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## Beware, Migrating Spouses, Texas Lacks a Quasi-Community Property Statute: It Could Be a Long Cold Winter

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# BEWARE, MIGRATING SPOUSES, TEXAS LACKS A QUASI-COMMUNITY PROPERTY PROBATE STATUTE: IT COULD BE A LONG COLD WINTER

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## INTRODUCTION

Bubba and Betty Lou were married and lived in Oklahoma, a common law property state. Bubba worked hard, and over the course of

twenty years he acquired a fairly large estate. Betty Lou managed their home and attended their six children. Bubba, Betty Lou, and their children appeared to be one big, happy family. However, Bubba loved his paramour, Emma, who lived in Texas. Bubba even decided to change his will, leaving all his accumulated property to Emma when he died. Bubba retired a few years after changing his will, sold his home, and moved his family to Texas, a community property state. Bubba rented a home for his family while he searched for that perfect little spread close to the town where Emma lived. Unfortunately for Betty Lou, Bubba died soon thereafter, and Bubba's will devised the entire estate to Emma. The Texas court probating Bubba's will could not reclassify the property acquired from Bubba's earnings as *community* property because it was acquired in Oklahoma and thus was characterized as Bubba's separate property. However, had the same property been acquired in a community property state, Betty Lou would have enjoyed ownership of one-half of the property they acquired while married. Thus, Bubba disinherited Betty Lou of all the property the couple acquired during their marriage.

Clyde and Juanita were married for ten years, and they too lived in a common law property state. This marriage was not Clyde's first, and he had children from his prior marriage. Clyde was the sole breadwinner in their household, while Juanita took care of their home. While married to Juanita, Clyde executed a will devising all his separate marital property to his children. Upon learning the contents of Clyde's will, Juanita wisely consulted an attorney who informed her that state *elective or forced share* laws could prevent her from being disinherited. Subsequently, Clyde received a job promotion which required that he and Juanita move to Texas. Again, Juanita consulted an attorney, who informed her that Texas had no elective share statute, and therefore, she was no longer protected in the event of Clyde's death. However, if Juanita divorced Clyde, Texas law *would* provide protection for her against loss of all property the couple accumulated while married. Juanita subsequently divorced Clyde. The court, using the concept of *quasi-community property*, equitably divided their marital property.

While both of these stories are fictitious, the consequences are real. Texas, a community property state, protects non-acquiring, migrating spouses in the event of marriage dissolution through divorce but not if the marriage is dissolved through death of a spouse.<sup>1</sup> Yet, the community property system assumes the existence of a marital partnership, where property acquired during a marriage is presumed to be acquired through the spouses' *joint* efforts. Furthermore, elementary principles of equity conflict with a policy permitting a spouse to be disinherited of all assets acquired during a marriage. However, the

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1. See *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 665 (Tex. 1987).

Texas Legislature refuses to follow the lead of some other community property states<sup>2</sup> that have rectified this unfairness.

This article briefly outlines the community property and common law property systems and gives a brief history of wills. Next follows a discussion of built-in protections provided spouses in the community and common law property systems. Third, this article addresses how a spouse migrating to Texas from a common law state can be effectively left without support when her property-acquiring spouse devises property the couple acquired during marriage to a third party. Fourth, this article contends that quasi-community property principles should be employed in probate contexts to provide widowed migrating, non-acquiring spouses equitable property distributions similar to the way they apply in cases of divorce in Texas and in accordance with the jurisdictions of California, Idaho, Washington, and Louisiana. Finally, this article argues the Texas Legislature should amend the Texas Probate Code and suggests proposed legislation to correct the present inequity.

## I. A BACKGROUND OF PROPERTY SYSTEMS

Two basic marital property systems exist in the United States: the community property system and the common law property system.<sup>3</sup> Under the community property system, the husband and wife own all property acquired during their marriage in equal, undivided shares, except property acquired by gift, devise, or descent.<sup>4</sup> Under the common law system, each spouse separately owns all property each acquires during a marriage unless they expressly agree to joint ownership.<sup>5</sup>

### A. *The Community Property System*

Commentators note that the community property system is of Germanic origin, implemented when wives who assisted their warrior husbands "were thought to be worthy of a share in the spoils."<sup>6</sup> Later,

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2. See *infra* p. 113 and note 137.

3. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 473 (5th ed. 1995). There are many variations among the states in both systems. *Id.* See also *Blackman v. Blackman*, 43 P.2d 1011, 1014 (Ariz. 1935); 41 C.J.S. *Husband and Wife* § 122 (1991) ("Although community property laws in the different states in which the system obtains are not uniform in all their details, they are in agreement in matters pertaining to fundamentals of the system.").

4. See 15A AM. JUR. 2D *Community Property* § 3 (1976). See also *McNabney v. McNabney*, 782 P.2d 1291, 1295 (Nev. 1989) ("After all, community property is, by definition, property owned in common by a husband and wife, with each having an undivided one-half interest."); *Lee v. Lee*, 247 S.W. 828, 832 (Tex. 1923) ("the community property belonging to both, in which their rights are unified and are equal").

5. See DUKEMINIER & JOHANSON, *supra* note 3, at 473.

6. TEX. CONST. art. XVI, § 15 (1876, amended 1987) *interp. commentary* (West 1993).

the community property concept became part of the general law of Spain, whose rulers introduced it to the New World when they conquered the southwestern part of North America.<sup>7</sup> This Spanish influence explains the location of the eight community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Washington, and Texas.<sup>8</sup> The Spanish referred to property acquired during marriage as *gananciales*<sup>9</sup> and defined ganancial property as:

that which husband and wife, living together, acquire during matrimony, by a common title, lucrative or onerous; or those which husband and wife, or either, acquire by purchase, or by their labor and industry, as also the fruits (*frutos*) of the separate property which each brings to the matrimony or acquires by lucrative title during the continuance of the partnership.<sup>10</sup>

Following community property principles, Texas characterizes property acquired during a marriage as either separate or community property.<sup>11</sup> The Texas Constitution provides, "All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse . . . ."<sup>12</sup> Thus, community property encompasses all other property acquired by either spouse during the marriage that is not the separate property of one of the spouses.<sup>13</sup>

Additionally, Texas follows the *inception of title* rule "which provides that property acquired during marriage takes it [sic] status as separate or community at the time of its acquisition, and its status

7. *See id.*

8. *See* DUKEMINIER & JOHANSON, *supra* note 3, at 474. Wisconsin may also be considered a community property state through its adoption of the Uniform Marital Property Act, which uses the term *marital property* to describe property acquired by spouses from earnings during their marriage and adopts community property principles. *See* WIS. STAT. ANN. §§ 766.01, 766.31 (Vernon 1986).

9. *See* BLACK'S LAW DICTIONARY 679 (6th ed. 1990).

10. *Cartwright v. Cartwright*, 18 Tex. 626, 634 (1857) (examining Spanish law to determine the extent of the rule that fruits of separate property belong to the marital community).

11. *See* TEX. FAM. CODE ANN. § 5.01 (West 1993). Clearly delineating separate from community property, the Texas Family Code states:

(a) A spouse's *separate property* consists of:

- (1) the property owned or claimed by the spouse before marriage;
- (2) the property acquired by the spouse during marriage by gift, devise or descent; and
- (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

(b) *Community property* consists of the property, other than separate property, acquired by either spouse during marriage.

*Id.* (emphasis added).

12. TEX. CONST. art. XVI, § 15 (1876, amended 1987).

13. *See* TEX. FAM. CODE ANN. § 5.01(b) (West 1993). The Texas Family Code, however, has added "recovery for personal injuries sustained by the spouse during marriage" to the list of separate property characterizations. *Id.* at § 5.01(a)(3).

becomes fixed at that time.”<sup>14</sup> Therefore, “[a]s long as separate property can be definitely traced and identified, it remains separate property regardless of the fact that it may undergo mutations and changes.”<sup>15</sup>

The concept at the heart of the community property system is that a husband and wife are involved in a *marital partnership*.<sup>16</sup> Through this partnership, the husband and wife decide how to make the most efficient use of their time and skills in order to maximize their assets. Thus, the married partners equally share any profits,<sup>17</sup> and they own

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14. *Welder v. Welder*, 794 S.W.2d 420, 427 (Tex. App.—Corpus Christi 1990, no writ) (citing *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 430 (Tex. 1970)). In *Welder*, the husband claimed that the funds used to purchase the property in dispute could be traced back to royalties generated from oil and gas interests he had inherited. *See id.* at 425. Although the royalty payments were deposited in the spouses' joint bank account, the court determined that the husband's use of the community-out-first presumption to trace the separate funds was legally correct. *See id.* at 433. Thus, the court held the disputed property was purchased from the husband's separate funds. *See id.* Texas courts have adopted the community-out-first doctrine to trace funds deposited in a married couple's joint bank account. *See id.* The community-out-first doctrine provides “that the community funds are drawn out first, before separate funds are withdrawn, and where there are sufficient funds at all times to cover the separate property balance in the account at the time of the divorce, [it is presumed] that the balance remains separate property.” *Id.* *See also* *Smith v. Buss*, 144 S.W.2d 529, 532 (Tex. 1940).

