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Planning for Community Property in Colorado

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This column is sponsored by the CBA Trust and Estate Law Section. The column focuses on trusts and estate law topics, including estate and trust planning and administration, elder law, probate litigation, guardianships and conservatorships, and tax planning.

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Although Colorado is a common law state, many people moving to Colorado are bringing community property with them. This article provides an overview of the basic concepts of community property, along with some of the common issues that Colorado practitioners may encounter. It also suggests ways to preserve the community property character of the property.

During the past ten years, there has been a significant increase in the number of people moving to Colorado from community property states, such as California and Texas, and individuals residing in Colorado who own property in community property states. Now, more than ever, Colorado attorneys must be prepared to advise clients with respect to the legal implications of the community and separate property character of their property. This article provides a basic overview of the community property system, focusing primarily on California and Texas, and looks at some of the common issues that Colorado attorneys will need to address with their clients.

Overview of Community Property System

The community property system developed from Mexican, Spanish, and French law. Currently, eight states follow a community property regime: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington. In addition, Wisconsin has adopted the Uniform Marital Property Act, which, in effect, puts Wisconsin residents in a community property regime unless they elect out of it.1 The Internal Revenue Service ("IRS") has ruled that Wisconsin marital property is equivalent to community property for income tax purposes.2 In addition, on May 23, 1998, Alaska adopted the Alaska Community Property Act, which allows couples, including couples residing out of state, to elect into a community property regime.3 Whether the IRS will recognize Alaska community property for income or estate tax purposes has yet to be tested.

The laws defining and controlling community property vary significantly among the community property states. Although an in-depth review of the law of all of the community property states is beyond the scope of this article, the basic concept of community property is that such property is owned equally by the spouses. As a result, a spouse may dispose of only his or her one-half interest in the property at death, and certain restrictions apply for lifetime transfers of community property. The concept of community property closely resembles the definition of marital property under the Colorado Uniform Dissolution of Marriage Act ("Colorado Dissolution Act"), which applies to divorce, but not death.4

As a general rule, "community property" is defined as all property acquired during marriage other than by gift, devise, or descent, regardless of how the property is titled.5 States differ as to whether the income from and appreciation on separate property is considered community property or separate property. Arizona, California, New Mexico, Nevada, and Washington provide that income from separate property is separate property.6 Texas, Idaho, and Louisiana provide that income from separate property is community property.7 Most states provide that the appreciation in value of separate property is separate property.8 In comparison, the Colorado Dissolution Act provides that, for dissolution of marriage purposes, the income from and appreciation on separate property is marital property.

In many community property states, spouses actually can choose which property will be separate property or community property by either converting separate property into community property or by converting community property (including future acquired community property) into separate property by agreement.9 Often, community property states have a presumption that all property owned by the spouses on the date of dissolution of marriage, whether by death or divorce, is community property.10 This presumption can be rebutted through some means of tracing, as discussed below.

The Community or Separate Property Character of Property

A common issue that arises is how to characterize property where both community and separate funds are used to acquire or improve the property. For example, one spouse may acquire a house prior to marriage by making the down payment with separate funds and taking a mortgage for the balance, but future payments on the mortgage are made with community funds. Several different approaches are used by the community property states in this situation.

Texas generally applies the "Inception of Title Doctrine," which provides that the characterization of the property depends on the facts existing at the time the asset was acquired.11 Under this Doctrine, the house would be classified as the separate property of the acquiring spouse. The non-acquiring spouse would have a claim for reimbursement for community funds used to enhance the value of the property or to discharge debt on the separate property.12 However, where property is initially purchased partly with community funds and partly with separate funds, Texas provides that the community and separate estates each own an interest in the proportion that each estate supplies to the consideration.13

California courts use the *pro-rata* apportionment of title method, based on the relative contribution of each estate in the above situation, and each estate shares *pro rata* in the appreciation of the asset.14 Other states apply the "Time of Vesting Rule," under which ownership rights are determined when title vests. Contributions

to the purchase price after the time of vesting only give rise to a claim for reimbursement.

