Playing Both Sides of the Florida Community Property Street?

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I. A Short Form Look At The Issue.

Cutting to the chase, here in nine easy bullet points is the whole program:

- Community property rights (at times referred to as "CPR" property) of married couples follow their assets into Florida when they move here from a community property jurisdiction.

- These rights are vested 50% undivided interests for each of the couple in all property stemming from their imported assets (usually cash in accounts) with *no survivorship rights*.

- Florida Tenancy by the Entireties ("TBE") ownership requires 100% ownership by both members of the couple in the Florida property to arise. (Unity of Interest)

- Because the property the couple purchases in Florida is mandatorily owned as 50% interests because of the vested community property rights, that new property in Florida cannot attain the status of TBE property unless the couple expressly and with informed consent changes the property ownership to TBE.

- Deeds or purchase records that say just "husband and wife" (or with no reference to married status at all) are not that change and certainly not with any informed consent on the part of both of the couple.

- This problem has not been addressed adequately over the decades and hence it is quite possible that a vast quantity of real and person property in Florida which was thought to be TBE property at the death of the first of the couple to die has been instead Tenancy-In-Common ("TIC") property at that first death.

- In light of this oversight, property which was assumed to vest in the survivor by operation of law as TBE property, has been instead 50-50 TIC property with ½ in the estate of the decedent, and ½ owned by the surviving spouse. Does this make a difference? Yes, hugely.

- Contrary to the above, there is the strong argument that local land rules apply to at least real property and these local rules control how we in Florida view the ownership in this scenario. Local rules and strong Florida public policy state that TBE applies here and this would override the above application of community property rights here. This might win. And again, it might not.

- The above profound conflict between two diametrically opposed legal conclusions in a very important area of estate planning and administration in Florida allows the practitioner to play both sides of that argument, depending which supports the client involved. This is what playing both sides of the "community property rights street" means. The following detailed discussions explains how this conflict arises and plays out for the planner.

FRIENDLY REMINDER: If the reader does not have the time, he or she can stop here and just attend the January 8 dinner lecture by the author to gather in the gory details. This is the best approach. Caution: reviewing the total materials here does NOT give the reader anywhere near the required content to learn this well. The author has intentionally left out critical detail, especially legal tactic points, from the discussion below for the sole purpose of forcing all interested parties to spring for the dinner tab and attend the January 8 EPC meeting. The dramatic PowerPoint slides (not included in these web accessed materials) in the live presentation alone provide the keys to success in this subject. So don't even dream of ripping down the web content and not attend the dinner meeting on January 8.

II. Overview of Playing Both Sides of the CPR Street

HEADNOTE: Florida recognizes (as it must) community property rights to be *imported into* Florida, but Florida does not allow them to be *originated* here.

We are taking about how married people hold property, both real and personal, in Florida, although this can apply to all 41 common law states in the US. This is a very important issue in Florida, like all other states, since married people own a large percentage of the property, real and personal, in the United States. This investigation is focused on the estate in property called "tenants by the entireties" which we will call "TBE" for short. Even more critically, the focus is on how Florida community property rights affect TBE in property --- more precisely, how community property rights prevent TBE from every arising. Important in Florida? We should say so since so many married people move into Florida bringing with them their property rights from community property jurisdictions which continue directly to the property they purchase and own in Florida.

Yes, this is scary stuff, we all admit. That is why no one wants to talk about it. Especially the title companies who insure land titles many of which were until now religiously thought to be tenancies by the entireties once upon a time. We are talking more than 100 years of title insurance coverage since this issue has emerged in American jurisprudence. And this conflict

which goes for both real and personal property. However, if community property rights are imported by all those married people moving in, and there is no survivorship in those rights and only a 50-50 division between them, how can there be any tenancy by the entirety in the first place for such property? Ouch. Community property rights are an undivided fifty percent thing, not an undivided *whole* of the property as the five unities of tenancy by the entirety demand. If any one of those unities is lost, all these people have is a tenancy in common with no survivorship rights. Is this a big deal? Are there condos on Brickell? Of course this is a legal firestorm brewing.

The Miami-Dade Estate Planning Council never shirks its duty to present even the most controversial, dangerous and mind-tingling subjects and therefore this investigation heads directly into its perfect storm which can be viewed as a "street." On one side of the street are the traditionalistic title people and goldbricking surviving spouses quaking in their shoes hoping that the Florida Supreme Court will rule that community property rights do not interfere with the establishment of tenancies by the entireties. On the other side are the greedy children from the first marriage screaming that tenancy by the entirety cannot arise from imported community property rights property because the required five unities of time, title, interest, possession and marriage did not ALL exist simultaneously. The fact that many decades of title insurance policies completely overlooking this issue ride on this outcome should not affect our view here. Or should it?

III. Background of Community Property Rights in Florida

A. There is no such thing as Florida Community Property

HEADNOTE: Florida does not recognize community property, but the community property *rights* imported into Florida are almost identical to those rights as they were back in the originating community property jurisdiction, except as possibly limited by Florida public policy.

Florida, as one of the 41 "common law" states, does not have an *estate in property* called "community property." In divorce law, as do most other common law states, Florida creates a "marital property" classification in dissolution which mimics the effect of community property, but it is simply a method to divide property in marriage dissolution proceedings and nothing else. It uses evidentiary presumptions and makes it clear that it does not establish rights to property or an estate in property. This law can be changed at any time by statute and establishes no constitutional rights to property. Ironically, the strongest statutory rejection of community property as an estate in property in Florida is in our divorce law. Notice how the applicable Florida divorce statute labors to eliminate any thought of community property entering through Florida's dissolution law or by way of the dissolution proceeding:

> **FS §61.075 (7)** All assets acquired and liabilities incurred by either spouse subsequent to the date of the marriage and not specifically established as

> nonmarital assets or liabilities are presumed to be marital assets and liabilities. Such presumption is overcome by a showing that the assets and liabilities are nonmarital assets and liabilities. The presumption is only for evidentiary purposes in the dissolution proceeding and does not vest title. Title to disputed assets shall vest only by the judgment of a court. This section does not require the joinder of spouses in the conveyance, transfer, or hypothecation of a spouse's individual property; affect the laws of descent and distribution; **or establish community property in this state.** [emphasis added]

One of the major mistakes of past approaches to understanding community property rights in Florida has been the assumption that our Florida Uniform Community Property Rights at Death Act (FUDCPRTA) passed in 1998 and updated in 2001 is the fountainhead and focal point of the way we work with community property rights. That is incorrect. Florida's handling of community property *rights* is founded in constitutional law and conflicts between state laws presented much earlier by case law. The uniform statute only came later to try to make things easier to understand for common law jurisdictions and to protect established land title interests. It did not exactly accomplish those goals, as will be seen below.

