1–3 (hereinafter referred to as "Drafting Committee Comments"). The committee's proposal was not changed significantly by the legislature, and the Drafting Committee comments probably constitute the best legislative history available, although they do not provide many answers to the questions raised by the act. There is even less legislative history for the 1988 amendments, but brief comments were submitted to the Washington State Senate Law and Justice Committee under cover letter from Douglas Lawrence to Jeanne Cushman Scott dated January 4, 1987 [sic] (hereinafter "1988 Comments").

16. *See In re Thornton's Estate*, 1 Cal.2d 1, 33 P.2d 1–2 (1934).

17. Cal. Prob. Code §§ 66, 101–102 (West, 1988 pocket part).

18. Idaho Code § 15-2-201, 15-2-202 (1979).

19. Wis. Stat. §§ 851.055, 861.02–861.17 (West 1987 pocket part).

20. Cal. Civ. Code § 4800 (West 1988 pocket part), § 4803 (West 1983).

21. Ariz. Rev. Stat. Ann. § 25-318 (1985 rev. cum. pocket part).

22. Tex. Family Code Ann. § 3.63 (Vernon 1988 cum. pocket part).

23. Apparently a solution to the problem of migratory spouses relying in part on the quasi-community property approach will soon be proposed to the Louisiana legislature by the Louisiana State Law Institute. *See* Reppy, *supra* note 1, at 4 n.13. The proposal will cover dissolution of marriage by divorce or death. *Id.*

24. Symeonides, *supra* note 13, at 16–22.

25. This failure to provide a forced elective share against a decedent's "pure" separate property points to a more general difference between the protection provided by the common law forced share and that provided by community property regimes. This is the problem of the so-called "separate property" marriage, in which little community property is acquired, either because the marriage is of short duration, or because one spouse has enough separate property to support both spouses, or because all marital property was acquired in a common law jurisdiction where it was classified as separate property. Since the community property states generally do not protect a share of a decedent-spouse's separate property for the surviving spouse, the non-acquiring spouse in a separate property marriage is left essentially unprotected in a community property jurisdiction. By contrast, the common law states provide an elective share against decedent's property regardless of how it was acquired. The quasi-community property approach partially addresses the problem of the separate property marriage because it effectively provides an elective share against one type of a decedent's separate property, namely that part that was acquired onerously in a common law state while married. But quasi-community property has no effect on separate property marriages where the property is separate because it was brought into the marriage or acquired by gift, devise, or descent.

26. "Approximately" is used because, while the quasi-community property approach does provide the survivor the same "share" of the property as would the community property system, it fails to parallel the effect of community property laws in other respects that may substantially impair the survivor's rights in the quasi-community property. These features are discussed below.

27. Symeonides, *supra* note 13, at 17.

28. As explained below, in some instances the protection of the act may extend to real estate located outside of Washington.

29. Washington law achieves this effect by negative inference: "Neither spouse shall devise or bequeath by will more than one-half of the community property." RCW § 26.16.030(1).

30. RCW § 11.04.015(1)(a).

31. RCW § 26.16.230. "Upon the death of any person domiciled in this state, one-half of the decedent's quasi-community property shall belong to the decedent's surviving spouse and the other one-half of such property shall be subject to

testamentary disposition by the decedent, and in absence thereof, shall descend in the manner provided for community property under chapter 11.04 RCW."

32. RCW § 26.16.250.

33. RCW § 26.16.220(1).

34. The act does provide limited protection against inter vivos transfers without adequate consideration, but such protection is only available where the transfer occurs within three years of death and the decedent has retained beneficial rights to the property transferred. RCW 26.16.240. See text accompanying footnotes 78–106.

35. See McClanahan, *supra* note 5, at 42, 377–403.

36. Since each spouse has an equal right to manage all the community property in Washington, the acquiring spouse would lose the right to exclude the nonacquiring spouse from managing more than half. RCW § 26.16.030. Moreover, since Washington requires joinder for gifts of community property, the acquiring spouse would also lose the right to make a gift of any of the property without the consent of the nonacquiring spouse. RCW § 26.16.030(2).