15. *Welder*, 794 S.W.2d at 425 (citing *Norris v. Vaughn*, 260 S.W.2d 676, 679 (Tex. 1953)). The inception of title rule and tracing become particularly important when community property is co-mingled with separate property in the acquisition of newly acquired property or when community property is used to enhance or complete payment for separate property. Some community property states, however, follow the “time of vesting” rule, prescribing that the character of the newly acquired property is established when it *unconditionally* vests in the acquirer. *See Short v. Short*, 890 P.2d 12, 17 (Wash. 1995). The *Short* court determined that a portion of the husband's employee stock options granted to him by his company was not vested and was for employment services to be rendered in the future. *See id.* The court held these options could not be characterized as community property. *See id.* *See also* JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 409 (3d ed. 1993). Other community property states, including California, follow a *pro rata sharing* rule, which requires that the two property estates share in the ultimate value of the newly acquired property according to their *pro rata* contribution. *See Shea v. Shea*, 169 Cal. Rptr. 490, 493 (Cal. Ct. App. 1980) (“In computing the community's pro rata share, only the amount by which community funds have reduced the loan principal is counted.”); *Jafeman v. Jafeman*, 105 Cal. Rptr. 483, 491 (Cal. Ct. App. 1972) (“The community has a *pro tanto* interest in such property in the ratio that the payments on the purchase price made with community funds bears to the payments made with separate funds.”). *See also* DUKEMINIER & KRIER, *supra*.

16. *See Brigden v. Brigden*, 145 Cal. Rptr. 716, 722-23 (Cal. Ct. App. 1978) (“The distinct feature of California marital property law is that the marital community is viewed as a partnership in which the spouses are equal partners.”); *De Blane v. Hugh Lynch & Co.*, 23 Tex. 25, 28-29 (1859) (holding that crops grown on the wife's separate property land were community property, because the crops were acquired by the couple's mutual industry and thus should not be considered an “increase of land”). *See also* DUKEMINIER & JOHANSON, *supra* note 3, at 476.

17. *See* DUKEMINIER & JOHANSON, *supra* note 3, at 476.

all property acquired "from earnings after marriage in equal undivided shares."<sup>18</sup>

In Texas, there is a strong presumption that property is community property when circumstances make the property's characterization doubtful.<sup>19</sup> A spouse claiming otherwise has the burden of proving by clear and convincing evidence that the property is separate.<sup>20</sup>

### B. *The Common Law Property System*

Currently, forty-one states have a common law basis for distributing marital property.<sup>21</sup> The common law property system originated in the common law of England.<sup>22</sup> Although the common law recognizes the unity of married persons, property acquired by a spouse during marriage is considered separate property.<sup>23</sup> Thus, "[t]he common law never developed a system of *community* property . . ."<sup>24</sup> Rather, under the common law property system, unless agreed otherwise, the husband and wife separately own the property each acquires.<sup>25</sup> Therefore, wages and property purchased from wages will be owned separately by the wage-earning spouse.<sup>26</sup> Furthermore, if one spouse earns a substantial income while the other works at a low-paying job, their marital acquisitions will belong proportionately to the spouse expending his or her income for the acquired property.

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18. *Id.* at 473. See *Magnolia Petroleum Co. v. Still*, 163 S.W.2d 268, 270 (Tex. Civ. App.—Texarkana 1942, writ ref'd) ("and in the community effects is that of real ownership, equal to that of the husband"); *Davis v. Davis*, 186 S.W. 775, 777 (Tex. Civ. App.—Texarkana 1916, writ dism'd) ("A married woman has as much interest in the community property as her husband, and has an equal right to its beneficial use.").

19. See TEX. FAM. CODE ANN. § 5.02 (West 1993). See, e.g., *Gleich v. Bongio*, 99 S.W.2d 881, 883 (Tex. 1937) (holding that when property is purchased partly with separate funds of one spouse and partly on the *credit* of the community, the community estate acquired a part interest in the property); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965) ("The plain wording of [Article 4619, Section 1, Vernon's Texas Civil Statutes] creates a rebuttable presumption that all property possessed by a husband and wife when their marriage is dissolved is their community property and imposes the burden upon the one asserting otherwise to prove the contrary by satisfactory evidence.").

20. See TEX. FAM. CODE ANN. § 5.02 (West 1993).

21. See DUKEMINIER & JOHANSON, *supra* note 3, at 535.

22. See Merrie Chappell, *A Uniform Resolution To The Problem A Migrating Spouse Encounters At Divorce and Death*, 28 IDAHO L. REV. 993, 993 (1992). While it is not known why the English rejected the community property system, it has been hypothesized that the common law property system was more agreeable "with the highly centralized English feudal system, dominated by a powerful king, which required succession of power (land) from father to son and fealty between a (male) lord and a (male) tenant. Women were supported by their husbands, but they were denied an ownership share of, or power over, their husbands' acquets." DUKEMINIER & JOHANSON *supra* note 3, at 474.

23. See Chappell, *supra* note 22, at 993.

24. *Id.*

25. See DUKEMINIER & JOHANSON, *supra* note 3, at 473.

26. See *id.* at 474.

Early common law property principles included rules giving clear domination over property owned by either spouse to the husband.<sup>27</sup> While the husband could independently perform legal acts in connection with his property, the wife could not do the same with her property.<sup>28</sup> Further, the husband had to be a party to any transaction involving an *inter vivos* conveyance or testamentary transfer by the wife.<sup>29</sup> Moreover, the common law gave the husband

considerable rights in her property, independent of her consent. In the case of personal property it is frequently, though probably somewhat inaccurately, said that he had complete control over it during his life. He could buy and sell it, it was liable to execution for his debts, and he could dispose of it by will, an exception being made in the last case for chattels real. Only if the husband predeceased the wife did what was left of her chattels become hers again.<sup>30</sup>

Though each wife was denied any power over, or ownership in, their husband's acquisitions, women typically were supported by their husbands.<sup>31</sup> Further, early common law property rules included the concepts of *dower*<sup>32</sup> and *curtesy*,<sup>33</sup> but today, these concepts "have been almost universally abolished or altered by statute."<sup>34</sup>

Legislation passed in the nineteenth and early twentieth centuries in the United States "abrogated many of the common law disabilities of the married woman, separating firmly her property from her husband's, and making the marriage partners more equal in the eyes of the law."<sup>35</sup> Entitled *Married Women's Property Acts*, these laws provided that a married woman would have the right to own and transfer property, to enter into contracts, and to sue or be sued as if she were not married.<sup>36</sup>

Presently, although the common law system does not follow the tenet that property acquired during marriage should be shared equally, almost all of the common law property states have statutes providing a deceased spouse an elective or forced share in the deceased spouse's estate, which protects a non-acquiring, surviving

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27. See CHARLES DONAHUE, JR., ET AL., *PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 563 (1974).

28. See *id.*

29. See *id.* *Inter vivos* means "from one living person to another." BLACK'S LAW DICTIONARY 821 (6th ed. 1990).

30. DONAHUE ET AL., *supra* note 27, at 564.

31. See DUKEMINIER & JOHANSON, *supra* note 3, at 474.

32. Dower is "the provision which the law makes for a widow out of the lands or tenements of her husband." BLACK'S LAW DICTIONARY 492 (6th ed. 1990).

33. Curtesy is the estate in property owned by a woman that was granted by common law to her husband upon her death. See BLACK'S LAW DICTIONARY 383 (6th ed. 1990).

34. JOHN E. CRIBBET ET AL., *PROPERTY* 324 (7th ed. 1996).

35. DONAHUE ET AL., *supra* note 27, at 565.

36. See *id.*



spouse from divestment of all property acquired during marriage.<sup>37</sup>

37. See, e.g., ALA. CODE § 43-8-70 (1991); FLA. STAT. ANN. §§ 732.201, 205-213 (West 1995); KAN. STAT. ANN. §§ 59-6a201-217 (1994); MISS. CODE ANN. §§ 91-5-25, 27, 29 (1972); N.J. STAT. ANN. §§ 3B:8-1 - 3B:8-19 (West 1983). Alabama's elective share statute provides:

(a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of the estate. The elective share shall be the lesser of:

- (1) All of the estate of the deceased reduced by the value of the surviving spouse's separate estate; or
- (2) One-third of the estate of the deceased.

ALA. CODE § 43-8-70.

Floridian surviving spouses are protected from disinheritance under the state's "Right to elective share" statute which states, "The surviving spouse of a person who dies domiciled in Florida shall have the right to a share of the estate of the deceased spouse as provided in this part, to be designated the elective share." FLA. STAT. ANN. § 732.201. Florida's elective share is thirty percent of the fair market value of all assets of the deceased as of the date of death after deducting valid claims against the estate and all mortgages, liens, or other security interests on the assets. See FLA. STAT. ANN. §§ 732.206-207.

Kansas law provides a right of election to the surviving spouse or to the personal representative of a deceased surviving spouse or on behalf of a disabled surviving spouse. See KAN. STAT. ANN. § 59-6a212. The elective-share amount is determined by the length of time the spouse and the decedent were married to each other with a ceiling of fifty percent of the *augmented* estate for a marriage of fifteen or more years. See KAN. STAT. ANN. § 59-6a202. The Kansas Probate Code lists property that constitutes the decedent's *augmented* estate in section 59-6a205. See KAN. STAT. ANN. § 59-6a205.

The Mississippi Code provides for disinherited spouses as follows:

When a husband makes his last will and testament and does not make satisfactory provision therein for his wife, she may, at any time within ninety (90) days after the probate of the will, file in the office where probated a renunciation to the following effect, viz.: "I, A B, the widow of C D, hereby renounce the provision made for me by the will of my deceased husband, and elect to take in lieu thereof my legal share of his estate." Thereupon she shall be entitled to such part of his estate, real and person, as she would have been entitled to if he had died intestate, except that, even if the husband left no child nor descendant of such, the widow, upon renouncing, shall be entitled to only one-half (1/2) of the real and personal estate of her deceased husband. The husband may renounce the will of his deceased wife under the same circumstances, in the same time and manner, and with the same effect upon his right to share in her estate as herein provided for the widow.

MISS. CODE ANN. § 91-5-25. Furthermore, section 91-5-27 of the Mississippi Code states,

If the will of the husband or wife shall not make *any* provision for the other, the survivor of them shall have the right to share in the estate of the deceased husband or wife, as in case of *unsatisfactory* provision in the will of the husband or wife for the other of them. In such case a renunciation of the will shall not be necessary, but the rights of the survivor shall be as if the will had contained a provision that was unsatisfactory and it had been renounced.