Tracing Methods

Even where the initial character of the property is known, if community and separate property are commingled, the character of the separate property may be lost. To rebut the community property presumption, the property must be traced from the time acquired through the time of dissolution of marriage, whether by death or divorce. There are several methods of tracing. These methods vary from state to state and include the following:

1. *Item Tracing*: Under item tracing, if subsequently acquired property can be traced back to the original separate property, a mere change in the form of property does not affect the separate character of the asset.

2. *Identical Sum Inference Tracing*: This type of tracing provides that if separate money is deposited into an account, the subsequent withdrawal of that exact sum is interpreted as the withdrawal of separate money. Likewise, property acquired by one spouse will be that spouse's separate property where an asset is purchased with funds from a community bank account and, soon after the purchase, the acquiring spouse transfers an amount of his or her separate property in the exact sum of the expenditure into the community bank account.

3. *Community Property Out First Tracing*: Under this method, when an account contains both separate property of one of the spouses and community property of both spouses, it is presumed that community funds are withdrawn first. However, an exception to this presumption exists where the court can follow the separate funds through the account.

4. *Inception of Title-Item Tracing*: In Inception of Title states, if the title of an asset can be traced back to a transaction that occurred prior to marriage or can be traced back to receipt as a gift, devise, or inheritance, the title is all of the proof necessary to overcome the community property presumption. This is true even though the other spouse may have a claim for reimbursement to the extent community funds were used to enhance the value of the property or discharge a debt relating to the property.

5. *Minimum Sum Balance Tracing*: This method is used for identifying funds in a particular account in which a portion can conclusively be proven to be separate property of one of the spouses. This method is used in situations where the transactions in the account have been few and are easily identifiable.

6. Pro-Rata *Approach Tracing*: Under this approach, where an account contains both separate and community funds, the withdrawals are treated as being made *pro rata* in proportion to the respective balances of separate and community funds in the account.

7. *Exhaustion Method*: This approach assumes all family living expenses are to be charged against community funds. The separate character of an asset can be established by showing that, on the date of a particular withdrawal, the commingled account contained only separate funds because, prior to that time, family living expenses had completely exhausted community funds.

8. *Deed Recitals-Item Tracing*: In most situations, it does not make a difference how property is titled. However, Texas provides for the following exceptions:

a) If a conveyance is a gift to both the husband and wife, an undivided one-half separate property interest vests in each.15

b) When one spouse uses his or her separate property to pay for an asset during marriage and takes title to the asset in the name of both the spouses, it is presumed that the spouse using the separate property intended the interest placed in the other spouse to be a gift.16

c) Where one spouse conveys property to the other and there is no contrary language in the deed, it is presumed that the grantor spouse made a gift to the other spouse.17

d) If the transferor recites in the deed that property is to be the separate property of the transferee spouse,

it is presumed that the property is separate property, unless it can be proven that the recital was inserted by fraud, accident, or mistake.18

e) If one spouse makes a gift of property to the other, that gift is presumed to include all the income that arises from the property.19

f) Where one spouse acquires property from a third party and the deed recital states that the consideration used was the separate property of the acquiring spouse, a rebuttable presumption is created that such property is the acquiring spouse's separate property.20

The above illustrates that there is no one way to trace the separate property character of commingled property. The practitioner should become familiar with each of these methods and when each applies.

Management Rights in Community Property

The management rights with respect to community property also vary from state to state. Texas provides for two types of community property: Sole Management Community Property and Joint Community Property. "Sole Management Community Property" is defined as property that the spouse would have owned if single, including personal earnings, revenue from separate property, and recoveries for personal injuries.21 Under Texas law, each spouse has the right to manage, control, and dispose of his or her Sole Management Community Property without the consent of the other spouse. All other community property in Texas is considered Joint Community Property, which is subject to both spouses' management, control, and disposition.22

California provides that, with certain exceptions, either spouse has the right to manage and control community personal property.23 In addition, California provides that either spouse has the right to manage and control community real property, but both spouses must join in executing any instrument for the sale, conveyance, encumbrance, or lease for more than one year of such property.24 Generally, all community property states impose a fiduciary relationship on the spouses with respect to the management of community property similar to that of a trustee. The managing spouse has a duty not to defraud the other spouse of his or her interest in the community property.25