37. *In re Thornton's Estate*, 1 Cal.2d 1, 33 P.2d 1 (1934). See also *Paley v. Bank of America National Trust & Savings Assoc.*, 324 P.2d 35 (Cal. App. 1958) (holding unconstitutional prior version of California statute insofar as it purported to give nonacquiring spouse testamentary power over quasi-community property during life of acquiring spouse).

38. *Brookman v. Durkee*, 46 Wash. 578, 583, 90 P. 914, (1907): "If it were the intent of the statute that property acquired in another jurisdiction and brought within the state should become community property, its legality might be seriously questioned. It would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion and ownership, and vest an interest therein in the other...."

39. *See In re Marriage of Bouquet*, 16 Cal.2d 583, 546 P.2d 1371 (1976); *Addison v. Addison*, 62 Cal.2d 558, 399 P.2d 899, 901 (Cal. 1965); *Boyd v. Oser*, 23 Cal.2d 613, 623–24, 145 P.2d 312, 318 (Cal. 1944) (Traynor, J., concurring). *See generally*, Flagg, *Respecting Reliance: A Standard for Due Process Review of California's Retroactive Community Property Legislation*, Community Prop. J., January 1988, at 14. Reppy, *Retroactivity of the 1975 California Community Property Reforms*, 48 S. Cal. L. Rev. 977, 1070–85 (1975). Armstrong, *"Prospective" Application of Changes in Community Property Control–Rule of Property or Constitutional Necessity?*, 33 Calif. L. Rev.476, 501–5 (1945).

40. *Williams v. North Carolina*, 317 U.S. 287, 298 (1942); *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942); *Addison*, 62 Cal.2d 558, 399 P.2d 899 (Cal. 1965).

41. *Ismail v. Ismail*, 702 S.W.2d 216 (Tex. App.—Houston 1985, writ ref'd, n.r.e.); *Sample v. Sample*, 135 Ariz. 599, 663 P.2d 591 (Ariz. App. 1983); *Addison*, 62 Cal.2d. 399 P.2d at 900-1; *In re Miller*, 187 P.2d 722 (Cal. 1947).

42. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

43. RCW § 26.09.080 *Edwards v. Edwards*, 47 Wash.2d 224, 287 P.2d 139 (1955); *Glorfield v. Glorfield*, 27 Wash.App. 358, 617 P.2d 1057 (1980).

44. The Washington courts may reach this result by judicial implication. In *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982), the Texas Supreme Court adopted the quasi-community property approach judicially for a case not yet covered by the new quasi-community property provisions of the Texas Family Code. *But see Estate of Hanau v. Hanau*, 730 S.W.2d 663, 665–66 (Tex. 1987), in which the Texas court declined to extend quasi-community property to a decedent's estate judicially in the absence of legislative guidance.

45. Medaille, *The Taxation of California Quasi-Community Property*, 45 Taxes 341, 343–45 (1967); Gilchrist, *supra* note 5, at 303.

46. 26 U.S.C. § 2034 (1979); *Estate of Sbicca*, 35 T.C. 96, 106 (1960) (quasi-community property is the separate property of acquiring spouse and totally includable in his or her gross estate; any relinquishment of statutory rights by nonacquiring spouse is release of a mere expectancy and so is not consideration).

47. 26 U.S.C. § 2056(a) (West 1988 pocket part) 26 C.F.R. §§ 20.2056(e)-1(a)(3), 20.2056(e)(b), 20.2056(c)-2(d)(1987); *See also*

Medaille, *supra* note 45 at 343; Sabban & Hoffman, *California's Community Property Laws: Planning for a Move to California,* 121 Tr. & Est. 11 (June 1982).

48. 26 U.S.C. 1014(a), 1014(b)(1), and 1014(b)(9) (West 1982). *See also* Medaille, *supra* note 46; Sabban & Hoffman, *supra* note 47.