Another statement of this concept that Florida has no community property rights occurred in *Estabrook v. Wise*, 348 So.2d 355 (Fla. 1st DCA 1977). "Florida is not a community property state, and thus is not required to recognize an encumbrance predicated upon a foreign state's community property law." Of course, that case was no addressing the issue of this investigation. In fact this quote is pure dicta, but used here for dramatic function, and not for brilliance in application.

Hence Florida property, divorce and estate law goes out of its way to make it clear that there is no "community property" in Florida. Of course, what does exist in Florida are community property "rights" imported from community property jurisdictions. This community property thing then is limited to *importation* of rights to Florida and not *origination* of those rights in Florida, which is our second simple truth: Common law states like Florida make a big deal about allowing community property rights to be *imported into* Florida, but *not originated* here. This is the guiding principal behind this whole conflict of laws issue presented here.

B. <u>What is community property in the simplest terms</u>?

> **<u>HEADNOTE</u>**: "Community Property" in its simplest terms is the vested ownership by a married person in an undivided ½ of the assets acquired by either or both married persons during the marriage regardless of who takes legal title to the property, and *without survivorship characteristics.*

An estate planning professional in Florida would react to this definition with a very proper statement: Hey, this looks like tenants-in-common ("TIC") property. That would be

about 96% correct. The difference here is that community property rights assets in Florida have additional attributes which purely TIC property in Florida do not have. Each community property jurisdiction has its own nuances concerning its rules, so one must be careful to go to the source CPR law in each instance. In effect, community property rules force ownership as equal tenants-in-common between the spouses no matter what the title document (if any) states, and without survivorship. Income from community property is also community property in Florida. "Separate property" of each spouse also retains the same characteristics as it does in Florida divorce law. Let us keep it that simple for now in the discussion. Hence, the definition in the headnote above is that which we will use.

The "vested" ownership part of the above is very important. This ½ ownership is a property right in community property states. In common law states, marital rights (if any) in property in which a married person does not own legal title is a matter of legislative grace, and not a property right, let alone a constitutionally protected property right. This is a significant difference. Because of this vesting ownership, the community property of the decedent is excluded from the Florida elective estate at death. FPC §732.2045(1)(f), and rightly so. If the surviving spouse already owns something exclusively, applying the elective share rules to would be nonsensical.

C. Community property rules are used in Florida divorce law, but not at death

HEADNOTE: Community property closely resembles the way Florida divorce law handles asset rights upon dissolution, looking upon marriage as a partnership with equal vested ownership of all assets instead of property rights being controlled by who holds legal title.

Florida and virtually all common law jurisdictions for many years have adopted the "partnership" view of marital assets in divorce law, which is very much, but not exactly identical to community property laws. *See* Chapter 61, Florida Statutes.

However, the moment that death occurs, the common law jurisdictions jettison the community property view and switch back over to the common law tradition of looking to legal title ownership and then engrafting legislative graces such as the elective share and exempt property rules to benefit a surviving spouse. Why not just let the partnership idea of marital property flow through the death of the first spouse to die? If that was good enough for determining property rights during life, why should the death of the first spouse to die change anything? And there is the big question of the universe. Answer: Because we don't want community property rules to apply in Florida estate law. Since our real property laws have for so long depended upon that fundamental reality, changing to a community property-like system is complex, vastly political and almost universally avoided[1] in the common law states.

[1] Wisconsin is the sole common law state to adopt the Uniform Marital Property Act, which it did in 1986. This uniform act was designed to accomplish the transformation from a common law property at death state to a state

D. What if anything does Florida recognize in regard to "community property?"

Although Florida does not, as previously stated, have community property as an *estate* in property, Florida must recognize the *rights* of a person in community property. This is a convenient fiction to accommodate the ownership of community property in a common law state. The person bringing community property *or proceeds thereof* from a community property jurisdiction, once crossing the Florida state line, then has community property *rights* in Florida but not community property. Those rights are almost[2] identical to the ownership of community property from the original jurisdiction, but simply with a different name to adapt to the common law jurisdiction milieu. They are fully vested rights. These newcomers to Florida will not own community property in Florida, but they will own property invested with community property *rights*.

What is the difference? Not much. Probably no difference at all. A rose by any other name smells the same – and behaves the same. Because this is a constitutional issue of rights in property, the community property states must maintain the same cross recognition rule. They have a status of property called "Quasi Community Property" for married persons coming from a common law jurisdiction to a community property state to preserve the pre-existing vested marital rights. The community property *rights* imported into Florida are almost identical to those rights as they were back in the originating community property jurisdiction, except as possibly limited by Florida public policy.

E. How do we know community property rights are protected like this in Florida?

It certainly isn't Florida's rather flawed uniform statute on the subject which is discussed below. Rather, we know this from many well-reasoned cases from both state and a few from federal courts over the years, but the primary Florida case *Colclazier v. Colclazier*, 89 So.2d 261 (Fla. 1956) laid out the basics of how community property rights arrive in Florida and are recognized and protected under Florida law. It held that a mortgage interest was controlled by the community property rights imported by the married couple from a community property jurisdiction.

The most well considered and concisely written case, however, in Florida law arose from South Florida (surprise, again) when the Third District Court of Appeal explained this importation of rights with even greater detail in Q*uintana v. Ordono,* 195 So.2d 577 (Fla 3rd

where community property characteristics are maintained at the death of the first of a married couple to die. The Wisconsin experience in this area has not been seen as a raging success.

[2] "almost" -- this word is the little nasty which creates more trouble in the world of Florida community property rights than any other. The biggest question of all is to what extent Florida law can change, limit or even eliminate incoming community property rights. This awaits a final Florida judicial determination which has not yet arrived.

DCA 1967). This case came out of then Dade County and restated the universally prevailing view that community property rights follow a married person coming from a community property jurisdiction into Florida and must be protected just as the common law property rights of all married persons in Florida are protected.

There are several constitutional law reasons behind this and it makes sense. If you own a car in Texas and drive it to Florida, when you arrive here, does your ownership of that car change? No. It cannot because it is a fully ascertained (vested) right of ownership. Concepts of equal protection, full faith and credit and the interstate privileges and immunities among others provide that constitutional protection. To have it any other way would cause chaos for a federal republic where transiency is a way of life. To its credit, *Quintanna* used as support the leading cases from community property states which strongly hold these rights to be vested and constitutionally protected.