Legal Implications of Community Property Character

The characterization of property as community property affects each spouse's rights with respect to the disposition of the property, during life or on death, and each spouse's rights in property on divorce. As discussed above, with respect to lifetime transfers, community property states restrict a spouse's ability to sell or give away community property during his or her lifetime without the other spouse's consent.26 This is not the case with marital property under the Colorado Dissolution Act. In Colorado, such property can be transferred by the spouse holding title to the property without the other spouse's consent.27

With respect to transfers on death, because each spouse is deemed to own an undivided one-half interest in the community property, each spouse can dispose of only one-half of the community property at death, regardless of how the property is titled.28 One advantage to community property is that the estates of the spouses are automatically equalized for estate tax purposes, and no retitling of assets is necessary, assuming the couple has resided in a community property state during their entire marriage. However, it appears that this also can be achieved in common law states through the use of a joint revocable trust, as discussed below.29

In addition, unlike most common law states, community property states do not give a surviving spouse the right to elect against the Will of a deceased spouse, because the surviving spouse theoretically cannot be completely disinherited due to his or her one-half ownership interest in the community property. This may not be the case when a couple resides in a common law state and subsequently moves to a community property state. In this situation, the community property system may not protect the surviving spouse because there

is little or no community property and because there is no right given to the surviving spouse to elect against the Will of the deceased spouse.

Some states, such as California and Texas, provide for quasi-community property.30 Basically, "quasi-community property" is defined as any property acquired by a couple while residing in a common law state that would have been community property if they had resided in the community property state when the property was acquired.31 California applies the quasi-community property concept both on death and divorce.32 However, Texas applies it only in the context of divorce, which could leave a surviving spouse without any recourse in this situation.33

Step-Up in Tax Basis

Aside from automatic equalization of estates, one of the primary advantages to community property is the step-up in tax basis on the first spouse's death. In community property states, when one spouse dies, *both* halves of the community property receive a "step-up" in basis in an inflationary market.34 This is not the case with separate property held jointly or as tenants-in-common, in which case only the decedent's one-half interest in the property receives a step-up in basis. Furthermore, the IRS has recently clarified that a full step-up in basis cannot be achieved through the use of a joint revocable trust where the property transferred to the trust is not community property.35 As a result of the step-up in basis, gain on the subsequent sale of the property by the surviving spouse will be reduced or eliminated. In addition, the basis of the property for purposes of depreciation will be increased, thereby increasing the depreciation deduction that can be taken on the property in the future.

It should be noted that the Economic Growth and Tax Relief Reconciliation Act of 2001 provides for the elimination of step-up in basis beginning in the year 2010.36 If this occurs, one of the primary advantages to retaining community property character, at least with respect to disposition on death, will be eliminated. However, the Tax Relief Act contains a Sunset provision that states that the law will revert back to its current status unless a future Congress elects to continue the legislation. At this time, it is impossible to predict what will happen prior to the year 2010; thus, planning for the step-up in basis is still advisable.

As mentioned above, with respect to dissolution of marriage on divorce, the community property system acts in much the same way as under the Colorado marital property system. Most community property states provide that community property must be divided equally on divorce.37 However, some states, such as Texas, allow for a "just and equitable division" of the community property, which actually may result in an unequal division of the property.38 In addition, as mentioned above, some community property states have incorporated the concept of "quasi-community property" to protect spouses moving to community property states from non-community property states. In these states, quasi-community property, property acquired by the spouses while residing in a common law state, is treated the same as community property for purposes of divorce.

Community Property Held in Joint Tenancy

There has been a great deal of confusion regarding the effect of titling community property as joint tenancy property with rights of survivorship. Joint tenancy (and tenants by the entirety) is a form of ownership of property; therefore, it cannot theoretically exist at the same time as community property, which is also a form of ownership of property. Unlike community property, one spouse's interest in a joint tenancy can be unilaterally transferred. In contrast, a spouse cannot unilaterally sever community property.39 Based on this analysis, it has been held by some courts that the transfer of community property into joint tenancy severs the community property character of the property.40

Washington, Texas, Nevada, New Mexico, and recently California have enacted legislation allowing community property to be titled jointly.41 The effective dates of the statutes may depend on when the property

was placed in joint tenancy.42 Other states have provided this by case law precedent.43 In determining whether the community property character has been severed by placing it in joint tenancy prior to moving to Colorado, the attorney should review the applicable state law in light of the date the joint tenancy was created.