49. RCW §§ 26.16.010-.020. Note, however, that a gift or devise to both husband and wife, together, may well be community property in Washington. *Estate of Salvini,* 65 Wash.2d 442, 397 P.2d 811 (1964); *Marriage of Martin,* 32 Wash.App.92, 645 P.2d 1148 (1982); Cross, *supra* note 7, at 31–32.

50. Cross, *supra* note 7, at 27-30.

51. If the couple commingles the common law property brought into Washington with community property acquired in Washington, the commingled fund will be presumed to be community property and the act will not apply for that reason.

52. RCW § 64.28.040.

53. *See, e.g., Halvorsen v. Ferguson,* 46 Wash.App. 798 (1986); *Marriage of Elam,* 97 Wash.2d 811 (1982); *Hamlin v. Merino,* 44 Wash.2d 851 (1954). *See generally* Cross, *supra* note 7, at 57–61, 67–74.

54. 1988 amendments, *supra* note 2, at § 1, to be codified at RCW § 26.16.220(3).

55. The proper treatment of separate property businesses on which substantial community labor has been expended has been a particularly difficult problem in Washington. *See, e.g., Halvorsen v. Ferguson,* 46 Wash.App. 798 (1986); *Hamlin v. Merino,* 44 Wash.2d 851 (1954).

56. Given that Washington's definition of community property is fairly narrow in contrast to other community property jurisdictions, this situation is not likely to occur very often. It may happen, however, that Washington's application of its community property presumptions would lead to a community property classification that another community property jurisdiction would have rejected. Similarly, in Washington, a gift of property to "husband and wife" creates community property in the donees absent an expression of intent to the contrary by the donor. *In re Salvini's Estate,* 65 Wash.2d 442, 397 P.2d 811 (1964). Other community property jurisdictions may reach a contrary result. Presumably in such cases, Washington would extend quasi-community property protection to property thus acquired in a community property jurisdiction.

57. RCW § 26.16.220(1).

58. Idaho Code § 32-906 (1983); La Civ. Code Ann. art. 2339 (West 1985); *Arnold v. Leonard,* 114 Tex. 535, 273 S.W. 799 (1925); Wis. Stat. § 766.31 (4)(West 1987 pocket part); RCW §§ 26.16.010-.020. R.L. Mennell & T.M. Boykoff, *Community Property in a Nutshell* 35 (2d ed. 1988).

59. Rheinstein & Glendon, *Interspousal Relations,* IV International Encyclopedia of Comparative Law 49.

60. Marsh, *supra* note 5, at 205.

61. RCW § 26.16.220(1).

62. RCW §§ 26.16.220(1) and (2). The statute expressly defines "real property" to include "leasehold interests in real property." In the absence of this language, a tenant's interest in a leasehold would be considered a "chattel real" in Washington and classified as personal property. Cross, *supra* note 7, at 77. The effect of the statutory definition may therefore be to narrow the leasehold interests that would otherwise be covered by the act. Cf. Idaho Code § 15-2-201 (1979), which defines leasehold as personal property, rather than as real property.

63. *Fall v. Eastin,* 215 U.S. 1 (1909). See Marsh, *supra* note 5, at 203–4.

64. *Restatement (Second) of Conflicts* § 242 (1969).

65. 1988 amendments, *supra* note 2, at § 1, to be codified at RCW § 26.16.220(2)(b).

66. 1988 Comments, *supra* note 15, at 1.

67. U.P.C. § 2-201(b) provides, "If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death." 8 U.L.A. 74 (1983). Idaho's quasi-community property statute contains a comparable provision for real estate located outside of Idaho. Idaho Code § 15-2-201(b) (1979).

68. RCW § 26.16.230.

69. RCW § 26.16.250.

70. RCW § 11.86.010-090; 26 U.S.C. § 2518 (West 1988 pocket part); 26 C.F.R. §§ 25.2518-

1-25.2518-3 (1987).

71. *See* RCW §§ 26.16.050, 26.16.120, and 26.16.150. *See generally* Cross, *supra* note 7, at 94–98 and 100–107. It is interesting, however, to contrast the waiver of quasi-community property rights, which may be done by signed written agreement, with statutory community property agreements, which must be "witnessed, acknowledged and certified in the same manner as deeds to real estate," RCW § 26.16.120, and which must therefore be notarized. RCW § 64.04.020.