Therefore *Colclazier* and *Quintana* quite properly outlined those rules for Florida and have stood as the guiding law since then. *Quintana* used a constructive trust enforcement mechanism to retrieve the errant ½ of the property, but the right to that ½ property interest was determined as a vested property right. This case is so important in this study that it is attached in its full text as Exhibit A to these notes.

However a clearer definition of community property rights relating to Florida *real* property will need to come eventually regarding tenancy by the entireties and protected homestead. *Colclazier* and *Quintana* continue their control over this area of Florida law without any diminution although the cases simply echo similar rulings in other common law states which have directly addressed community property.

Florida commentators in the treatises are a bit skittish about addressing community property issues but there is an exception: The Real Property, Probate and Trust Law Section's own Laird Lile, of Naples, Florida. He is the only nationally recognized commentator to address the issue as to whether Florida recognizes community property rights as vested constitutionally protected rights. Mr. Lile had the courage to state this important legal truth in his immortal probate treatise:

> *"[Quintana]* judicially established that community property does not lose its unique characteristics by the owners merely moving to Florida. Property rights acquired in community property jurisdictions are constitutionally protected rights; the property maintains that characteristic." Laird Lile, *Florida Probate*, page 73, George Bisel 1999.

And how do we know that Mr. Lile is correct in this? Look no further than the most authoritative statement as to the constitutional stature of community property rights. This was stated by the California Supreme Court in *Estate of Thornton*, 33 P.2d 1 (Cal. 1934). This is the granddad of all community property cases which is used in the community property jurisdictions as authority for CP rights being fully vested constitutional protected rights. *Quintanna* cited it. Ironically this case concerns protecting *separate* property rights where a couple moved from a

common law state to California, a community property state. The discussion is crystal clear and well-reasoned. So much so a copy of this critically important opinion is attached as Exhibit B to these notes. The federal courts have considered this issue strictly as a matter of state law and hence have universally given due regard to the holding of *Thorton*, and similar rulings in other community property jurisdictions. Hence, federal courts steer clear of tinkering in the constitutional confines of the *Thorton* ruling and those like it from other community property jurisdictions.

F. What are the community property jurisdictions in the USA?

HEADNOTE: The reason why community property is an estate of property in nine states of the US is because of the strong civil law traditions of the Southwestern states, proximity to those states or through Spanish legal traditions (Louisiana during Spain's occupation), and adoption of the uniform marital property law. (Wisconsin 1986)

These are the NINE community property jurisdictions in the US:

1. Louisiana (most authentic)
2. Texas
3. New Mexico
4. Arizona
5. California
6. Nevada
7. Washington
8. Idaho
9. Wisconsin (least authentic) UMPA 1986

All of the above have been accepted by the Internal Revenue Service as true community property jurisdictions. Alaska enacted a community property law in 1998 which has not been accepted by the IRS as a valid community property application.

Alaska & Other State Attempts Rejected by IRS. The reason why the IRS does not recognize Alaska as a "proper" community property jurisdiction is because it feels the Alaska act allows too much flexibility of opting in and out of community property rules. Hence the IRS looks upon Alaska's alleged "community property" regime as more of a tax avoidance device than a unified state property law system. Spouses using the Alaska law may create community property by entering into a community property agreement or by creating a community property trust. Alaska Stat. §§ 34.77.020 - 34.77.995. The U.S. Supreme Court ruled that a similar statute allowing spouses to elect a community property system under then (and later repealed) Oklahoma law would not be recognized for federal income tax reporting purposes. *Commissioner v. Harmon*, 323 U.S. 44 (1944). The IRS takes the position that the *Harmon* holding applies to Alaska's community property regime for tax purposes, and any other state which makes that attempt.

Double Step-Up in Basis Benefit. The double step up in basis for capital gains tax purposes is simple enough. In a common law state, when a person dies, the property of the *decedent* receives a step-up to the fair market value at the date of death (or alternate valuation if applicable) if it is included in his or her gross estate for federal estate tax purposes. For community property owned in part by the decedent, not only the decedent's ½ receives the step-up, but also the ½ owned by the surviving spouse receives this. If the reader is seriously interested in being immersed in complexity at the expense of clarity in this study, please feel free to study IRS Publication 555 and research each point stated therein.

Other States Experimented with CPR. Several common law states many years ago "experimented" with community property as a regime and then repealed it. Michigan, Nebraska, Oklahoma (see the *Harmon* case above), Oregon, Pennsylvania and Hawaii temporarily adopted community property regimes from the period 1945-1949 in an attempt to garner tax benefits. However, after *Harmon*, popular support faded for that benefit and the supposed legal confusion which was thought to have resulted pushed all of them to re-adopt common law traditions for marital property rights at death.

G. What other community property jurisdictions are there?

HEADNOTE: The reason why community property is an estate of property in nine states of the US is because of the strong civil law traditions of the Southwestern states, proximity to those states or through Spanish legal traditions (Louisiana during Spain's occupation), and adoption of the uniform marital property law. (Wisconsin 1986).

In the territories of the United States, Puerto Rico has maintained its community property regime for hundreds of years, since well before it became a commonwealth territory of this country.

Beyond the United States, the majority of foreign nations are community property jurisdictions. Virtually all of the nations of Latin America, most of Europe, and some of Africa and Asia, are community property jurisdictions. Jurisdictions with strong ties to the history of the British common law will usually not maintain community property. Because so many married people moved to Florida from community property jurisdictions, both foreign and from within United States, this is a very major area of law to understand and use every day.

H. Why does it matter what the IRS thinks about a jurisdiction's community property status?

HEADNOTE: The IRS is very concerned about what are true community property jurisdictions because at death not only does the capital gains basis of decedent's ½

community property interest get stepped-up to the value at death, but also that of the surviving spouse. IRS §1014(a)(6).