The Uniform Disposition of Community Property Rights at Death Act ("Community Property Rights at Death Act"), adopted by Colorado in 1963, provides that real property located in Colorado and personal property, wherever situated, acquired by married persons with community property *while domiciled in Colorado* and titled as joint tenants with rights of survivorship is presumed *not to be* community property.44 However, this presumption can be rebutted by a preponderance of evidence.45 As a result, if the couple shows an intent to preserve the community property character of the joint property, such as a recitation in a deed or a list of personal property stating that the spouses intend for such property to retain its community property character, placing the property in joint tenancy after moving to Colorado should not destroy the community property character of the property.

The Community Property Rights at Death Act does not specifically address property acquired and titled with rights of survivorship while a couple resided in a community property state. However, the Act does provide that property acquired during marriage while domiciled in a community property state is presumed to be community property.46 Again, this presumption is rebuttable. Therefore, the conflict of laws issues discussed below will need to be analyzed in determining whether the presumption can be rebutted.

Transferring Community Property to a Revocable Trust

Another issue that estate planning attorneys have struggled with is whether placing community property into a revocable trust for one or both of the spouses converts the property into separate property. Because the character of community property is generally not affected by how title is held (unless the title indicates a different form of ownership, as with rights of survivorship mentioned above), it would follow that titling property in the name of a revocable trust or trusts should not affect the community property character of the property. Both California and Texas have case law supporting this proposition.47

The California Family Code specifically addresses the power to revoke a trust that contains community property, confirming that under California law the character of the property does not change when it is transferred to a revocable trust.48 In addition, Colorado's Community Property Rights at Death Act refers to community property held by a trustee of an *inter vivos* trust created by the deceased spouse, supporting the conclusion that community property held by a revocable trust does not lose its community property character under Colorado law.49 However, care still must be taken when transferring community property to a revocable trust to avoid a deemed partition of the community property.

Both Texas and California law require an express agreement signed by both spouses to partition community property into separate property.50 Furthermore, California statutes expressly provide that an agreement is presumed to exist between the spouses that any community property transferred to a revocable trust retains its character.51 To avoid any possibility of an inadvertent partition, the drafter should consider adding language to the trust document providing that the property transferred to the trust shall retain its character as either separate or community property.

Other risks to transferring community property to a revocable trust can be avoided if the necessary steps are taken. For example, both spouses should consent to the transfer to avoid any argument that it was a fraudulent transfer against the non-transferring spouse. Also, care should be taken to prevent the transfer from causing a commingling of community and separate funds, because this could result in the loss of the separate character of the property. There appears to be no rule requiring that a trust holding community property be a joint trust created by both spouses. However, because community funds are owned by both spouses, the joint trust appears to best reflect the true nature of the property, as both spouses will be deemed the transferor of any community funds to the trust. In addition, if one spouse transfers community property to a trust and the other spouse is not given power over his or her interest in the community property held by the trust, the courts may hold that the transfer is a fraudulent transfer against the non-transferring spouse.

It could be interpreted that California law requires that any trust containing community property must be a joint trust if the community property character is to be retained. California specifically provides by statute that for transfers made on or after July 1, 1987, unless the trust instrument or instrument of transfer expressly provides otherwise, community property that is transferred in trust remains community property during the marriage, regardless of the identity of the trustee. This is true if the trust provides that it is revocable as to that property during marriage, and that the power, if any, to modify the trust as to the rights and interests in community property during the marriage may be exercised *only with the joinder or consent of both spouses*.52

To avoid any issue regarding the character of property, if a joint revocable trust is established and funded with community and separate property of the spouses, the trust agreement should provide that the power of revocation must be exercised jointly by the spouses with respect to community property assets and severally as to the separate property of each spouse (and Sole Management Community Property if Texas law applies).