72. The act only creates quasi-community property rights in property that is not community property at the time of death. If property has been recharacterized as community property prior to death, the statute by its terms will not cover it. In general, this result should be fair since conversion to community property should give the nonacquiring spouse even greater rights in the property than the new act would. A couple might, however, convert separate property to community property during the lives of each, but then provide for its disposition at the death of the survivor in such a way as to deprive the surviving spouse of the power of testamentary disposition that he or she would otherwise have over one-half if it were community property or quasi-community property. *See* RCW § 11.02.090, 26.16.120. But the act would not have covered this situation anyway, since the property has been recharacterized as community property by agreement and there are no quasi-community property rights in community property.

73. Such an agreement would be authorized by RCW § 11.02.090, which allows agreements providing for the disposition of property at death. Why would a couple enter into such an agreement? The owning spouse may be prepared to leave some or all of the separate property to the surviving spouse but may wish to control the disposition of this property at the death of the surviving spouse. There are ways to do this other than by agreement, since the owning spouse may create a life estate (in trust or not) in the surviving spouse. But it is also possible that it will have been done by agreement.

74. 1988 amendments, *supra* note 2, at § 4.

75. P.G. Haskell, Preface to *Wills, Trusts and Administration* 140–43 (1987).

76. RCW § 26.16.030(2).

77. RCW § 26.16.240. *Cf.* Calif. Prob. Code § 102 (West 1988 pocket part); Idaho Code § 15-2-202 (1979).

78. RCW § 26.16.240(1).

79. RCW § 26.16.240(1). The intent here seems to have been to adopt an "item theory" with regard to each item of quasi-community property. Thus, if the acquiring spouse transfers part of property in a manner not entitling the survivor to recapture, and another part in a manner entitling the survivor to recapture, the survivor may apparently recapture only one-half of the property conveyed to the vulnerable transferee, regardless of whether the recapturable property represents less than one-half of all quasi-community property accumulated. Washington has adopted the item theory in determining rights to community property at death. *Estate of Patton*, 6 Wash. App. 464, 494 P.2d 238 (1972).

80. RCW § 26.16.240(2).

81. Drafting Committee Comments, *supra* note 15, at 2-3. *Cf.* Calif. Prob. Code § 102 (West 1988 cum. pocket part); Idaho Code ¶ 15-2-202 (1979); Uniform Probate Code § 2-202(1) 8 U.L.A. 75-77 (1983).

82. Idaho Code § 15-2-202(d) (1979). *Cf.* U.P.C. § 2-202(1)(iv) 8 U.L.A. 76 (1983).

83. Calif. Prob. Code § 102(b) (West 1988 pocket part).

84. Wisconsin's original quasi-community property provision, taken verbatim from the Uniform Marital Property Act, did not provide for recapture of inter vivos gifts. *See* Wis. Stat. 766.77 (West 1985 pocket part); Uniform Marital Property Act 18, 9A U.L.A. 139 (1987). Wisconsin, however, amended its quasi-community property provisions in 1985 to provide recapture rights modeled on the Uniform Probate Code augmented estate. Wis. Stat. 861.02–861.17 (West 1987 pocket part) and appended comments of Legislative Council.

85. It does not, for instance, allow recapture of property transferred subject to a retained "right ... to designate the persons who shall possess or enjoy the property," reversionary interests, or powers merely to "alter" or "amend" a property disposition. 26 U.S.C. §§ 2036(a)(2) (West 1988 pocket part), 2037(a)(2), and 2038 (West 1979).

The result of this difference in language may be that certain retained interests may be included in the decedent's estate for federal estate tax purposes, but may not be recapturable by the surviving spouse as quasi-community property. See *Lober v. United States,* 346 U.S. 335 (1953) (power to accelerate enjoyment of property in children caused inclusion of property in grantor's estate as a power to "alter, amend, or revoke"); *Struthers v. Kelm,* 218 F.2d 810 (8th Cir. 1955) (power to control beneficiaries' time of enjoyment caused inclusion of property in grantor's estate as a power to designate the persons who should possess or enjoy).