IRS Approval Double Step-Up. Because the greatest quantitative benefit of community property status is the double step-up in capital gains basis to the fair market value at death is allowed only for IRS approved community property jurisdictions §1014(a)(6). In an upmarket for assets, the double step-up can be very valuable. In a down market, the opposite can be true.[3]

Proving 50% Inclusion. Another reason why the IRS is concerned is because in the estate tax world of non-resident aliens (properly documented non-immigrant persons), married couples do not have the 50% interest of jointly held property inclusion in the gross estate, IRS §2056(d)(1)(b), on the estate tax return form 706NA. That is, unless the surviving spouse is a US person (citizen or resident alien). IRC §2040(b). So without a US person as a surviving spouse, the decedent's gross estate must include 100% of the asset value unless contribution can be clearly proved. However, where community property rules apply, the 50% is mandatory. This is where the community property determination drops the 100% to the desired 50% simply by applying the community property rights from the sourcing jurisdiction. This can save considerable tax where tracing of contribution is difficult or impossible. This needs the following example:

> Simple Example: A Swedish couple buys a house in Florida, and then years later the husband dies. Sweden of course is a community property jurisdiction. The record title shows just "husband and wife," with no labeling. For Florida land title purposes this would presume a tenancy by the entireties scenario knowing nothing else. In the world of eyes wide shut, the title companies are most comfortable with not knowing anything about community property status. But does this really constitute a tenancy by the entireties under state law? And even if it is tenancy by the entireties under Florida law, how does the IRS look upon this when the husband's interest is stated as part of the gross estate for estate tax purposes on the 706NA? This is quaint because for non-resident aliens there is no benefit of automatic 50% inclusion even if the property is deemed to be tenancy by the entireties and the surviving spouse is not a US person. For non-resident aliens the presumption is 100% inclusion for any spousal situation unless by tracing contribution one can prove that economic benefit by the surviving spouse. Fifty percent inclusion would happen for a US citizen or resident alien ("green carder"), but not for a non-resident alien no matter if it is tenancy by the entireties or not. But when community property rights enter into the picture, the IRS is forced to accept a 50% inclusion in the gross estate. Hence, community property rights are a handy way of forcing the 50% inclusion when it is difficult or impossible to trace any contribution by the surviving spouse. Often there is no contribution, and here community property rights is excellent at chopping an estate tax bill down by more than one-half. For these reasons the IRS is sensitive about the applicability of community property rights in Florida.

[3] The double step-up in basis can also mean a double step down in basis in the event the market value of any asset has *decreased* in the interim. The kneejerk reaction to benefit of the double adjustment can turn sour in a down market.

Therefore, an obscure planning point here is that the IRS is very concerned because non-resident alien taxpayers who are married do NOT have the presumption of 50% ownership of jointly held marital property for estate tax purposes. It is only community property rights which get you the 50% ownership.

I. How are community property rights identified in a common law jurisdiction?

Tracing is the Method. These rights are identified and quantified by tracing --- just like in a divorce case. This is where our job becomes very much like that in a Florida marital dissolution proceeding. One must survey all of the assets of the married couple and classify them as "community" or "separate." Then the assets must be researched backwards in time to see where they originated. Is this labor intensive? Of course it is. The "community" vs "separate" differentiation varies with the originating jurisdiction, so it takes some good help from that jurisdiction. Each originating state has slightly differing rules concerning this important classification point. However, our Florida view of marital vs. separate assets is a good starting point in that study and covers most issues.

Quality of Marital Status. In many community property jurisdictions a valid marriage is *not* necessary to establish community property rights. Hence the local law of the originating jurisdiction is critical in that starting point. California, for instance, will establish community property rights with couples who live together in conjugal relationships which are termed "peripheral marriages." Yes, this makes our study cease to be simple, but in every narrative, there are complicating elements, though not enough to sink the ship of simplicity. However, the IRS takes a strict view of this subject. If a state denominates a legally recognized relationship as a "marriage," then the IRS will allow the couple to use married persons' rights and procedures like joint returns, the estate tax marital deduction etc. Hence, same sex marriages will be recognized for these purposes if they were formalized in a state which allowed them. This applies even if the couple later moves to a jurisdiction which does not allow them. However, where states do not consider the relationship a "marriage," such as the Registered Domestic Partners status in California, Nevada and Washington, those RDP couples will *not* be granted tax related marital rights and procedures even though they are bound by the community property laws of those states like married people.

Separate Property Characteristics. Community property is the group of assets acquired, earned, improved and expanded by married people during the time in which they are married. It may include some pre-existing separate assets if the couple agrees to deem them community. Couples can also sever community property by agreement and make it separate, but this requires informed consent, and that is usually difficult to prove. For the most part, however, community property is computed, evaluated and ascertained during which time the married persons are indeed married. In virtually all of the community property jurisdictions, the presumption is that community property is owned in equal shares between the two married persons regardless of who earned or required it, and most importantly, and regardless of how legal title is taken. Separate property is that property owned by the members of the marriage

prior to the marriage or received by inheritance or gift by either of them during the marriage, among a few other unique rules.

American vs Civil/Spanish Income Rules. Income from separate property in some jurisdictions (California, Nevada, Washington, Arizona & New Mexico) follows the "American Rule" which means that the income stays as the separate property of the owner spouse. In other jurisdictions (Idaho, Texas, Louisiana & Wisconsin), the "Civil/Spanish Rule" makes that income community property.

Florida Follows American Rule. This whole asset identification system with the American Rule (income from separate property stays as separate property) mimics the way that Florida law handles "marital" and "separate" assets in the divorce setting. In fact, the "marital asset" rules for Florida, and most other common-law jurisdictions is really the community property idea applied but only for divorce. However, at that magic moment of death in Florida, common law rules of asset ownership and rights take over and community property ideas are jettisoned. So Florida in effect is very much a community property state until the first spouse heads to Boot Hill.

J. Do imported community property rights attach to Florida real property?

Yes, FPC §732.217(2) Says So. Now we are getting close to the question at hand, but not quite, because this statute tries to exclude TBE property. This is how it reads:

732.217 Application.—Sections 732.216-732.228 apply to the disposition at death of the following property acquired by a married person:
(1) Personal property, wherever located, which:
(a) Was acquired as, or became and remained, community property under the laws of another jurisdiction;
(b) Was acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, community property; or
(c) Is traceable to that community property.
(2) **Real property, except real property held as tenants by the entirety, which is located in this state,** and which:
(a) Was acquired with the rents, issues, or income of, the proceeds from, or in exchange for, property acquired as, or which became and remained, community property under the laws of another jurisdiction; or
(b) Is traceable to that community property. [Bold face added]

The other statutory reference to TBE in FUDCPRDA is §732.218(2) which is a blatant double negative and hence that section cannot be used for the support of anything. So it is only the above statutory section which speaks to TBE in its relationship to CPR. But because CPR eliminates the Interest Unity, it is arguable that TBE never arises and this exception is useless and hence inapplicable to this discussion. *See* Section III below for the big conclusion concerning TBE vs CPR.