The IRS has ruled that for purposes of the step-up in basis under Internal Revenue Code § 1014(b)(6), a husband and wife are considered as continuing to own property transferred by them to a revocable trust as their community property where the law of the state (California) provided that community property could be held by a trustee without losing its character.53 As a result, both halves of the community property held by the trust would receive a step-up in basis on the death of one of the spouses. The trust in the Revenue Ruling was a joint revocable trust established by the husband and wife, and the trust instrument provided that the property transferred to the trust retained its community property character.

Community Property Owned by Couples Residing in Common Law States

Another common issue that attorneys in common law states increasingly deal with is that of clients residing in the common law state who own property in a community property state. This situation occurs in two instances: (1) where the couple, while residing in the common law state, purchases real property (such as a vacation home) in a community property state; and (2) where a couple moves to a common law state and retains property located in a community property state that was acquired while they resided in the community property state. In each of these situations, a conflict of laws may arise.

Typically, in the absence of an effective choice of law by the spouses, the character of *movable property* acquired by spouses during marriage is determined by the law of the domicile of the spouses at the date of acquisition of the property.54 Colorado follows this rule.55 Furthermore, the character of marital property does not change when a couple moves from a community property state to a common law state.56 This concept also applies to property purchased with the proceeds from the sale of such property or acquired in exchange for such property.57

In *People v. Bejarano*, the Colorado Supreme Court held that a change in form of the property does not change the basic character of ownership.58 Generally, the law of the situs of *real property* controls the characterization of such property.59 However, there is not universal agreement on this.60 It should also be noted that some community property states may require specific recitals in the deed for the property to be considered community property in this situation. As a result, practitioners should advise their clients that when purchasing property in a community property state, they should include a recitation that the property will be held as community property.

Colorado Recognition of Community Property

Colorado recognizes community property rights, at least with respect to rights at death. Whether Colorado would recognize community property for purposes of divorce is beyond the scope of this article, but should be taken into consideration by the practitioner when counseling clients. As noted above, Colorado has adopted the Community Property Rights at Death Act.61 The statute provides that on the death of a married person, one-half of the community property to which the Act applies is property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the Colorado laws of succession.62

In other words, it preserves the community property character of such property for purposes of disposition on death. The Community Property Rights at Death Act defines community property as follows:63

Personal Property (wherever situated): (1) which was community property under the laws of another jurisdiction; or (2) property acquired with the rents, issues, or income of, or proceeds from, or in exchange for such community property; or (3) traceable to community property.

Real Property situated in Colorado acquired with the rents, issues, or income of, the proceeds from, or in exchange for, property that was community property under the laws of another jurisdiction. (*Emphasis added*.)

In addition, the Act provides for the following rebuttable presumptions:64

(1) property (real or personal) acquired during marriage while domiciled in a community property state is presumed to be community property; and

(2) real property situated in Colorado and personal property wherever situated acquired by a married person while domiciled in a common law state (*i.e.*, Colorado), title to which was taken in the form which created rights of survivorship, is presumed *not* to be community property.
(*Emphasis added*.)

The personal representative has no duty to discover whether property owned by the decedent is community property unless a written demand is made by the surviving spouse or by an heir, devisee, or creditor of the decedent.65

Colorado also recognizes community property held in joint tenancy with rights of survivorship. This is supported by several statutes. First, community property with rights of survivorship is specifically defined under the Colorado Revised Statutes pursuant to CRS § 15-10-201(29). Second, CRS § 15-15-216 provides that the deposit of community property into a joint account does not alter community property character or rights in the property, but that a right of survivorship in such property cannot be altered by Will.66 In addition, Colorado law provides that divorce severs the interests of spouses in community property with the right of survivorship, transforming it into tenants in common.67

Maintaining Community Property Character

For the reasons set forth above,68 it is often important to maintain the community property character of property owned by couples residing in Colorado. This can be accomplished in several ways. One way is by written agreement. Colorado allows couples, either before or after marriage, to enter into an agreement with respect to their rights and obligations in any property of either or both of them whenever and wherever acquired or located.69 Furthermore, the Community Property Rights at Death Act does not prevent couples from severing or altering their rights in community property.70 As a result, couples who reside in Colorado can, by agreement, list community property and their intent either to retain its character as community property or to sever it.