86. Drafting Committee Comments, *supra* note 15, at 2.

87. RCW § 26.16.030(2).

88. Comment to U.P.C. § 2-202, 8 U.L.A. 78 (1983).

89. This limitation of the California provision is not obvious on its face. But the Legislative Committee Comment notes that the sectionis limited to "transfers made at a time when the surviving spouse has an expectancy . . . i.e. at a time when the transferor is domiciled in California." Calif. Prob. Code 102 (West 1988 pocket part). (Legislative Committee Comment).

90. Idaho Code § 15-2-202 (1979). Idaho does, however, limit the recapture of absolute gifts in excess of $3,000 to those made within two years of death.

91. 26 U.S.C. § 2035 (d) (West 1988 pocket part). That section "recaptures" for the taxable estate property transferred within three years of decedent's death if the decedent retained a life estate, a reversionary interest, a power to control beneficial enjoyment, amend, alter, revoke or terminate the transferee's interest, or if the transferred property was life insurance.

92. California requires written consent. Calif. Prob. Code § 102(a)(2) (West 1988 pocket part).

93. RCW § 26.16.030(2).

94. *See Nichols Hills Bank v. McCool,* 104 Wash.2d 78, 701 P.2d 1114 (1985).

95. RCW § 26.16.220.

96. RCW § 2.1.220(1)(b).

97. The term "adequate consideration" seems to have been taken from the Idaho Code § 15-2-202 (1979). California requires consideration of substantial value. Calif. Prob. Code § 102(a)(2) (West 1988 pocket part). The California Legislative Committee Comment appended to section 102 notes that "[i]t is not expected that a transfer will be set aside . . . if the transferee gave a consideration equal to one-half or more of the value of the property received." Calif. Prob. Code § 102 (West 1988 cum. pocket part).

98. RCW § 26.16.240(1), as originally enacted.

99. 1988 amendments, *supra* note 2, at § 3.

100. The statute, as amended, provides, "[N]o such property interest . . . may be required to be restored to the decedent's estate if:

(a) Such property interest was transferred for adequate consideration;

(b) Such property interest was transferred with the consent of the surviving spouse; or

(c) The transferee purchased such property . . . from the decedent while believing in good faith that the property . . . was the separate property of the decedent and did not constitute quasi-community property."

1988 amendments, *supra* note 2, at § 3.

101. What is the difference between "adequate consideration" and "value"? The act does not say. Possibly the drafter intended to incorporate the meaning of "value" that is found in the U.C.C., which defines "value" generally to mean "any consideration sufficient to support a simple contract." U.C.C. § 1-201(44) 1 U.L.A. 50 (1976); RCW § 62A.1-201(44). One would suppose that even "inadequate consideration" may support a simple contract.

102. *See* U.C.C. § 1-201(32), 1 U.L.A. 48 (1976); RCW § 62A.1-201(32).

103. The act does not state that someone who should have known that the property was community or quasi-community will fail the good faith purchaser test: It speaks only in terms of belief. But the Washington Supreme Court has construed a comparable phrase ("actual bona fide purchaser") to include a due diligence requirement. In *Campbell v. Sandy,* 190 Wash. 528, 69 P.2d 808 (1937), the court held that since a couple had maintained a marital relationship

within the state (even though they were not living together at the time of the conveyance), the purchaser, through the exercise of reasonable diligence, could have discovered the fact of marriage. He therefore could not be a good faith purchaser under the recording statute free and clear of the community property claims of a nonjoining spouse. It seems to follow from *Campbell* that any transferee of quasi-community property would lack the requisite good faith if he or she had actual knowledge that the transferor was married, or, with reasonable diligence, could have obtained such knowledge by virtue of the maintenance of the marital relation in the state. But whether the court would follow *Campbell* in interpreting the good faith requirement in this act is unclear.