Land in Florida therefore is indeed included in the CPR attachment system by this statute and the history of CPR constitutional guarantees. As stated, it is possible that the exception stated in FUDCPRDA §732.217(2) is not applicable or enforceable. Although Florida does not

have a defining case directly on point concerning apparent tenancy by the entireties property and protected homestead. These community property rights are, as stated, constitutionally protected vested property rights. However, when dealing with real property, the local traditions where the land is situated are much stronger than with movables. Case law from around the country supports this although there is no definitive Florida case on point concerning realty, particularly where it is apparently tenancy by the entireties or protected homestead. However, indications are that in Florida, realty should be treated like movables in regard to community property rights. *Colclazier* controlled mortgage ownership, which is, although an intangible, a real property related interest. Why would a mortgage interest be different from a deed interest? Therefore, there should be no limitation as to real property in this regard. This result is summarized by the following Comment from the Restatement Second of the Conflicts of Laws Comment to Section 234(a) of the Restatement 2d of Conflict of Laws Conflicts of Law:

> **". . .** So if land in a common law state is purchased with funds that are held in community because acquired while the spouses were domiciled in a community property state, the courts of the situs would usually hold that the spouses - at least as between themselves - have the same marital property interests in the land as they formerly had in the fund. On the other hand, these courts would usually apply their own local law in situations where the rights of some third person, such as a creditor or a transferee, are involved."

TBE vs CPR. This sets the issue directly heading for a potential clash dealing with Florida real property rights dealing with tenancy by the entireties and homestead realty. That is played out in Section III below. This clash was supposed to be avoided by the Florida Uniform Disposition of Community Property Rights at Death Act (FUDCRPDA), but was not for the reasons stated above and below. California through its *Thorton* case (cited above) leaves no doubt that marital rights to property are constitutionally protected, which includes all property including realty. Other courts in community property jurisdictions have more recently ruled specifically in accordance with *Thorton* where realty was involved. *Ford v. Ford*, 276 Cal. App. 2d 9, 80 Cal. Rptr. 435 (Ct. App. 1969); *Muckle v. Superior Court,* 102 Cal. App. 4th 218, 125 Cal. Rptr. 2d 303 (Ct. App. 2002). The key to this is that this result occurs when the property was purchased with community property funds and where the issue was the ownership rights as between the spouses. Of course, at death, that is the whole point. The IRS follows this and has made the principal staple of their treatment of community property rights in IRS Manual Part 25, Chapter 13, 25.13.1.2.6.

Local Law on Realty. On the other hand, there is the age-old general rule that the law controlling realty is the law where it is located. The Florida cases are too numerous to list. The federal courts also acknowledge that concept as a *general rule*, see *Woods v. Naimy*, 69 F.2d 892, 894 (9th Cir. 1934). However, we are not dealing with general real estate rules here. The imported CPR issues are specific, not general. They are constitutionally protected rights, not just statutory. Hence it will be the specific cases and rules therefrom which control, not the generic. The very specific Restatement citation above shows that the conflicts cases will not apply the general rule to imported CPR in land. In this narrow context of vested constitutionally protected

property rights we are talking importable rights which infuse themselves into the new property when deposited into the new jurisdiction where they are planted. *Colclazier, Quintana, Thornton* and Laird Lile say exactly that. The Restatement 2d says so. What more could you want? A Florida appellate case, or any appellate case, would do. Unfortunately we do not have a case in Florida that has ventured that far, or in any known jurisdiction directly on point, but we do have signs which make that result likely. The problem is that litigants have historically folded[4] before a good appellate case could be decided.

Florida's View of Death Disposition Rights. Although there is no Florida case law directly on point yet dealing with Florida real estate being controlled by imported community property rights, *Shriners Hospitals V. Zrillic*, 563 So.2d 64 (Fla 1990) strongly suggests that vested rights having the level of historical dignity as community property rights would be treated no differently than other vested property rights at death. That is, as constitutionally protected. In *Shriner's Hospital* the Florida Supreme Court held that the right to dispose of property at death was a property right protected constitutionally. Owing to the case law like *Thorton* from emanating from community property states, there is little doubt that *Shriner's Hospital* would be extended to community property rights dealing with realty. However, the rub comes in when it comes to the real property estates of tenancy by the entireties and protected homestead realty. Would these staples of Florida realty law be upended by imported community property rights? See Section III for the Author's diagnosis. That is where the public policy exception could play a role. Much is at stake, and therefore this will be interesting.

K. What Does the Florida Uniform Disposition of Community Property Rights at Death Act Accomplish?

Not a whole lot. FUDCPRDA is attached as Exhibit C hereto. It attempts to summarize the basic rules of community property rights in order to translate them into a simple way to apply what the case law and constitutional rulings already have mandated. The Florida uniform act is found in FPC §§732.216-228 and was fully effective on January 1, 2001. There have been only 16 common law states[5] around the country including Florida which have adopted this uniform law.

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[4] The author conjectures (with some empirical support) that litigants caught anywhere near this problem sense that this touchy subject could only be solved by a state supreme court ruling and hence back off spending that much legal money on this subject. The other problem is that the opposing positions are so evenly matched that a probable outcome is not easily predicted. Another factor is that the subject is seen as so exotic that the litigators feel uncomfortable dealing with it. Thus, to our chagrin, this standoff of concepts invariably has the parties compromising instead of paying for the full Monte to the highest court of the state without a predictable outcome. It just is too risky and too expensive to take to the top. Hence, the dearth of appellate court guidance.

[5] Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Minnesota, Montana, New York, North Carolina, Oregon, Utah, Virginia, and Wyoming

One would think that, with the absolute constitutional mandates which drive the idea of the uniform statute, all 41 common law states would have adopted it by now since it was proposed back in 1971. However, that has not happened since there has been major pushback against it from both the estate and property bars in the non-adopting common law states. Florida made far more modifications to the act than any other adopting state. This was, in turn, driven by the ardent fear that tenancy by the entireties and homestead land titles would be impaired by the statute. Of course, the statute only replicates in part what the constitutional court rulings mandated in the first place. So those mandates still apply to all states regardless of whether they adopted the uniform law, changed it in adoption (as Florida did) or refused to adopt it at all. Most did not.