A revocable trust also can be used as a means of preserving the community property character of imported community property and prevent commingling of such property with separate property. Ideally, such a trust should be a joint trust, as discussed above.71 The trust should provide that it is governed by the laws of the community property state from which the couple has moved so as to provide more clarity on how the property is to be treated. In addition, care must be taken when drafting a joint trust to avoid inadvertently losing the use of the "Applicable Credit" of the first spouse to die. A separate trust could then be established by each spouse for his or her separate property and any newly acquired separate property.

Alaska Community

Property Act

For those couples who have always resided in Colorado or another common law state but wish to take advantage of the community property regime, Alaska may have the answer. Under the Alaska Community Property Act, out-of-state residents can "opt-in" to community property treatment by transferring their property to a "community property trust."72 The Alaska Act provides that a community property trust (1) must be signed by both spouses; (2) at least one trustee must be a "qualified person" [a qualified person is defined as: (a) an individual residing in Alaska, whose permanent home is in Alaska, and who has no present intention of moving from Alaska; (b) a trust company that has its principal place of business in Alaska; or (c) certain banks or national banking associations that possess and exercise trust powers and have their principal place of business in Alaska];73 and (3) the trust must contain the following language in CAPITALIZED type:

The consequences of this trust may be very extensive, including, but not limited to, your rights with respect to creditors and other third parties, and your rights with your spouse both during the course of your marriage and at the time of a divorce. Accordingly, this agreement should only be signed after careful consideration. If you have any questions about this agreement, you should seek competent advice.74

There has yet to be any case law interpreting whether a community property trust created under the Alaska Act will be recognized in other states. Moreover, the IRS has not ruled on whether the Alaska system of "opting in" to community property will be recognized for income and estate tax purposes. However, this is an option that some attorneys and clients may wish to explore.

Conclusion

Community property is a complex and evolving area of law. Historically, Colorado attorneys rarely had to deal with this area of the law. However, with the increasing number of out-of-state couples moving to Colorado, it has become clear that community property impacts many couples who now reside in Colorado and other common law states. Practitioners should discuss with their clients the nature of any property owned and counsel them regarding the advantages and disadvantages of maintaining the character of any community property. To determine the best course of action, it also may be advisable for practitioners to consult with an attorney in the community property state from which the client is moving or where property is located.

NOTES

1. Wis. Stat. § 766.01-766.97 (2001).

2. Rev. Rul. 87-13, 1987-1 C.B. 20.

3. Alaska Stat. §§ 34.77.010 *et seq*.

4. CRS § 14-10-113(2).

5. *E.g.,* Cal. Fam. Code §§ 760 and 770 (2001); Cal. Prob. Code § 28 (2001); Tex. Fam. Code §§ 3.001 and 3.002 (Vernon, 2001).

6. Ariz. Rev. Stat. § 25-213 (2001); Cal. Fam. Code § 770(a)(3) (2001); N.M. Stat. Ann. § 40-3-8E (2001); Nev. Rev. Stat. § 123.130 (2001); Wash. Rev. Code §§ 6.16.10 and 26.16.020 (2001).

7. Tex. Const. Art. XVI, § 15; Tex. Fam. Code §§ 3.001 and 3.002 (Vernon, 2001); Idaho Code § 32-906 (Michie, 2001); La. Civ. Code Ann. Art. 2339 (West, 2001).

8. *Id.*

9. Tex. Const. Art. XVI, § 15; Tex. Fam. Code §§ 4.102 and 4.202 (Vernon, 2001); Cal. Fam. Code § 850 (2001).

10. *See, e.g.*, Tex. Fam. Code § 3.003 (Vernon, 2001); *see also* Cal. Fam. Code §§ 760 and 802 (2001) (California statutes do not specifically provide for presumption).

11. Tex. Fam. Code § 3.006(a) (Vernon, 2001).

12. Tex. Fam. Code §§ 3.006(b), 3.401, and 3.402 (Vernon, 2001).

13. *Gleich v. Bongio*, 99 S.W.2d 881, 883 (Tex. 1937).