MISS. CODE ANN. § 91-5-27 (emphasis added).

Under New Jersey's elective share statutes, the surviving spouse's elective share amount is one-third of the decedent's augmented estate. See N.J. STAT. ANN. § 3B:8-1. In New Jersey, the decedent's augmented estate includes lifetime transfers of property without adequate and full consideration if the property remained under the testator's control or possession or if the property's value exceeded \$3,000.00 and was

Moreover, the elective share is enforceable against all property owned by the decedent spouse, including but not limited to property acquired with earnings.<sup>38</sup>

### C. A Brief Overview of Wills

The right to devise property at one's death is a valuable right, a separate and identifiable stick in the bundle of rights called property that "has been part of the Anglo-American legal system since feudal times."<sup>39</sup> However, the right to devise one's property is clearly a civil, or legislated, right and not a natural right, because even the right to own property is not inherent.<sup>40</sup> However, it may seem to be a natural right because of the "long and inveterate custom" of land ownership.<sup>41</sup> Further, laws granting the right of an individual to devise his property have long been thought by some to be in society's best interest.<sup>42</sup> For example, in earlier times, when primogeniture<sup>43</sup> laws prevailed and heirs at law could not be disinherited of property, they often were "disobedient and headstrong [and] defrauded creditors of their just debts."<sup>44</sup> Furthermore, these strict common law rules of inheritance dictated which offspring would inherit property and often prohibited dividing estates even if family circumstances compelled it.<sup>45</sup> For these and other reasons, in time, governing bodies passed laws allowing an owner to dispose of his property or a part of it by testament, "according to the pleasure of the deceased," and this disposition became the decedent's will.<sup>46</sup>

Texas law recognizes a testator's right to dispose of property as he wishes.<sup>47</sup> Texas laws dealing with the execution, revocation, validity,

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transferred within two years of the testator's death, unless such transfer was made with written consent or joinder of the surviving spouse. See N.J. STAT. ANN. § 3B:8-3, -5. Furthermore, New Jersey requires that at the time of the decedent spouse's death, the surviving spouse and the decedent were living together in one habitation in order for the surviving spouse to take under the state's elective share statutes. See N.J. STAT. ANN. § 3B:8-1.

38. See *id.*

39. *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (holding that a statute prohibiting the devise or descent of certain fractional interests in Indian land was an unconstitutional taking of a property right without compensation).

40. See 2 WILLIAM BLACKSTONE, COMMENTARIES \*11.

41. *Id.*

42. See *id.* at 11-12.

43. Primogeniture is the eldest son's right to succeed to his ancestor's estate to the exclusion of younger male siblings and all female siblings. See BLACK'S LAW DICTIONARY 1191 (6th ed. 1990).

44. BLACKSTONE, *supra* note 40, at \*12.

45. See *id.*

46. *Id.*

47. See TEX. PROB. CODE ANN. § 58(a) (West Supp. 1997); *Anderson v. Menefee*, 174 S.W. 904, 908 (Tex. Civ. App.—Fort Worth 1915, writ ref'd) (holding that under Texas law, the deceased had the right to do with his property as he pleased "with such limitations only as prescribed by law"). See also *In re Goods Estate*, 274 S.W.2d 900, 902 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.) (holding that citizens of Texas

and effects of wills and intestate succession are found in the Texas Probate Code.<sup>48</sup> The Texas Probate Code states, "Every person competent to make a last will and testament may thereby devise and bequeath all the estate, right, title, and interest in property the person has at the time of the person's death, subject to the limitations prescribed by law."<sup>49</sup> Thus, a testator may direct the disposition of his estate to whomever he wishes by way of a will or by the laws of intestacy. Moreover, a testator may even disinherit an heir if he chooses.<sup>50</sup>

Texas courts strive to carry out a testator's intent, as evidenced in his will, regarding the disposition of his property.<sup>51</sup> Furthermore, Texas courts prohibit other individuals, after the testator's death, from altering the testator's will to defeat the testator's intentions.<sup>52</sup> Accordingly, courts follow the *plain meaning rule* and forbid the introduction of extrinsic evidence to give the testator's written words a different meaning from that plainly stated.<sup>53</sup> Courts adhere to this rule even though the equity of the devise is questionable.<sup>54</sup> Nevertheless, because allowing testamentary transfer of property was created by civil or municipal law, it has long been recognized, particularly in the United States, that state governments have broad authority to dictate the rules governing descent and distribution of property.<sup>55</sup>

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may dispose of their property "without regard to the ties of nature and relationship, and may do so in defiance of the rules of justice or the dictates of reason . . .").

48. The Texas Probate Code descends in part from Spanish and Mexican law and was influenced by the English Statute of Frauds and certain Virginia statutes. See 9 EDWARD W. BAILEY, TEXAS PRACTICE: TEXAS LAW OF WILLS § 265 (1968).

49. TEX. PROB. CODE ANN. § 58(a) (West Supp. 1997).

50. See *id.* § 58(b)(1)-(2).

51. See *Huffman v. Huffman*, 339 S.W.2d 885, 889 (Tex. 1960) (refusing to construe that the testator's holographic will impliedly devised stock in an apartment building as part of testator's *personal* property devise in the will's first paragraph, when the testator later addressed income from the stock but did not expressly devise the stock).

52. See *id.* The Texas Supreme Court in *Huffman v. Huffman* stated:

The very purpose of requiring a will to be in writing is to enable the testator to place it beyond the power of others, after he is dead, to change or add to his will or to show that he intended something not set out in, or different from, that set out in his will.

*Id.*

53. See, e.g., *Odeneal v. Van Horn*, 678 S.W.2d 941, 942 (Tex. 1984) (holding that when language of spouses' joint will is clear on its face, extrinsic evidence is inadmissible to show a contrary meaning); *Shriner's Hosp. for Crippled Children v. Stahl*, 610 S.W.2d 147, 151 (Tex. 1981) ("The intent of the testator . . . must be ascertained from the language used within the four corners of the instrument.").

54. See *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 666 (Tex. 1987) ("[T]he will should usually be enforced regardless of the equity of the devises or bequests within."); *Huffman*, 339 S.W.2d at 888 (determining that testator died intestate as to certain stock not expressly devised in testator's will, although the will suggested that testator believed that during her life she had given the stock to her sister and brother and extrinsic evidence showed that testator wanted her brother and sister to have the stock).

55. See *Hodel v. Irving*, 481 U.S. 704, 717 (1987) (citing *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) ("Nothing in the Federal Constitution forbids the legislature

## II. PROBATE PROTECTIONS FOR NON-ACQUIRING SPOUSES

### A. Community Property Protections<sup>56</sup>

The community property system presumes that assets acquired during a marriage belong to the community<sup>57</sup> and that each spouse has equal ownership rights in the property.<sup>58</sup> Furthermore, each spouse is given the power to devise a one-half interest in the community property to any person or entity that he designates.<sup>59</sup> Accordingly, the surviving spouse has all ownership rights to the other one-half interest that is *not* subject to the deceased spouse's testamentary disposition. Moreover, if the will of a deceased spouse attempts to devise all or a part of the surviving spouse's community property interests to third parties and at the same time gives the surviving spouse some benefit, the surviving spouse must elect to either disregard the will and take his own one-half share of the community property or accept the will's disposition of his property along with the benefit devised by the deceased spouse.<sup>60</sup>

Additionally, a deceased spouse can include in his will a *forced election* provision that his surviving spouse surrender, after her spouse's death, her one-half community property interest to be placed in a trust and combined with his one-half interest in all their marital prop-

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of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."); *Jefferson v. Fink*, 247 U.S. 288, 294 (1918) ("Like other rules of descent it was subject to change by the law-making power . . .").

56. Each community property state has probate statutes mandating a certain distribution of a deceased spouse's separate and community property should the deceased spouse die without a will. However, these intestacy laws are beyond the scope of this article.

57. See TEX. FAM. CODE ANN. § 5.02 (West 1993). "Property possessed by either spouse during . . . marriage is presumed to be community property." *Id.* See also *Phillips v. Vitemb*, 235 F.2d 11, 14 (5th Cir. 1956); *Hardee v. Vincent*, 147 S.W.2d 1072, 1073 (Tex. 1941).

58. See, e.g., CAL. PROB. CODE § 100 (West 1991). "Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent." *Id.* See also *Magnolia Petroleum Co. v. Still*, 163 S.W.2d 268, 270 (Tex. Civ. App.—Texarkana 1942, writ ref'd) ("[The wife's] right of property . . . in the community effects is that of real ownership, equal to that of the husband."); *Davis v. Davis*, 186 S.W. 775, 777 (Tex. Civ. App.—Texarkana 1916, writ dism'd) ("A married woman has as much interest in the community property as her husband, and has an equal right to its beneficial use.").

59. See, e.g., ARIZ. REV. STAT. ANN. § 14-3101A (West 1995) ("Upon the death of a person . . . his share of community property devolves to the persons to whom the property is devised by his last will . . ."); IDAHO CODE § 15-3-101 (1996) ("[U]pon the death of a husband or wife, the decedent's share of their community property devolves to the persons to whom it is devised by his last will . . .").

60. See *Wright v. Wright*, 274 S.W.2d 670, 674-75 (Tex. 1955) (holding since testator's will attempted to devise entire community interest in certain marital properties of the testator and his wife, the surviving spouse was required to elect either to take under the testator's will or renounce the will and take her one-half interest in all of their community property).

erty, with the trust income payable to the surviving spouse for life.<sup>61</sup> This so-called *widow's election* was developed in community property states during the time when husbands typically were the managers of the community estate and wives had little or no business experience.<sup>62</sup> Today, widow's elections still may be utilized in some instances to obtain certain tax advantages.<sup>63</sup> Nevertheless, the surviving spouse retains the right to *elect* to maintain ownership of her one-half interest in the community property and forego the election to take under the deceased spouse's will. Therefore, in community property states, under their probate laws regarding testate succession, a non-acquiring spouse has protection as to ownership of *at least* one-half of the total community property estate, unless the *surviving spouse* elects otherwise.