104. RCW §26.16.240(1); RCW §11.40.010.

105. RCW § 26.16.240(3).

106. RCW § 26.16.240(3).

107. *Miebach v. Colasurdo*, 102 Wash.2d 170, 180-81, 685 P.2d 1074 (1984) (citations omitted). Applying this principle in *Miebach*, the Court held that the redemption notice provision added to the mortgage foreclosure act in 1981 was not retroactive, even though it had "a remedial aspect," because "retroactive application would severely impinge upon the vested right given with an order of confirmation."

108. RCW § 26.16.220(1).

109. California took nearly 50 years to resolve the question of the retroactivity of its quasi-community property statute. See *In re Frees' Estate*, 201 P. 112, 113–14 (1921) (holding that the California legislature's first attempt at dealing with migratory spouses was prospective only and applied only to property acquired "hereafter"); *In re Drishaus' Estate*, 249 P. 515 (Cal. 1926) (holding that retroactive application of that statute would be unconstitutional); *Addison*, 62 Cal.2d 558, 339 P.2d 897, 904 (Cal. 1965) (upholding that retroactive application of the quasi-community property statute, applicable by its term to property *"heretofore or hereafter acquired,"* while claiming not to be applying the statute retroactively); *In re Marriage of Bouquet*, 546 P.2d 1371, 1377 n.10 (Cal. 1976) (acknowledging that despite the disclaimer in *Addison*, *Addison* had given the statute retroactive effect).

Arizona's first attempt to introduce quasi-community property at dissolution—with language comparable to that in Washington's original act—was held not to be retroactive. *In re Marriage of Furimsky*, 595 P.2d 662 (Ariz. 1979). The Arizona legislature quickly acted to express its intent clearly, and the retroactive effect of the amended statute was upheld. *Sample v. Sample*, 3 P.2d 591 (Ariz 1983).

The Texas court has held that state's quasi-community property legislation—with language comparable to that in Washington and Arizona's original statutes—is retroactive. *Ismail v. Ismail*, 702 S.W.2d 216 (Tex. App.—Houston 1985), *writ ref'd, n.r.e. See also* Sampson, *Interstate Spouses, Interstate Property, and Divorce*, 13 Tex. Tech. L. Rev. 1285, 1351–57 (1982).

The Idaho legislature avoided the problem by expressing its intent clearly the first time, making its quasi-community statute apply to all property "which has heretofore been acquired or is hereafter acquired." Idaho Code § 15-2-201 (1979).

The Wisconsin quasi-community property provisions, by their terms, apply to property *"acquired* during marriage and *before the determination date"*. Wis. Stat. §§ 851.055, 861.02 (West 1987 pocket part). The determination date is elsewhere defined as the later of (1) the effective date of the act (January 1, 1986) or (2) the establishment of a marital domicile in Wisconsin. Wis. Stat. 766.01(5). Thus, the retroactive application of the Wisconsin statute should not be in doubt.

110. 1988 amendments, *supra* note 2, at §1.

111. *See supra* note 109.

112. 1988 Comments, *supra* note 15.

113. *See supra* note.

114. Cross, *supra* note 7, at 114–48.

115. *Id.* at 114–15.

116. *See Nichols Hills Bank v. McCool*, 104 Wash.2d 78, 701 P.2d 1114 (1985); *Edmonds v. Ashe*, 13 Wash.App. 690, 537 P.2d 813, *review denied* 86 Wash.2d 1001 (1975). A separate tort judgment creditor may, however, reach the tort-feasor-spouse's half-share of the community property even during the lives of both spouses, *de Elche v. Jacobsen*, 95 Wash.2d 237, 622 P.2d

835 (1980); and a premarital separate creditor may, depending on the circumstances, be able to reach a portion of the community property. RCW § 26.16.200.

117. *See* Cross, *supra* note 7, at 145–46.

118. RCW § 26.16.250.

119. *Marriage of Lindsey*, 101 Wash. 2d 299 (1984), *overruling Creasman v. Boyle*, 31 Wash 2d 345 (1948). *See also Warden v. Warden*, 36 Wash.App. 693, 676 P.2d 1037 (1984).

120. *Poole v. Schricte*, 39 Wash.2d 558, 569 (1951).