The uniform statute attempts to show how community property rights apply to a common law state, but it labors far more diligently to protect the established land title systems in the common law states for which it was intended. Hence, it is a uniquely backhanded uniform act designed almost more to inhibit and limit the importation of community property rights than it does to foster their enforcement. Florida went several steps further in that motivation. It inserted (as no other adopting state did) several provisions stating that the act was not applicable to any real property which was held as tenants by the entireties or as protected homestead at death. See Section III below for more on those gory details. FUDCPRDA therefore stands as the only adopted version of the uniform act which was injected with heavy doses of realty protective provisions which may not pass constitutional muster. Here are the high points of FUDCPRDA's attempts:

1. Attempt to prevent imported community property rights in homestead realty.

   The RRPTL responded to concerns about "community property rights screwing up homestead titles" by inserting the following underlined text into an otherwise simple and needed uniform provision:

   732.225 Acts of married persons.—Sections 732.216-732.228 do not prevent married persons from severing or altering their interests in property to which these sections apply. The reinvestment of any property to which these sections apply in real property located in this state which is or becomes homestead property creates a conclusive presumption that the spouses have agreed to terminate the community property attribute of the property reinvested.

The immediate problem with this attempt to exclude homestead property from CPR attributes is that the title to the land happens far earlier than the establishment of homestead status. The land is purchased first and the homestead status can arise only after that event takes place. So couples never attain title when it is already homestead. The bigger question deals with the word "becomes" in this provision.

To the extent the provision attempts to cancel out CPR when land later "becomes" homestead is clearly unconstitutional. It is a statutory attempt to eliminate a constitutionally protected right. There is no conceivable scenario where this would include informed consent to the waiver of CPR. That is nonsense. Since community property rights are vested and constitutionally protected, and if one accepts that concept from *Thornton*, Laird Lile, and many cases out of the community property jurisdictions, one must conclude that this added text can only be unconstitutional. The only legal concept which could save it is a finding by the Florida Supreme Court that the homestead provision of Article X, Section 4 of the Florida Constitution is a "strong public policy" which cannot be undone by imported property rights. The author considers that argument only marginally debatable since individual property rights constitutionally proclaimed by the highest courts of the states of origin usually trump vague public policy arguments in the receiving states. And here we also have the hot subject of marriage which raises the boiling point of all legal controversies surrounding it. Nonetheless, the protected homestead has been a major Florida public policy fixture since the post-Civil War years and thus we have a very nice engagement of two warring constitutional issues. Tenancy by the entireties does not enjoy quite the same level of public policy endearment as is shown below.

2. <u>Attempt to protect fiduciaries who do not search out community property rights</u>.

   Section 732.221 states that unless a beneficiary or creditor demands the determination as to community property rights within three months of the notices to creditors or administration, the fiduciary cannot be held liable for not determining those rights. Florida added nothing to this provision. This was one of the great selling points of the uniform act to a rather skeptical group of common law states.

This is probably constitutional since it deals only with forgiving the personal representative for not being thorough since anyone with an interest at any time can determine rights stemming from community property even long after the estate is closed. Does it protect the attorney for the personal representative for not spotting the community property rights issues? No. Does this matter? Yes.

3. <u>Attempt to protect tenants by the entireties and homestead properties from the presumptions showing community property rights.</u>

   §§ 732.217(2) (see above) and 732.218(2) of FUDCPRDA (see Exhibit C and Section III below) were also amended by the RPPTL Section in an attempt to keep homestead property and tenancy by entireties property out of the statute and out of the presumption regime. The debate at RPPTL Executive Council meeting when this was passed by the Section expressed the intent to make sure this statute and its community property rights did not "mess with"

tenancy by the entireties property or protected homestead under Article X, Section 4 of the Florida Constitution. Will this work? Maybe not.

As stated below in Section III, like the potentially unconstitutional attempt to exclude protected homestead property in §732.225, these two attempts to exclude tenants by the entireties property and protected homestead may fail the constitutionality test, especially where the taking of title in deed form was anything but "informed consent" on the part of both spouses. Children from a previous marriage and creditors will be hot on the trail of finding community property rights so as to upend tenancy by the entireties benefits to the surviving spouse. A similar form of chaos will ensue as to protected homestead, but it will play differently in that the surviving spouse will fare better having community property rights engage: Owning one half outright, and having a life estate or one-half of the other half.[6]

4. Attempt to protect purchasers for value and lenders.

The provision in §732.222 states that purchasers for value and lenders who rely on the "apparent title" of the asset involved, both real and personal, take free of any claim relating to community property rights. This was one of the big selling points for the statute in Florida and everywhere the uniform act was hawked. The bankers strongly wanted this protection and so did the title companies, although nowhere is "apparent title" defined. That could in itself be chaotic. For the other 15 states which passed the act, it works and it is constitutional. The big problem for Florida with this otherwise wonderful protection is we unfortunately took tenancy by the entireties property out of the applicability of the statue directly in §732.217(2) and protected homestead out by the functions of §732.218(2) and §732.225. So for the most vulnerable land issues which the RPPTLs thought needed this protection, the Florida act does NOT grant the most important protection for which it was passed. Tenancy by the entireties and protected homestead are NOT protected as to their purchasers for value or lenders under §732.222. This hardly could have been the intent of the legislature or the RPPTL Section when it passed this.

Other than the above unique, troubling and actually misconceived additives, FUDCPRDA simply codified law and procedures which were or could have been effectuated since *Quintana* in our probate courts.

[6] **The Waiver Argument**. If the deed into the couple said nothing about their marital status, the CPR position is the strongest since the couple was married at the time they took title and no attempt at all was made to try to waive any CPR. If the deed referred to them only as husband and wife with nothing else, then no informed waiver could be argued, let alone proved. If the deed refers to them as husband and wife and "as tenants by the entireties," then an argument could be made that there was waiver of CPR, but that can be beaten back by showing that the spouse alleged to have waived never saw the deed, understood the deed to waive anything or even knew about the deed. Any one of these can kill the waiver argument.

L. How are the estate planning documents different in a community property jurisdiction?

The big difference is in the form of trusts, particularly revocable trusts. Instead of husbands and wives having separate trusts as is done routinely in common law jurisdictions, a standard community property trust is a unitary "single bucket" trust which resembles a "joint trust" in common law jurisdictions. However, unlike a common law joint trust, the community property trust contains unique provisions which protect the unities of community property differently than a common law joint trust. In addition, the community property peculiarities from jurisdiction to jurisdiction are great enough to make any generalities altogether too dangerous. One size does not fit all. The drafting of estate planning documents to perpetuate community property rights is a job for only those who feel comfortable doing something dangerous from the specific jurisdiction whence the community property rights originate. Therefore, this is a mandatory planning point:

> A Florida estate planning attorney should work with a qualified estate planning attorney from the originating community property jurisdiction. That attorney from the community property state drafts the trust while the Florida attorney adapts the document to the Florida execution requirements and other local peculiarities, particularly as to homestead rules.