### B. Common Law Property Protections

Along with certain support rights,<sup>64</sup> all common law property states, except Georgia,<sup>65</sup> provide the surviving spouse with an option of an *elective or forced share* of all the property acquired by the deceased spouse.<sup>66</sup> Elective share statutes were promulgated to protect the spouse who manages the home and family, in recognition of the contributions, though not in dollars and cents, of that spouse to the marital partnership.<sup>67</sup> Elective share statutes allow a surviving spouse to

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61. See DUKEMINIER & JOHANSON, *supra* note 3, at 538. In this scenario, masculine pronouns indicate the deceased spouse and feminine pronouns indicate the surviving spouse. Obviously, this could also be considered a widower's election.

62. *See id.*

63. *See id.*

64. Although beyond the scope of this article, it may be important to note that surviving spouses in both common law and community property regimes have rights to support in connection with property owned by marital partners, and these rights are generally the same for both property regimes. *See id.* at 476. A partial list of surviving spousal rights of support, granted either by state or federal law, that give equal protection to acquiring and non-acquiring spouses are social security benefits, private pension plan benefits, homestead rights, family allowances, and personal property set-asides. *See id.* at 476-82.

65. *See id.* at 483 n.1. Although section 53-5-2 of the Georgia Code provides short term protection to a surviving spouse and minor children through a twelve-month allowance from the estate of the deceased spouse, see GA. CODE ANN. § 53-5-2 (1995), Georgia gives almost "absolute testamentary freedom for the married testator" to disinherit his spouse. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 137 (1994) (noting that "Georgia alone affords the surviving spouse no protection in the form of dower or forced share"). *See* GA. CODE ANN. § 53-2-9 (1995). However, the deceased spouse's will that completely disinherits his spouse is subject to close scrutiny for "evidence of aberration of intellect, or collusion, or fraud, or any undue influence or unfair dealing," in which case probating the will is refused. *Id.* *See* Brashier, *supra*, at 137 n.180.

66. *See* DUKEMINIER & JOHANSON, *supra* note 3, at 483-84.

67. *See id.* at 484 (quoting *Elective Share of Surviving Spouse*, Unif. Prob. Code general comments on art. II, part 2 (1990)). Professors Dukeminier and Johanson, however, cite several commentators who question and criticize these statutes as being second best to the community property system, where property acquired by the mar-

take the property devised to her under the terms of the deceased spouse's will or to renounce the will and take the fractional default share that the statute provides.<sup>68</sup> If there are children of the marriage, this fraction is generally one-third of all the decedent's estate, including both real and personal property.<sup>69</sup> However, some state elective share statutes limit the surviving spouse's interest in the deceased spouse's property to a *life estate* in one-third or one-half of the property.<sup>70</sup>

### III. A MIGRATING, NON-ACQUIRING SPOUSE MAY BE DISINHERITED IN PROBATE IN TEXAS

Texas courts consistently apply three conflict-of-laws principles when a married couple migrates to Texas with marital property that was acquired outside of Texas:<sup>71</sup>

First, the laws of the couple's domicile at the time of property acquisition determine the property ownership. Second, moving the property to another state or changing domicile does not change a person's legal interest in that property. Third, the laws of the state of domicile at the time of death govern the disposition of property.<sup>72</sup>

In so doing, property acquired in a common law jurisdiction by one spouse, while married, and brought into Texas upon the couple's relocation retains its common law separate property label. But it is no longer subject to the common law state's elective share provisions that would protect the non-acquiring spouse from losing all interest in such property. Furthermore, because the property retained its separate property classification, the non-acquiring spouse is not protected by Texas's community property statutes.

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riage partners is actually co-owned. See *id.* at 486-89 (citing John H. Langbein and Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP., PROB. & TR. J. 303, 306 (1987); Margaret V. Turano, *UPC Section 2-201: Equal Treatment of Spouses?*, 55 ALB. L. REV. 983, 1003-06 (1992); Mary L. Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 J.L. & INEQUALITY 137 (1991); Mary M. Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 877).

68. *Id.* at 484.

69. See CRIBBET ET AL., *supra* note 34, at 325.

70. See DUKEMINIER & JOHANSON, *supra* note 3, at 487. For example, Connecticut's elective share statute allows the surviving spouse the election of a one-third life estate in the value of real and personal property whether owned legally or equitably by the decedent at his death. See CONN. GEN. STAT. ANN. § 45a-436 (West 1996). Whereas, election under the Massachusetts statute varies based on who in addition to the spouse survives the decedent. See MASS. GEN. LAWS ANN. ch. 191, § 15 (West 1990). In certain situations the surviving spouse can take only one-third of the personal and real property of the decedent. See *id.*

71. See McClain v. Holder, 279 S.W.2d 105 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.); Blethen v. Bonner, 71 S.W. 290 (Tex. Civ. App.—1902, writ ref'd); Oliver v. Robertson, 41 Tex. 422, 425 (1874). See also Chappell, *supra* note 22, at 1008.

72. Chappell, *supra* note 22, at 1008.

A. *The Character of Property is Defined by the Laws of the State Where the Property is Acquired*

Generally, the law of the state where a person is domiciled at the time of property acquisition determines that property's characterization.<sup>73</sup> Thus, whether property acquired during marriage is characterized as community property or separate property depends upon a spouse's domicile at the time of acquisition.<sup>74</sup> Moreover, if either or both spouses move to a new state, the characterization of the property as community or separate is not affected by the change in domicile.<sup>75</sup> For example, when a spouse's income in a common law property state is characterized as separate property,<sup>76</sup> then whatever that spouse acquires with his earnings is also characterized as his separate property.<sup>77</sup> Furthermore, if the spouses subsequently move to Texas, a community property state, conflict of laws precepts do not permit the character of the money or the property purchased with the separate property funds to be re-characterized as community property simply by crossing a state line.<sup>78</sup> Thus, Texas is bound to recognize such money earned or property acquired with separate property earnings as the acquiring spouse's separate property.<sup>79</sup> For example, in *Blethen v. Bonner*,<sup>80</sup> the Texas Court of Civil Appeals determined that Texas land purchased by a married man was his separate property because it was purchased with separate funds from a milk business he owned in Massachusetts, a common law state.<sup>81</sup> The court held his former wife had no claim to the property even though the money was earned and the Texas land was purchased during their marriage.<sup>82</sup> The court explained, "[W]e have no power to alter the status of property fixed and

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73. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 234(1), 258 (1971). Section 234(1) states that the effect of marriage upon the character of land, acquired by either spouse during coverture, is determined by the law where the land is located. See *id.* § 234(1). Similarly, section 258 states that personal property acquired by either spouse during marriage takes the character determined by the local law of the state which has the most significant relationship to the spouse and the property in question. See *id.* § 258. However, absent an agreement between the spouses, greater weight will be given to the law of the state in which the property was acquired. See *id.* See also *Oliver v. Robertson*, 41 Tex. 422, 425 (1874) (holding that while married, Robertson acquired money in Georgia, a common law property state, and used it to purchase Texas property; thus the Texas property was characterized as his separate property).

74. See *Oliver*, 41 Tex. at 425.

75. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259 (1971).

76. See DUKEMINIER & KRIER, *supra* note 15, at 410-11.

77. See *id.*

78. See Chappell, *supra* note 22, at 1008.

79. See *Welder v. Welder*, 794 S.W.2d 420, 425 (Tex. App.—Corpus Christi 1990, no writ) (holding that a ranch purchased from funds in a community bank account was the husband's separate property because the husband satisfactorily traced the funds to his earnings from separate property royalty interests).

80. 71 S.W. 290 (Tex. Civ. App.—1902, writ ref'd).

81. See *id.* at 291.

82. See *id.*

vested by such laws before its introduction into this state.”<sup>83</sup> The court regretfully stated its decision could not be affected by the harsh or cruel treatment that Blethen’s wife could show as a result of their sixteen-year separation before Blethen secured a Texas divorce without his wife’s knowledge.<sup>84</sup>

### B. *The Law of a Decedent’s Domicile Controls Succession*

When a person dies, the laws of the state where the decedent lived at the time of his death determine the disposition of his personal property and his real property located in that state.<sup>85</sup> The rationales behind this rule include: (1) the decedent’s domicile state has the dominant interest in any issues regarding the decedent and (2) the utilization of only one state’s laws protects the parties’ expectations by adding certainty, predictability, and uniformity to questions surrounding property ownership.<sup>86</sup>

### C. *Texas Has No Elective Share Statute*

If the property acquired in a common law property state kept its original separate property characterization and was also subject to that state’s elective share statutes, then the surviving, non-acquiring, migrating spouse would be protected from disinheritance when her acquiring spouse dies.<sup>87</sup> However, if a couple migrates to Texas with property acquired by one spouse while domiciled in a common law state, then the non-acquiring spouse will have no such protection because Texas does not have an elective share statute. Texas instead provides community property protections for non-acquiring spouses. However, in a situation where the migrating couple acquires no jointly owned community property, the non-acquiring spouse may be left “without any means of support after [the acquiring spouse] dies.”<sup>88</sup>

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83. *Id.*

84. *See id.* at 291-92.

85. *See* DUKEMINIER & KRIER, *supra* note 15, at 411. Real property located in another state will be governed by the laws of the situs of the property. *See id.* *See also* Holman v. Hopkins, 27 Tex. 38, 39 (1863) (holding that a will, satisfying Texas probate formalities though not valid in Virginia where it was executed, was valid to pass title to the testatrix’s real property in Texas even though Virginia refused to admit the will to probate in that state for disposition of her personal property).

86. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 cmt. b (1971).