121. *Latham v. Hennessey*, 87 Wash.2d 550 (1976); *In re Estate of Thornton*, 81 Wash.2d 72 (1972). Moreover, the *Creasman* case, which *Lindsey* overruled, was itself a decedent's estate case.

122. *Estate of Brenchley*, 96 Wash. 223 (1917). *But see Estate of Hanau v. Hanau*, 730 S.W.2d at 666, in which the Texas Supreme Court declined to apply that state's quasi-community property approach to a decedent's estate, even though legislation made it applicable at divorce.

123. This much was suggested in *Latham*, 87 Wash.2d at 554.

124. Some support for extending the quasi-community property approach to the case of unmarried cohabitants can be found under California law. California has by statute addressed the problem of dividing property where one or both parties believed in good faith that there was a valid marriage. The statute provides the court shall divide, as if it were community property, "that property acquired during the union which would have been community property *or quasi-community property* if the union had not been void or voidable. The property shall be termed 'quasi-marital property.'" Calif. Civ. Code 4452 (West 1988 pocket part) (emphasis added). This section does not apply to decedent's estates. Laughran & Laughran, *Property and Inheritance Rights of Putative Spouses in California: Selected Problems and Suggested Solutions*, 11 Loy. L.A.L. Rev. 45, 52 (1977). But the California courts have quite clearly applied the quasi-marital property approach to succession cases. *Estate of Leslie*, 689 P.2d 133 (Cal. 1984); *Estate of Krone*, 189 P.2d 741 (Cal. 1948). Whether the California courts will similarly include quasi-community property in such quasi-marital property in an appropriate succession appears to be an open question. Laughran & Laughran, *supra* at 54. But the California courts' solicitude for putative spouses, demonstrated in the cited cases, makes it likely that they will. This result has been advocated in the Laughran article cited.

It would be an additional step, of course, to extend the quasi-community property concept from cases where one party innocently believed a valid marriage existed to cases where clearly neither had such a belief. Certainly California has not yet addressed this issue. But it seems entirely in keeping with the recent coalescence of doctrine in the innocent and meretricious relationship cases that such an application be made. *See Marvin v. Marvin*, 134 Cal. Rptr. 815 (1976); *Marriage of Lindsey*, 101 Wash.2d 299 (1984)).

125. RCW § 26.16.230.

126. *In re Patton's Estate*, 6 Wash.App. 464, 494 P.2d 238 (1972).

127. *Id.* at 476 (citations omitted). These principles were applied in *Patton's Estate* to find an election was intended where the testator had tried to leave his surviving spouse all property that was in the names of both husband and wife, while giving all other property to his children. The husband's disposition would have left his wife with over one-half of the community property in aggregate. What he did not know, since it had never been decided by a Washington court, was that Washington would follow the item theory, with the result that his wife was entitled not just to one-half of the community in aggregate, but to one-half of each item of community, regardless of how it was titled.

128. Where an election is made to accept testamentary gifts in lieu of community property it may constitute a taxable gift of the property over which the decedent did not have testamentary control. See *Commissioner v. Siegel*, 250 F.2d 339 (9th Cir. 1958), *acq.* 1964-2 C.B. 7 (election constitutes a gift of property given up reduced by the value of property received in consideration for the election).

129. The general rule is that an election should not be required where a will permits a reasonable interpretation that the decedent did

not intend to dispose of property not his own.

Thus, where the testator and the beneficiary are both interested in the property disposed of, the presumption is that the testator intended only to give what was his. By the use of such expressions as "all my lands" or "all my estate", the testator is deemed to intend to pass only his interest in that property, though it is otherwise if the testator owned a partial interest and devised the entire land by specific description.

T. Atkinson, *Handbook of the Law of Wills* 768 (1953).

130. The California Law Commission's Comment states that "the rule for quasi-community property is the same as for community property. The surviving spouse is not forced to an election unless the decedent's will expressly so provides or unless such a requirement should be implied to avoid thwarting the testator's apparent intent." Calif. Prob. Code § 101 (West 1988 pocket part) (Law Commission Comment).