III. So which one wins: TBE or CPR?

When this case hits, it will be a migraine day for the Florida Supreme Court because of the two conflicting sides to this argument:

A. **For Community Property Rights Winning**. In the CPR corner you have the avaricious children of the first marriage pitted eternally against the goldbricking second/surviving spouse. These less than successful on-their-own children have for themselves the interest of showing a TIC interest so that they will see at least ½ of the property involved shuffled off into a trust regime for their benefit or maybe even to them directly depending on how the estate governing instruments dictate. This is vastly better than seeing all of the subject property vesting at death in the surviving spouse tax free, trust free, care free and totally unearned by the detested stepparent and dashing all of the children's life-long hopes of moving out of their doublewide and into regular modular housing. This CPR side has the following very strong arguments behind their position:

   a. Florida must recognize the constitutionally protected community property rights (CPR) of the deceased spouse in the subject property via *Quintana* and other Florida Cases.

b. FS § 732.217(2) specifically shows CPR applying to real estate, and its exception for TBE does not work. CPR purchased property in Florida can never become TBE since the UNITY of Interest is not present. The statutory exception for homestead property is unconstitutional.

c. Nothing in the Florida cases excludes CPR application to *all* real property and Florida avidly protects the right to dispose of property at death as a constitutional right through *Shriners Hospital v. Zrillic*. Therefore assuming a flippant waiver of that right through CPR waiver is impossible constitutionally. Florida case law does not exclude TBE from the effects of CPR.

d. Restatement 2nd of Conflicts (Sec 234a) specifically shows through its historical case law that CPR does indeed apply to realty and dictates the ownership relations between the couple themselves. Hence national case law supports the application of CPR to all realty in Florida with no exceptions for TBE or homestead.

e. The statutory prohibition in FS § 732.217(2) for applying CPR to TBE are ineffective because CPR prevents land from becoming TBE in the first place because of the lack of all 5 Unities. TBE can never arise in land purchased with CPR because it lacks the Unity of Interest.

f. FS §732.218(2) is a textual double negative which states the opposite presumption supporting CPR application to TBE property. CPR and TBE are thus mutually exclusive and therefore this FUDCPRDA section cannot and does not speak to this.

g. FS §689.11 concerning TBE speaks only to the married couple themselves creating tenancy by the entirety when one of them is the original single ownership. It also does not speak to any lack of the 5 Unities and simply assumes that they all exist. Therefore this provision does not speak to this issue and cannot control.

h. There cannot be informed consent to support waiver unless there is express written evidence of that informed consent to waiver. That almost never occurs in real Florida life.

B. **For Tenancy by the Entireties Winning**. In the TBE corner we have the surviving spouse of the second marriage clinging mightily to his or her well won bounty having endured the terrible deprivation of almost two years of marital hard labor attending

country club galas, touring Alaska in a custom motor home, hot air ballooning in Austria, and warding off even more suitors trying to pervert the decedent's marital interests, being joined on this side of the ring with a vast horde of title insurers, underwriters, real estate attorneys and heavily sweating lenders, arguing the following formidable positions:

a. Informed consent to waiver did take place since both parties of the couple participated in the transactions where title was taken, with the surviving spouse is recounting in detail oral pronouncements of the decedent where informed waiver was shown indisputably.

b. FS §689.11 concerning TBE does speak to the creation of TBE and this set of facts fits perfectly into the purpose of this statute: the parties chose to take title jointly as husband and wife and nothing in this statute mandates that all five unities be present. It is curative in nature, and this is the cure which was intended, among others.

c. FS § 732.217(2) is effective and prevents CPR from affecting TBE property. In light of §689.11, TBE comes first in the vesting of title and is not dependent on the existence of all 5 Unities of TBE.

d. As for constitutional full faith and credit, Florida has stated it preference for TBE over CPR in both §689.11 and §732.217(2). Hence it is the express policy of Florida to characterize land as TBE and not CPR. Since it is the policy of Florida, this state is not constitutionally forced to recognize CPR. This is especially strong in that these presumptions have been in existence since the establishment of the State of Florida which incorporated the common law of England from day one, part of which was the law of TBE. CPR is a late comer and against the preexisting policy of this state.

e. The reliance factor of the people of Florida on the presumption of TBE is huge, ancient and of colossal economic importance. If property titles are upended by the interference of CPR to re-characterize TBE, vast financial losses would occur and legal chaos in property titles would explode.

Which one wins in the view of the author? Forget the law. Forget the facts. Any smooth talking policy flow by the court can paste over the legalities. It is paragraph e, directly above favoring TBE which will win the day. Our Supreme Court is not about to detonate the sure Legal-Economic Armageddon which would last decades if it sided with CPR. The court will squeeze hard on the excuse of public policy

considerations as being paramount in our legal system over imported conflicting property rights. But it will a painful trip to resolution.

Exhibit A

195 So.2d 577 (1967)
Carmen Camps De QUINTANA, Individually, Appellant,
v.
Maria Del Pilar Bertha Lopez De Quintana de ORDONO, a/k/a Bertha Ordono, M.L. De Quintana, Jr., and Maria Teresa L. De Quintana, Appellees.

No. 66-230.
District Court of Appeal of Florida. Third District.

February 14, 1967.
Rehearing Denied March 14, 1967.

*578 George H. Salley and Paul D. Barns, Jr., Miami, for appellant.
Redfearn & Simon and Robert P. Kelley, Wall, Roth & Sheradsky, Miami, for appellees.

Before HENDRY, C.J., and PEARSON and CARROLL, JJ.

HENDRY, Chief Judge.

Plaintiffs, children of the deceased by a prior marriage, sought a declaratory decree to determine the rights of the defendant widow, and the estate of the deceased in certain property. The chancellor granted the plaintiffs' motion for summary decree and found that the property was solely owned by the deceased at the time of his death. He therefore decreed that the estate of the deceased is now the owner of the property and the widow, Carmen Camps de Quintana, has no right, title or interest in the property except such interest as may be set off to her by the County Judge's Court of Dade County, Florida under the probate laws of Florida.

There is no substantial conflict as to the material facts. The defendant and the deceased were married on September 10, 1936, in Oriente Province in Cuba. Both parties were Cuban Nationals. Under the then existing laws of Cuba the marriage was under the regime of "Sociedad de Gananciales", a form of community property marriage. The deceased had no assets at the time of his marriage. The husband and wife were domiciled in Cuba until 1960. A Florida domicile was established when the couple moved here in 1960. They remained in Florida up to the time of the husband's death on September 1, 1963. The husband died intestate.