87. *See* DUKEMINIER & JOHANSON, *supra* note 3, at 483-84. The use of a feminine pronoun when speaking of the non-acquiring spouse follows statistics that men tend to earn higher wages than women and acquire more property. *See* Chappell, *supra* note 22, at 994 n.11 (citing U. S. Bureau of Labor statistics in Frank L. Spring, *In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage*, 9 N.M. L. Rev. 113, 113 (1978-79)).

88. *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 667 (Tex. 1987) (Spears, J., concurring).



D. *The Texas Supreme Court Refused to Extend to Probate the Quasi-Community Property Statutory Protection Granted Migrating, Non-Acquiring Spouses in Divorce*

In 1981, the Texas Legislature addressed the non-acquiring, migrating spouse dilemma in a dissolution of marriage setting through passage of section 3.63(b) of the Texas Family Code.<sup>89</sup> The Texas Legislature was concerned with the "[i]nequities [that] arise when Texas courts divide property in marriage dissolution suits that was acquired while a couple lived in a common law state."<sup>90</sup> Section 3.63(b) of the Texas Family Code provides:

In a decree of divorce or annulment the court shall also order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage:

- (1) property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition; or
- (2) property that was acquired by either spouse in exchange for real or personal property, and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.<sup>91</sup>

This statute utilizes the concept of *quasi-community property*.<sup>92</sup>

In 1982, the Texas Supreme Court formally "adopted" this statute in *Cameron v. Cameron*.<sup>93</sup> The *Cameron* court agreed with the courts of New Mexico, Idaho, Arizona, and Nevada that common law separate property should not be treated the same as separate property in community property law states.<sup>94</sup> The court explained that both the common law and community property systems provide equitably for the welfare of spouses upon dissolution of a marriage.<sup>95</sup> Moreover, the court stated,

In community property states, like Texas, each spouse has legal title in half of the property accumulated during the marriage. In common law states, the same property may belong to one spouse, but

89. Act of Sept. 1, 1981, 67th Leg., R.S., ch. 712, § 1, 1981 Tex. Gen. Laws 2656 (current version at TEX. FAM. CODE ANN. § 3.63(b) (West 1993)).

90. HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, Tex. H.B. 753, 67th Leg., R.S. (1981). This bill analysis makes no mention of inequitable property distribution in the event of marriage dissolution through the death of a spouse but rather limits discussion to marriage dissolution lawsuits (divorces and annulments). *See id.*

91. TEX. FAM. CODE ANN. § 3.63(b) (West 1993).

92. *See* DUKEMINIER & JOHANSON, *supra* note 3, at 541.

93. 641 S.W.2d 210, 222 (Tex. 1982).

94. *See id.* at 221 (citing *Hughes v. Hughes*, 573 P.2d 1194 (N.M. 1978); *Berle v. Berle*, 546 P.2d 407 (Idaho 1976); *Braddock v. Braddock*, 542 P.2d 1060 (Nev. 1975); *Rau v. Rau*, 432 P.2d 910 (Ariz. Ct. App. 1967)).

95. *See id.* at 222-23.

the other spouse is found to have acquired an equitable interest that can be vested upon dissolution of the marriage.<sup>96</sup>

The *Cameron* court painstakingly addressed concerns that section 3.63 of the Texas Family Code impermissibly allowed divestment of a spouse's *separate* property upon dissolution of the marriage due to divorce,<sup>97</sup> which the Texas Supreme Court held unconstitutional in *Eggemeyer v. Eggemeyer*.<sup>98</sup> The *Eggemeyer* court concluded that "[c]ommon law marital property is not and should not be regarded by Texas courts as 'separate' property in the context of our community property law on divorce."<sup>99</sup> Moreover, the court explained that courts in other community property jurisdictions had also "looked behind the label when dividing marital property" acquired during marriage.<sup>100</sup>

In *Estate of Hanau v. Hanau*,<sup>101</sup> a case decided five years after *Cameron*, the Texas Supreme Court faced the question of whether the *Cameron* quasi-community property rule should apply in cases where a marriage is dissolved due to the death of a spouse.<sup>102</sup> The Hanau's were married in Illinois, a common law property state, and five years later they moved to Texas.<sup>103</sup> While domiciled in Texas, Mr. Hanau prepared a will devising his separate property to his children from a former marriage.<sup>104</sup> Upon his death and in response to a petition filed by one of his children seeking removal of Mrs. Hanau as executrix of Mr. Hanau's estate, the court was asked to decide whether stock, purchased by Mr. Hanau with separate funds earned while married and living in Illinois, remained separate property or should be reclassified as community property.<sup>105</sup>

Reasoning that the Texas Supreme Court could not have intended the quasi-community property concept to apply only to divorce proceedings, the *Hanau* trial court ruled that because the stock would have been considered community property if acquired while the

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96. *Id.* at 222.

97. *See id.* at 213-17.

98. 554 S.W.2d 137 (Tex. 1977). The *Eggemeyer* court determined that the new Texas Family Code provision was simply a codification of an earlier statute that allowed a court to order a division of the estate of the divorcing parties, taking into consideration the rights of each party and the needs of their children. *See id.* at 139. *Estate of the parties* in that statute had been construed by the Texas Supreme Court to mean community property, and thus division of the parties' property was limited to their community property. *See id.* (citations omitted). The *Eggemeyer* court found it was the Texas Legislature's intent "to keep the law unchanged and as it was under [the earlier statute]." *Id.*

99. *Cameron v. Cameron*, 641 S.W.2d 210, 221 (Tex. 1982).

100. *Id.*

101. 730 S.W.2d 663 (Tex. 1987).

102. *See id.* at 664.

103. *See id.*

104. *See id.*

105. *See id.* at 665.

Hanau were married and domiciled in Texas, the stock should be considered community property.<sup>106</sup>

However, the court of appeals reversed, determining that the quasi-community property Family Code provision applied only in divorce and not probate contexts.<sup>107</sup> The Texas Supreme Court agreed.<sup>108</sup> The court reasoned, "[T]he statutory regulation of rights of succession has been regarded as something apart from the determination of property rights between living persons."<sup>109</sup> Furthermore, the court noted that other community property states extending the rule of quasi-community property to probate contexts had done so only by statutory authority.<sup>110</sup> Therefore, since the Texas Legislature amended the Texas Family Code to include the quasi-community property rule but did not amend the Texas Probate Code, the court was not required to apply quasi-community property concepts to Mr. Hanau's stock.<sup>111</sup>

#### IV. TEXAS SHOULD PROTECT MIGRATING, NON-ACQUIRING SPOUSES IN PROBATE

In *Hanau*, the Texas Supreme Court clearly stated it saw no need for a statute extending quasi-community property principles to probate proceedings.<sup>112</sup> In fact, the court reasoned that to extend the *Cameron* decision to probate contexts "would make a shambles of 150 years of Texas probate law [and] without a clear showing of supporting case law, statutory authority or a clear need for such broad power in the trial court, we refuse to do so."<sup>113</sup> However, case law and statutory authority in other community property jurisdictions reveal that the quasi-community property concept can be utilized in a probate context to effect fair and equitable property distributions.<sup>114</sup> Furthermore, to uphold statutes that effectively divest non-acquiring spouses of property rights held in common law property states upon migration to Texas is unfair and may encourage a spouse to obtain a divorce to avoid the possibility that she may be left with no property acquired during the marriage should her spouse devise the common law separate property to others under the mistaken belief that the property was subject to elective share statutes.

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106. *See id.*

107. *See id.* (citing *Estate of Hanau v. Hanau*, 721 S.W.2d 515 (Tex. App.—Corpus Christi 1986), *rev'd in part, aff'd in part*, 730 S.W.2d 663 (Tex. 1987)).

108. *See id.*

109. *Id.* (quoting *Rau v. Rau*, 432 P.2d 910, 914 (Ariz. Ct. App. 1967)).

110. *See id.* at 665.

111. *See id.* at 666.

112. *See id.*

113. *Id.*

114. *See infra* pp. 113-121.

A. *Quasi-Community Property Principles Can Be Utilized in a Probate Context*

The *Hanau* court suggested that to extend the quasi-community property concept to Texas probate law would impermissibly interfere with an owner's right to distribute his estate.<sup>115</sup> However, Texas courts have long recognized that property law gives an owner the right to dispose of his property as he chooses only to the extent that it is not prohibited by law.<sup>116</sup> Furthermore, a property owner does not have an inherent right to distribute his property upon his death; rather, he is allowed this right by law.<sup>117</sup> Therefore, it would be perfectly permissible for a Texas probate statute to label property acquired by a married person while domiciled in a common law property state and not acquired by gift, devise, or descent as community property. Such property could be subjected to the same rules of testamentary disposition and succession as is Texas community property should one of the spouses die while domiciled in Texas. Such a statute would simply be a state's exercising its legislative right to control testamentary disposition of property, a right that is "of almost universal acceptance."<sup>118</sup>

Therefore, the Texas Legislature may amend the Texas Probate Code, because it has the authority to regulate descent and succession of property within the state's borders.<sup>119</sup> The Texas Legislature created the laws governing the distribution and succession of property, and it retains the power to alter those laws to incorporate the quasi-community property concept.

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115. *Hanau*, 721 S.W.2d at 666 ("If there is a valid will, the will should usually be enforced regardless of the equity of the devises or bequests within.") (citing *Huffman v. Huffman*, 339 S.W.2d 885, 889 (Tex. 1960)).

116. See *Singleton v. St. Louis Union Trust Co.*, 191 S.W.2d 143, 147 (Tex. Civ. App.—Waco 1945, writ ref'd n.r.e.). See also TEX. PROB. CODE ANN. § 58(a) (West Supp. 1997).