14. *See Vieux v. Vieux*, 251 P. 640 (Cal.App. 1926); *In re Marriage of Moore*, 618 P.2d 208 (Cal.3d 1980).

15. *Dutton v. Dutton*, 18 S.W.3d 849, 852 (Tex. App. 2000).

16. *In re Marriage of Morris*, 12 S.W.3d 877, 882 (Tex.App. 2000).

17. *Roberts v. Roberts*, 999 S.W.2d 424, 431 (Tex.App. 1999).

18. *Kyles v. Kyles*, 832 S.W.2d 194, 196 (Tex. App. 1992).

19. Tex. Fam. Code § 3.005 (Vernon, 2001).

20. *McCutchen v. Purinton*, 19 S.W. 710, 710-11 (Tex. 1982).

21. Tex. Const. Art. XVI, § 15; Tex. Fam. Code § 3.102(a) (Vernon, 2001).

22. Tex. Fam. Code § 3.102(c)

23. Cal. Fam. Code § 1100(a) (2001).

24. Cal. Fam. Code § 1102(a) (2001).

25. *E.g.*, Cal. Fam. Code §§ 721(b) and 1100(e) (2001).

26. *E.g.*, Cal. Fam. Code §§ 1100 and 1102 (2001).

27. *See* CRS §§ 38-35-101 *et seq*.

28. Cal. Prob. Code § 100(a) (2001); Tex. Prob. Code § 45 (Vernon, 2001).

29. *See* Priv. Ltr. Rul. 200101021 (Oct. 2, 2000).

30. Cal. Fam. Code §§ 63, 125, and 2660; Cal. Prob. Code §§ 66 and 101(a) (2001); Tax Fam. Code § 7.002 (Vernon, 2001).

31. Cal. Prob. Code § 66 (2001); Tax Fam. Code § 7.002 (Vernon, 2001).

32. Cal. Fam. Code §§ 63, 125, and 2660; Cal. Prob. Code. §§ 66 and 101 (2001).

33. Tex. Fam. Code § 7.002 (Vernon, 2001).

34. IRC § 1014(b)(6).

35. *Supra*, note 29.

36. Pub.L. No. 107-6; H.R. 1836, known as EGTRRA, amending numerous sections of the Internal Revenue Code and other sections of the U.S. Code.

37. *E.g.*, Cal. Fam. Code § 2550 (2001).

38. *E.g.*, Tex. Fam. Code § 7.001 (Vernon, 2000).

39. Cal. Fam. Code § 852 (2001); Tex. Fam. Code § 4.104 (Vernon, 2001).

40. *E.g., Siberell v. Siberell*, 7 P.2d 1003, 1005 (Cal. 1932); *but see Tomaier v. Tomaier*, 146 P.2d 905, 906 (Cal. 1944) (interpreting *Siberell* as establishing only that the trial court in divorce proceeding has the power to divide the property equally, whether property is a joint estate or community property).

41. Wash. Rev. Code § 64.28.040 (2001); Tex. Prob. Code § 451 (Vernon, 2001); Nev. Rev. Stat. § 111.065(1) (2001); N.M. Stat. Ann. § 40-3-8(B) (Michie, 2001); Cal. Fam. Code § 2581 (2001); Cal. Civ. Code § 682.1(a) (2001). Note that for purposes of transfers on death, Cal. Civ. Code § 682.1 requires the transfer document to declare that property be community property with right of survivorship.

42. Tex. Prob. Code § 451 applies to agreements between spouses creating a right of survivorship in community property entered into on or after the effective date of the 1987 amendment to Article XVI, § 15, of the Texas Constitution. *See* Tex. Prob. Code § 451 at Historical Note (Vernon Supp., 2000). *See also* Cal. Civ. Code § 682.1, providing that community property, when expressly declared in the transfer document to be community property with right of survivorship, shall, on the death of one of the spouses, pass to the survivor, and is effective for all instruments created on or after July 1, 2001 (although case law appears to have allowed community property with rights of survivorship prior to this for purposes of intestate succession). *See Estate of Maggio v. Vahldieck*, 194 Cal. App.3d 1006, 240 Cal.Rptr. 84 (Ct.App. 1987) (character of property for purposes of intestate succession is determined by its source, not nature of title in which it is held). With respect to division of property on divorce or legal separation in California, property acquired in joint form is presumed to be community property, regardless of the date of acquisition or the date of any agreement affecting the character of the property for all proceedings commenced on or after Jan. 1, 1984. Cal. Fam. Code §§ 2580 and 2581 (2001).