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

118. *In re Thornton's Estate*, 33 P.2d 1, 3 (Cal. 1934) (Langdon, J., dissenting). The California Supreme Court held unconstitutional a statute declaring that "all other property (than separate property as defined by [certain California civil statutes]) 'acquired after marriage by either husband or wife, or both, . . . heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state is *community property*.'" *Id.* at 1-2 (emphasis added). In his dissenting opinion, Justice Langdon agreed that a California statute divesting a spouse of his property acquired in another state and brought into California was "undoubtedly unconstitutional." *Id.* at 3. However, he stated that the real issue in the cause of action was "whether the state [sic] of California may require that upon the death of a decedent, certain property owned by him and brought into this state shall be subject to the same rules of testamentary disposition and succession as community property acquired in this state." *Id.* at 3. Justice Langdon unequivocally answered yes: "It is a rule of almost universal acceptance that the rights of testamentary disposition and of succession are wholly subject to statutory control, and may be enlarged, limited, or abolished without infringing upon the constitutional guaranty of due process of law." *Id.* (citations omitted).

119. See *id.* (holding that the state's ability to alter rights of testamentary disposition is not repugnant to the Federal Constitution).

B. *Quasi-Community Property Principles Promote Fairness and Equity*

The *Cameron* court reasoned that adopting the quasi-community property concept by statute empowered the trial court to effect an equitable distribution of marital property in divorce.<sup>120</sup> Accordingly, the *Hanau* court, commenting on the *Cameron* decision and deferring to the Texas Legislature, stated, "Without such power, unfair results could occur [if] one spouse's equitable share of the other spouse's separate property under common law might not be considered under our community property definition of separate property."<sup>121</sup>

In *Cameron*, the Texas Supreme Court recognized that property acquired in common law jurisdictions might be labeled *separate property*, notwithstanding the fact that the property was acquired *during* a marriage and *not* by gift, devise, or descent.<sup>122</sup> The court emphasized that this property acquired by a spouse in a common law state while married should not be considered as *separate* property according to community property law.<sup>123</sup> The *Cameron* court, although limiting its ruling to the dissolution of marriage through divorce, realized the previous unfairness of the law and commented that section 3.63 of the Texas Family Code was a "sensible approach" to resolving the conflict of property characterization.<sup>124</sup> One rationale behind the court's adoption of the quasi-community property concept is that since the non-acquiring spouse is protected by elective share statutes in virtually all common law states, protecting the non-acquiring spouse that has migrated to Texas does not give her a windfall.<sup>125</sup> Rather, it merely equitably recognizes that each spouse contributed to the marriage and thus is entitled to a portion of the assets.<sup>126</sup>

Therefore, *Cameron* and section 3.63 of the Texas Family Code demonstrate that Texas recognizes that equity demands a just and right division of all property not acquired by gift, devise, or descent belonging to a couple. These equitable principles should apply regardless of whether the marriage is dissolved by divorce or death. Thus, Texas courts should divide all property that would have been considered community property under Texas law, even if the property was acquired in another state,<sup>127</sup> upon the dissolution of a marriage through divorce or death.

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120. See *Cameron v. Cameron*, 641 S.W.2d 210, 223 (Tex. 1982).

121. *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 666 (Tex. 1987).

122. See *Cameron*, 641 S.W.2d at 221.

123. See *id.*

124. *Id.*

125. See *id.* at 222-23.

126. See *id.* at 223.

127. See HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, TEX. H.B. 753, 67th Leg., R.S. (1981).

A quasi-community property statute added to the Texas Probate Code would likewise allow courts, upon permanent dissolution of the marriage due to the death of a spouse, to divide property that would have been considered community property under Texas law. Moreover, it is only upon the death of the marriage that the quasi-community property statute would speak. The Texas Legislature has the *power* to regulate testamentary distribution and succession so that it is equitable, and if equity demands that non-acquiring spouses be protected in cases of divorce, then surely it likewise demands that non-acquiring spouses be protected in probate contexts.

It is neither equitable nor logical to extend greater rights and protections to a divorcing spouse than to a widowed spouse, because the community property system, "firmly embedded in the hearts and jurisprudence of the Texas people,"<sup>128</sup> recognizes the joint efforts of a couple's enterprise.<sup>129</sup> Surely, if a quasi-community property statute effects just and right divisions of property in divorce actions, then it most certainly should be implemented in a just and right probate action.

### C. *Migrating, Non-Acquiring Spouses in Probate are Receiving Disfavored Treatment*

The Texas Legislature's reluctance, or possible outright unwillingness, to amend the Texas Probate Code to include a quasi-community property rule similar to section 3.63(b) of the Texas Family Code has created a situation where a person remaining married is less protected as to division of property acquired during marriage than a person obtaining a divorce. Such a legislative differentiation places the spouse choosing to remain married at a distinct disadvantage. Yet the law generally favors marriage.<sup>130</sup> Further, from a utilitarian vantage point, it is commonly believed that both individual and societal benefits accrue from the maintenance of a marriage and that detrimental consequences often result from the ending of a marriage.<sup>131</sup>

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128. *Blethen v. Bonner*, 71 S.W. 290, 291 (Tex. Civ. App.—1902, writ ref'd).

129. See *DeBlane v. Hugh Lynch & Co.*, 23 Tex. 25, 29 (1859) ("The principle which lies at the foundation of the whole system of community property is, that whatever is acquired by the joint efforts of the husband and wife, shall be their common property.").

130. See *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (stating that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress").

131. For instance, many children of divorce face difficult emotional trauma during the divorce, particularly when it suddenly results in a parent's subsequent absence from the child's everyday life. Admittedly, many divorcing adults responsibly place the child's best interests first in reaching custody and support agreements. However, such is not always the case, as a *Chicago Tribune* reporter writing in a Florida newspaper highlights:

By the year 2000, half of all children in America will live in homes that do not include both their mother and father. . . .

While the legislature cannot prevent the dissolution of a marriage through death *or* divorce, lawmakers should not encourage dissolution of marriages through divorce by failing to afford non-acquiring, migrating probate spouses the equivalent protections granted non-acquiring, migrating divorcing spouses. Moreover, refusing to legislate a quasi-community property rule in a probate context certainly does not encourage spouses to remain married.

Because divorce may result in negative individual and societal consequences, legislators should, at the very least, not place migrating spouses wishing to remain married at a legal disadvantage. One could even make the inference that the rule's omission might encourage divorce in some circumstances. For example, an economically dependent woman, faced with the option of being totally disinherited or, in the alternative, divorcing her husband to receive one-half of their quasi-community property, may very well choose the latter merely for economic protection.

A quasi-community property statute in the Texas Probate Code, treating quasi-community property like community property, would prevent inequity and would alleviate a potential threat that viable marriages might face. In sum, inclusion of quasi-community property principles in the Texas Family Code has given divorcing migrating spouses protection from loss of all marital property when the marriage ends, yet the Texas Probate Code offers no such protection when the marriage ends through death of a spouse. Therefore, the Texas Legislature should act to provide quasi-community property protection in the Texas Probate Code.

Legislators may wonder just how prevalent is the migrating, non-acquiring spouse problem.<sup>132</sup> The overriding force in natural popula-

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[S]tatistics [show] that children whose fathers are not involved in their lives are more likely to have trouble with school, to live in poverty, and to get into trouble with the law . . . .

Sharman Stein, *Children a Bigger Factor in Divorce*, FORT LAUDERDALE SUN-SENTINEL, Apr. 2, 1995, at 2G.

Furthermore, a special report in *U.S. News & World Report* informed readers that:

The absence of fathers is linked to most social nightmares - from boys with guns to girls with babies. . . . Studies show that only 43 percent of state prison inmates grew up with both parents and that a missing father is a better predictor of criminal activity than race or poverty. . . . [There are] similar links between a father's absence and his child's likelihood of being a dropout, jobless, a drug addict, a suicide victim, mentally ill and a target of child sexual abuse.

Joseph P. Shapir, et al., *Honor Thy Children*, U.S. NEWS & WORLD REP., Feb. 27, 1995, at 39.

132. Between 1990 and 1994, "a quarter-million more U.S. residents moved into the Lone Star State than moved out . . . ." Joseph Spiers, *Where Americans Are Moving*, FORTUNE, Aug. 21, 1995, at 38. Texas ranked second only to Florida in the rate of migration from other states. See *Texans Can Boast*, READING EAGLE, READING TIMES, Jan. 9, 1995, at B4. It has been reported that in 1994, Texas became the nation's second most populous state, according to the Census Bureau. See *Census*:

tion change is the *migration* of Americans, and they are being drawn to states in the South and the West.<sup>133</sup> These migrants are typically well educated,<sup>134</sup> and “[t]hey move to Texas to work.”<sup>135</sup> Therefore, because Americans are migrating to Texas in large numbers and also migrating to other states in the South and the West, one can infer that many of these Americans are migrating *from* northern and eastern common law property states. Thus, the migrating, non-acquiring spouse problem will likely continue to arise and in greater numbers. However, it is not necessary for the problem to be epidemic in scale for the Texas Legislature to address it. This “illogical and potentially inequitable difference” in the way marital property is characterized should be eliminated by “adopting a Probate Code section similar to Section 3.63 of the Family Code and the probate codes of other jurisdictions.”<sup>136</sup>

#### D. Other Community Property Jurisdictions

Some community property states protect the migrating, non-acquiring spouse who is either divorced or widowed in that community property jurisdiction.<sup>137</sup> Although these states use different legal theories such as quasi-community property or conflict-of-laws to award the property acquired in common law property states during the marriage, the result is more protection than is currently extended to the migrating spouse widowed in Texas.<sup>138</sup> The following sections detail the quasi-community property probate provisions in California, Idaho, Washington, and Louisiana.

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*Lone Star State Not So Lonely, Hits No. 2*, CIN. ENQUIRER, Dec. 28, 1994, at A1. In fact, statistics show that Texas grew sixty-five percent to eighteen and one-half million people during the twenty-five year period from 1970 to 1995, while our nation grew only thirty percent during that same period. See David LaGesse, *Strains From Immigration Studied; Growth Estimates Called Overstated*, DALLAS MORNING NEWS, Apr. 14, 1995, at 32A.

133. See *Spiers*, *supra* note 132, at 38.

134. See *id.*

135. Diane Jennings, *Job-Seekers Making Tracks To Texas Again*, DALLAS MORNING NEWS, Sept. 5, 1994, at 15A.

136. *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 667 (Tex. 1987) (Spears, J., concurring).

137. See generally Chappell, *supra* note 22. Of the eight community property states,

Arizona, Nevada, New Mexico, and Texas do not have a quasi-community property statute to protect the non-acquiring spouse upon migration and the subsequent death of the acquiring spouse. In those states, the non-acquiring spouse who had contributed to the marital estate will be left unprotected if the acquiring spouse devised the marital estate to a third party. Without a quasi-community property statute the non-acquiring spouse in those community property jurisdictions will not receive his or her share in the marital property.

*Id.* at 1013-14.

138. See *id.*



## 1. California

The California Probate Code recognizes quasi-community property and also protects the migrating spouse from inter vivos transfers of quasi-community property. In 1917, in an attempt to equalize the marital property rights of husbands and wives, the California Legislature amended the state's civil code, effectively redefining community property.<sup>139</sup> In so doing, the California legislature expanded the definition of community property to include *separate* property acquired in common law states under circumstances where it would have been community property had it been acquired in California by parties domiciled there.<sup>140</sup> However, in *In re Thornton's Estate*<sup>141</sup> the California Supreme Court determined that this attempt to convert separate property into community property was an unconstitutional impairment of the owner's vested property rights and declared the amendment unconstitutional and void.<sup>142</sup> Nevertheless, a dissenting justice suggested that the court construe the amendment as valid to the extent that it regulates *succession* of this type of property.<sup>143</sup> The following year, the California Legislature added a provision to the California Probate Code.<sup>144</sup> This statute, section 201.5, defined a spe-

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139. *In re Way's Estate*, 157 P.2d 46, 49-50 (Cal. App. 1945) (giving a "long and interesting history" of section 201.5 of the 1935 California Probate Code, the predecessor statute to California's current quasi-community property probate statute, Section 101 of the California Probate Code). See also Chappell, *supra* note 22, at 1003.

140. *See id.*

141. 33 P.2d 1 (Cal. 1934).

142. *See id.* at 1-2. William and Helen Thornton were married and living in Montana when they acquired the personal property that was the subject of this lawsuit. *See id.* at 2. Under the laws of the State of Montana at that time, the property was characterized as his separate property, subject only to his wife's dower rights. *See id.* In 1919, William moved to California and brought the property with him. *See id.* He died in California in 1929, and Helen petitioned the court for distribution of one-half of his estate on the theory that the property became community property when brought into California. *See id.* Section 164 of California's Civil Code supported her theory. *See id.* at 1. The trial court held the property was his separate property over which he had sole testamentary rights. *See id.* at 2. Helen appealed, but subsequently died, and the executor of her will was substituted as appellant in her stead. *See id.* The appellate court fashioned the issue as "whether separate property acquired by either spouse in a common law state can be converted to common property by the mere act of bringing it into a community property state and establishing a domicile therein." *Id.* As indicated in the text of this article, the California Supreme Court held a California law that impairs or takes away a property right vested in a person under the laws of another state when that person "chances to transfer his domicile to [California], bringing his property with him," is clearly an abridgement of that person's privileges and immunities. *Id.*

143. *See id.* at 4 (Langdon, J., dissenting). See also *In re Way's Estate*, 157 P.2d at 50.

144. *See In re Way's Estate*, 157 P.2d at 50 (noting that section 201.5 was adopted to accomplish what the dissenting opinion in *In re Thornton's Estate* had explained could be done lawfully).

cial class of separate property<sup>145</sup> that would be subject to the same laws of succession that applied to community property.<sup>146</sup>

California Probate Code section 101<sup>147</sup> directs that “[u]pon the death of a married person domiciled in this state, one-half of the decedent’s quasi-community property belongs to the surviving spouse and the other half belongs to the decedent.”<sup>148</sup> Quasi-community property is defined in section 66 of the California Probate Code<sup>149</sup> and is not unlike the description in section 3.63 of the Texas Family Code providing for that classification of property commonly labeled in Texas as quasi-community property.<sup>150</sup>

145. *See id.* at 48 (quoting section 201.5, which defined the special class of separate property as “personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state . . .”).

146. *See id.*

147. CAL. PROB. CODE § 101 (West 1991). Section 101 is the successor of section 201.5 of the 1935 California Probate Code. *See id.* (Law Revision Comm’n cmt.).

148. CAL. PROB. CODE § 101.

149. *See id.* § 66.

150. *Compare* TEX. FAM. CODE § 3.63(b) (West 1993) with CAL. PROB. CODE § 66 (West 1991). The Texas Family Code provides:

In a decree of divorce or annulment the court shall also order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage:

(1) property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition; or

(2) property that was acquired by either spouse in exchange for real or personal property, and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

TEX. FAM. CODE § 3.63(b).

Section 66 of the California Probate Code provides:

“Quasi-community property” means the following property, other than community property as defined in Section 28:

(a) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired by a decedent while domiciled elsewhere that 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 of its acquisition.

(b) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired in exchange for real or personal property, wherever situated, that 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.

CAL. PROB. CODE § 66.

In *In re Way's Estate*,<sup>151</sup> a California appellate court extended the classification of quasi-community property to include both personal and real property "that had its source in personal property acquired by the husband or wife while domiciled elsewhere and which would not have been the separate property of either if acquired while domiciled in [California]."<sup>152</sup> Furthermore, additional California probate provisions protect spouses from donative transfers or transfers "without receiving in exchange a consideration of substantial value" of quasi-community property in excess of the one-half interest belonging to the donating spouse.<sup>153</sup>

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151. 157 P.2d 46, 50 (Cal. App. 1945). The Ways migrated to California after Mr. Way's retirement from a clock company in Connecticut. *See id.* at 48. Since Mr. Way earned no income after leaving Connecticut, it was determined that all of his real and personal property was either the property he owned while in Connecticut or mutations or proceeds therefrom. *See id.* Mr. Way's will devised all of this property to a San Francisco bank as trustee and directed it to pay certain amounts monthly to his widow and two daughters. *See id.* Through a guardian, the widow challenged her husband's testamentary power over all of the property, believing that half of the property was hers by virtue of section 201.5 of the California Probate Code. *See id.* The daughters contended that section 201.5 only applied to "that portion of the estate of the decedent that was personal property at the time of death and [section 201.5] had no application at all to the real property in such estate." *Id.* at 49. The trial court found that all of the property he owned at his death was the "peculiar type" of separate property that section 201.5 of the California Probate Code addressed and the property would have been community property had it been acquired while the couple was domiciled in California. *Id.* at 48-49. Affirming the trial court, the California appellate court responded:

In our opinion, when the language of the section is considered in view of its history and in light of its obvious purpose, there can be no reasonable doubt that the Legislature intended and expressed the intent that the section applies to all property of the estate that had its source in personal property acquired by the husband or wife while domiciled elsewhere and which would not have been the separate property of either if acquired while domiciled in this state.

*Id.* at 49.

152. *Id.*

153. CAL. PROB. CODE § 102 (West 1991). Section 102 states:

(a) The decedent's surviving spouse may require the transferee of property in which the surviving spouse had an expectancy under Section 101 at the time of the transfer to restore to the decedent's estate one-half of the property if the transferee retains the property or, if not, one-half of its proceeds or, if none, one-half of its value at the time of transfer, if all of the following requirements are satisfied:

- (1) The decedent died domiciled in this state.
- (2) The decedent made a transfer of the property to a person other than the surviving spouse without receiving in exchange a consideration of substantial value and without the written consent or joinder of the surviving spouse.
- (3) The transfer is any of the following types:
  - (A) A transfer under which the decedent retained at the time of death the possession or enjoyment of, or the right to income from, the property.
  - (B) A transfer to the extent that the decedent retained at the time of death a power, either along or in conjunction

## 2. Idaho

The Idaho Code protects a widowed spouse through quasi-community property<sup>154</sup> and a divorced spouse through conflict-of-laws.<sup>155</sup> Like the California Probate Code, the Idaho Code contains quasi-community property provisions that prevent a migrating spouse widowed in Idaho from losing all property through common law characterization of separate property.<sup>156</sup> Idaho's quasi-community property statute is similar to section 101 of the California Probate Code in that "[u]pon death of a married person domiciled in [Idaho], one-half (1/2) of the quasi-community property shall belong to the surviving spouse . . . ."<sup>157</sup> Idaho's statutes further protect the surviving spouse against non-consensual, donative transfers of quasi-community property by the decedent spouse.<sup>158</sup>

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with any other person, to revoke or to consume, invade, or dispose of the principal for the decedent's own benefit.  
(C) A transfer whereby property is held at the time of the decedent's death by the decedent and another with right of survivorship.

(b) Nothing in this section requires a transferee to restore to the decedent's estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(c) All property restored to the decedent's estate under this section belongs to the surviving spouse pursuant to Section 101 as though the transfer had not been made.

*Id.*

154. See IDAHO CODE § 15-2-201(a) (1979).

155. See *Berle v. Berle*, 546 P.2d 407 (Idaho 1976).

156. See IDAHO CODE §§ 15-2-201, 15-2-202 (1979).

157. IDAHO CODE § 15-2-201(a). Idaho's primary quasi-community property statute provides:

(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.

IDAHO CODE § 15-2-201(a)-(b).