43. *See Estate of Ashe*, 48 P.2d 281 (Ct.App. 1988); *Swink v. Fingado*, 850 P.2d 978 (N.M. 1993); *Collier v. Collier*, 242 P.2d 537, 540 (Ariz. 1952); *Bonnell v. Bonnell*, 344 N.W.2d 123, 127 (Wis. 1984). *See generally* Harms, "Joint Tenancy, Transmutation and the Supremacy of the Community Property Prescription: *Swink v. Fingado*," 30 *Idaho L.Rev.* 893 (1994).

44. CRS § 15-20-103(b).

45. CRS § 13-25-127.

46. CRS § 15-20-103(a).

47. *See Berniker v. Berniker*, 182 P.2d 557 (Cal.2d 1947); *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968). *E.g.*, *Estate of Powell v. Powell*, 100 Cal.Rptr.2d 501, 506 (Ct.App.4th 2000); *Jameson v. Bain*, 693 S.W.2d 676, 681 (Tex.App. 1985).

48. Cal. Fam. Code § 761 (2001); *see also* Cal. Prob. Code (2001) § 104 (community property held in revocable trust described under § 761 of Family Code governed by provisions in trust for disposition at death) and § 104.5 (the transfer of community or quasi-community property to revocable trust shall be presumed to be agreement that those assets retain their character for purposes of any division provided by trust).

49. CRS §§ 15-20-105 and -106.

50. Tex. Fam. Code §§ 4.102 and 4.104 (Vernon, 2001); Cal. Fam. Code §§ 850 and 852 (2001).

51. Cal. Prob. Code § 104.5 (2001); s*ee also* Cal. Fam. Code § 761(a) (2001).

52. Cal. Fam. Code § 761(a) (2001).

53. Rev. Rul. 66-283, 1966-2 CB 297; *see also* Rev. Rul. 76-100, 1976-1 CB 123 (one-half community property interest in installment note required to be treated as if acquired from deceased spouse under Code

§ 1014 where trust provided that it could be revoked by either one or both spouses with respect to their one-half community property interest in trust).

54. *Estate of Kessler*, 203 N.E.2d 221 (1964); Cal. Fam. Code §Ê760 (2001); *Restatement (Second) of Conflict of Laws* § 258 (1969).

55. *See People v. Bejarano*, 358 P.2d 866 (Colo. 1961).

56. *Tomaier, supra*, note 40; *Restatement (Second) Conflict of Laws* § 259 (1969); *Bejarano, supra*, note 55; *Estate of Kessler, supra*, note 54.

57. *Restatement (Second) Conflict of Laws* § 259, cmt. b (1969).

58. *Bejarano, supra*, note 55 at 868.

59. *Restatement (Second) of Conflicts of Laws* § 223 (1969).

60. *E.g.*, Cal. Prob. Code § 28 (2001); Cal. Fam. Code § 760 (2001).

61. CRS §§ 15-20-101 *et seq.*

62. CRS § 15-20-104.

63. CRS § 15-20-102.

64. CRS § 15-20-103.

65. CRS §§ 15-20-105 and -106.

66. CRS § 15-15-216.

67. CRS § 15-11-804(b).

68. *See* the section entitled, "Legal Implications of Community Property," at notes 26-38, *supra*.

69. CRS § 14-2-304.

70. CRS § 15-20-109.

71. *See* the section entitled "Transferring Community Property to a Revocable Trust" and accompanying notes 47-53, *supra*.

72. Alaska Stat. § 34.77.030(a) (Michie, 2001).

73. Alaska Stat. § 34.77.100(a) (Michie, 2001).

74. Alaska Stat. § 34.77.100 (Michie, 2001).