158. See IDAHO CODE § 15-2-202 (1979). This statute in total provides:

To protect the non-acquiring spouse upon a dissolution of marriage by divorce, Idaho utilizes a conflict-of-laws approach, which the Idaho Supreme Court adopted in *Berle v. Berle*.<sup>159</sup> The *Berle* court intended to insure that a non-acquiring spouse, moving from a common law state to a community property state, would not be penalized by divestment of a statutory right of equitable distribution of the property upon dissolution of the marriage that the common law state provided.<sup>160</sup>

### 3. Washington

Washington equitably divests title to all property of migrating spouses who divorce<sup>161</sup> and extends quasi-community status to widowed migrating spouses.<sup>162</sup> Unlike Idaho and most other community property jurisdictions that only allow equitable division of a couple's *community* property upon divorce, Washington has long provided an equitable remedy for migrating couples by allowing limited divestiture of *separate* property as well upon dissolution of marriage by divorce.<sup>163</sup> However, to provide a workable solution upon dissolution of a marriage by the death of a spouse, Washington, like Idaho and California, adopted a quasi-community property approach.<sup>164</sup> More-

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Whenever a married person domiciled in the state has made a transfer of quasi-community property to a person other than the surviving spouse without adequate consideration and without the consent of the surviving spouse, the surviving spouse may require the transferee to restore to the decedent's estate one-half ( $\frac{1}{2}$ ) of such property, if the transferee retains such property and, if not, one-half ( $\frac{1}{2}$ ) of its proceeds or, if none, one-half ( $\frac{1}{2}$ ) of its value at the time of transfer, if:

- (a) The decedent retained, at the time of his death, the possession and enjoyment of or the right to income from the property;
- (b) The decedent retained, at the time of his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;
- (c) The decedent held the property at the time of his death with another with the right of survivorship; or
- (d) The decedent had transferred such property within two (2) years of his death to the extent that the aggregate transfers to any one (1) donee in either of the years exceeded three thousand dollars (\$3,000).

159. 546 P.2d 407 (Idaho 1976). See also Chappell, *supra* note 22, at 1000-01.

160. See *Berle*, 546 P.2d at 411.

161. See *Webster v. Webster*, 26 P. 864, 865 (Wash. 1891) (holding that a statute requiring courts to make a just and equitable disposition should not be construed to mean that courts must limit the divided property to jointly owned property).

162. See WASH. REV. CODE ANN. § 26.16.220 (West Supp. 1996).

163. See WASH. REV. CODE ANN. § 26.09.080 (West 1989); Chappell, *supra* note 22, at 996-97. Compare *Berle*, 546 P.2d at 407 with *Webster*, 26 P. at 865.

164. See WASH. REV. CODE ANN. § 26.16.220. Washington's quasi-community property statutes provide in part:

(1) Unless the context clearly requires otherwise, as used in RCW 26.16.220 through 26.16.250 "quasi-community property" means all personal property wherever situated and all real property described in subsection (2) of this

over, like Idaho, Washington protects a surviving spouse from her decedent spouse's lifetime transfers of quasi-community property to third parties in excess of the decedent spouse's one-half interest.<sup>165</sup>

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section that is not community property and that was heretofore or hereafter acquired:

- (a) By the decedent while domiciled elsewhere and that would have been the community property of the decedent and of the decedent's surviving spouse had the decedent been domiciled in this state at the time of its acquisition; or
  - (b) In derivation or in exchange for real or personal property, wherever situated, that 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 original property was acquired.
- (2) For purposes of this section, real property includes:
- (a) Real property situated in this state;
  - (b) Real 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; and
  - (c) Leasehold interests in real property described in (a) and (b) of this subsection.
- (3) For purposes of this section, all legal presumptions and principles applicable to the proper characterization of property as community property under the law 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 provisions of subsection (1) of this section.

*Id.* § 26.16.220.

Furthermore, the Washington Revised Code provides:

Upon the death of any person domiciled in this state, one-half of any quasi-community property shall belong to the surviving spouse and the other one-half of such property shall be subject to disposition at death by the decedent, and in the absence thereof, shall descend in the manner provided for community property under chapter 11.04 RCW.

*Id.* § 26.16.230.

Additionally, the Washington Revised Code makes clear the quasi-community property classification is solely for distribution purposes after death, and does not affect creditors' rights.

The 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. For all other purposes property characterized as quasi-community property under this chapter shall be characterized without regard to the provisions of this chapter. A husband and wife may waive, modify, or relinquish any quasi-community property right granted or created by this chapter by signed written agreement, wherever executed, before or after June 11, 1986, including without limitation, community property agreements, prenuptial and postnuptial agreements, or agreements as to status of property.

*Id.* § 26.16.250.

165. *See id.* § 26.16.240. The Washington Revised Code protects spouses from lifetime transfers of quasi-community property as follows:

- (1) If a decedent domiciled in this state on the date of his or her death made a lifetime transfer of a property interest that is quasi-community property to a person other than the surviving spouse within three years of death, then within the time for filing claims against the estate as provided by RCW

## 4. Louisiana

Louisiana protects migrating spouses who are widowed or divorced in the same manner it protects all Louisiana spouses.<sup>166</sup> In Louisiana, characterization of property owned by the parties to a marriage is governed exclusively by Louisiana law.<sup>167</sup> Under Article 3526(2) of Louisiana's Civil Code, if one or both of the spouses live in Louisiana at the time that the marriage terminates either by death or divorce, any property belonging to either spouse is characterized *as if the spouses were domiciled in Louisiana at all critical times*.<sup>168</sup> For example, personal property purchased from wages earned by a husband while domiciled in a common law property state, which in Louisiana would be characterized as community property, becomes community property under Louisiana law upon the demise of the marriage if one or both of the spouses was domiciled in Louisiana when the marriage

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11.40.010, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property interest, if the transferee retains the property interest, and, if not, one-half of its proceeds, or if none, one-half of its value at the time of transfer, if:

- (a) The decedent retained, at the time of death, the possession and enjoyment of or the right to income from the property interest;
  - (b) The decedent retained, at the time of death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the property interest for the decedent's own benefit; or
  - (c) The decedent held the property at the time of death with another with the right of survivorship.
- (2) Notwithstanding subsection (1) of this section, no such property interest, proceeds, or value 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 interest in property from the decedent while believing in good faith that the property or property interest was the separate property of the decedent and did not constitute quasi-community property.
- (3) All property interests, proceeds, or value restored to the decedent's estate under this section shall belong to the surviving spouse pursuant to RCW 26.16.230 as though the transfer had never been made.
- (4) The surviving spouse may waive any right granted hereunder by written instrument filed in the probate proceedings. If the surviving spouse acts as personal representative of the decedent's estate and causes the estate to be closed before the time for exercising any right granted by this section expires, such closure shall act as a waiver by the surviving spouse of any and all rights granted by this section.

*Id.*

166. See LA. CIV. CODE ANN. art. 3526 cmt. d (West 1994).

167. See *id.* cmt. c.

168. See LA. CIV. CODE ANN. art. 3526 (West 1994).

terminated. Thus, Louisiana extends the same protection to migrating spouses as provided under a quasi-community property approach.<sup>169</sup>

E. *Proposed Amendment to the Texas Probate Code*

The following proposed statute, modeled after statutory provisions of other community property jurisdictions, would protect the migrating, non-acquiring spouse's interest in property acquired by the other spouse in a common law jurisdiction by extending quasi-community property principles to property disposed of at death.

(a) Upon the death of a married person domiciled in this state, one-half of the decedent's quasi-community property shall belong to the surviving spouse and the other one-half shall be subject to the testamentary disposition of the decedent.<sup>170</sup>

(b) Quasi-community property means the following property, other than community property as defined in Section 5.01 of the Texas Family Code:

(1) property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition; or

(2) property that was acquired by either spouse in exchange for real or personal property, and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.<sup>171</sup>

(c) Whenever a married person domiciled in this state has made a transfer of quasi-community property

(1) to a person other than the surviving spouse without adequate consideration, and

(2) without the consent of the surviving spouse, and

(3) such transfer occurred while the transferor was domiciled in this state, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, if the transferee retains such property and, if not, one-half of its proceeds or, if none, one-half of its value at the time of transfer, if:

(i) The decedent retained, after such transfer and at the time of his death, the possession or enjoyment of or the right to income from the property;

or

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169. The Revised Comments to Article 3526 state that the statute "attempts to secure for the non-acquiring, formerly non-Louisianan, spouse the same protection as is provided by Louisiana substantive law for similarly situated Louisiana spouses. This scheme is similar to what is known in other states as the scheme of "quasi-community." See *id.* at cmt. d.

170. Language derived from CAL. PROB. CODE § 101 (West 1990) and IDAHO CODE § 15-2-201(a) (1979).

171. Language derived from TEX. FAM. CODE § 3.63(b) (West 1993).



- (ii) The decedent retained, after such transfer and at the time of his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for his own benefit, or
- (iii) The decedent, after such transfer, held the property at the time of his death with another with the right of survivorship; however,
- (iv) Nothing requires a transferee to restore to the decedent's estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.<sup>172</sup>

#### CONCLUSION

It seems fairly obvious that the Texas Legislature should add a quasi-community property statute to the Texas Probate Code. Virtually all states have laws that protect spouses from total disinheritance of property acquired during a marriage, either through community property principles or elective share provisions. It is only when a married couple migrates that a surviving spouse may lose the protection of one of these safeguards. The Texas Legislature should amend the Texas Probate Code to eliminate the present inequity where a non-acquiring, migrating, divorcing spouse has a right to a fair and just division of property acquired during the marriage but the same protection is unobtainable if widowed. A statute using terminology and concepts adopted by California, Idaho, or Washington would be the most advantageous to Texas' new citizens migrating from common law property states. Moreover, a statute like the one proposed here would rectify the current inequity and give the migrating spouse the same property protection in probate that already is provided upon dissolution of a marriage through divorce.

*Mark Evans Harden and Barbara A. Lindsay-Smith*

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172. Language derived in large part from IDAHO CODE § 15-2-202 and CAL. PROB. CODE § 102.