On or about June 12, 1952, the husband purchased for $50,000.00, five thousand shares of Okeelanta Sugar Refinery, Inc. stock, a Florida corporation. An additional five thousand shares was acquired for $50,000.00 on October 30, 1958. On December 29, 1961, as a result of a ten-for-one stock split, these shares were exchanged for one hundred thousand shares.

On October 1, 1963, the husband received the promissory note of Stewart Macfarlane, then President of Okeelanta Sugar Refinery, Inc., payable to the husband in the amount of $810,000.00 and a contract for additional monies from Macfarlane for the *579 alleged sale of the one hundred thousand shares.
The interest of the estate of the deceased and the widow in the promissory note and contract are the subject of this action. An additional issue raised below by the plaintiffs was that if the property is, in fact, owned in some part by the widow, is she estopped from obtaining her interest by a reference to the assets as "estate assets" in the inventory submitted by her as co-administrator of her husband's estate or by failing to file a claim within the six months provided for in § 733.16 Fla. Stat., F.S.A., the non-claim statute.

Paragraph 1401, Civil Code of Cuba provides:

"1401. To the Society of gains belong:

"1. Property acquired by onerous title,[1] during the marriage, at the expense of community property, whether the acquisition is made for the community or for only one of the consorts. [Footnote supplied.]

"2. That obtained by the industry, salaries or work of the consorts or of either of them.

"3. The fruits, rents, interests collected or accrued during the marriage, and which came from the community property, or from that which belongs to either one of the consorts."

Paragraph 1407, Civil Code of Cuba provides:

"1407. All the property of the marriage shall be considered as community property until it is proven that it belongs exclusively to the husband or to the wife."

Initially, it must be determined what interest, if any, the widow had in the one hundred thousand shares of Okeelanta Sugar Refinery, Inc. stock.

The plaintiffs submitted an affidavit of a friend of the family, N.H. Tomayo, in opposition to defendant's motion for summary decree. It is alleged therein that the husband came to Florida in 1951 to act as plant manager and supervise the operation of the Okeelanta Sugar Refinery, Inc. Further, that from 1951 until the time of his death in 1963, almost all of the husband's income and assets were acquired in Florida. It is also alleged that as an inducement to continue working in Florida, the husband was given an opportunity to buy stock in Okeelanta Sugar Refinery, Inc.; and, that while he was employed in Florida, the husband returned to Cuba for weekends and other occasional visits.

The defendant submitted an affidavit which indicated that the source of the purchase price of the stock was from profits and salaries of enterprises within Cuba, and a loan on an estate in Cuba.

Whether the source of the purchase price of the stock was from enterprises within Cuba or Florida is not material. What is material and not in conflict is that the husband and wife were domiciled in Cuba at the time of the acquisition of the stock.

As plaintiffs contend, the law of the situs has primary control over property within its borders. However, by the almost unanimous authority in America, the "Interests of one spouse in movables acquired by the other during the marriage are determined by the law of the domicile of the parties when the movables are acquired."[2] This rule is applicable where the money used to purchase the movables is earned from services performed in a place other than the place of the domicile.[3]We accept *580 this rule, founded on convenience, as the only logical method of determining marital interest in movables.

Section 1407 of the Civil Code of Cuba, the place of the domicile at the time of the acquisition of the stock, provides that all property of the marriage shall be considered as community property until proven to be separate property of the husband or wife. The plaintiffs presented no evidence which would tend to prove that the stock was the separate property of the husband or purchased from proceeds of his separate property. The uncontradicted evidence does show that the husband brought no assets to the marriage.

Therefore, under the laws of Cuba the stock did not vest in the husband but in the "Sociedad de Gananciales".[4] Thus the wife had a vested interest in the stock equal to that of her husband.[5]

The interest which vested in the wife was not affected by the subsequent change of domicile from Cuba to Florida in 1960.[6]

While domiciled in Florida, the husband allegedly sold the stock and received in exchange therefor the promissory note and contract with which we are concerned. The wife denied that the stock was in fact sold, alleging that it was merely transferred to Stewart Macfarlane, as trustee. Whether or not the stock was sold is not material to the determination of the ownership of the assets in question.

Since the promissory note and contract were acquired while the husband and wife were domiciled in Florida, this transaction is controlled by our law.

Under Florida law, if a portion of the consideration belongs to the wife and title is taken in the husband's name alone, a resulting trust arises in her favor by implication of law to the extent that consideration furnished by her is used.[7] A resulting trust is generally found to exist in transactions affecting community property in noncommunity property states where a husband buys property in his own name.[8] Therefore, while the husband held legal title to the note and contract, he held a one-half interest in trust for his wife.

It is well settled that the Florida non-claim statute, § 733.16, supra, does not apply so as to require the cestui to file a claim against the estate of the trustee.

As the estate holds the legal title to the note and contract, it is proper that the administrators of the estate collect the monies, principle and interest due on the note. Such procedure does not estop the wife from obtaining her interest. The administrators of the husband's estate are trustees as to the wife's equitable interest.

The chancellor was correct in his determination that there exists no material issues of fact. However, the applicable law was misapplied in granting the plaintiffs' motion for summary decree and in denying defendant's motion.

*581 Therefore, the decree appealed is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.
Reversed and remanded.

NOTES

[1] Blood v. Hunt, 97 Fla. 551, 121 So. 886 (1929), "`By onerous cause or title,' viz. by purchase or for value paid."

[2] Restatement, Conflict of Law § 290 (1934); Leflar, Conflict of Laws § 176 at 336 (1959); Stumberg, Conflict of Laws 313 (2d ed. 1951); 2 American Law of Property § 7.18 at 163 (Casner ed. 1952).

[3] Shilkret v. Helvering, 78 U.S.App.D.C. 178, 138 F.2d 925, 929 (1943).

[4] See Sanchez v. Bowers, 70 F.2d 715 (2d Cir.1934).

[5] 2 Tiffany, Real Property § 438 (3d ed. 1939); 4 Powell, Real Property pt. 3 § 627 at 688 (1954).

[6] In re Thornton's Estate, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343 (1934); Depas v. Mayo, 11 Mo. 314, 49 Am.Dec. 88 (1848); Restatement, supra note 2 § 292; Leflar, supra note 2 § 177 footnote 56; Stumberg, supra note 2 at 314; 2 American Law of Property § 7.18 at 165 (Casner ed. 1952).

[7] Foster v. Thornton, 131 Fla. 277, 179 So. 882, 883, 887 (1938).

[8] Rozan v. Rozan, N.D. 1964, 129 N.W.2d 694, 701; Stone v. Sample, 216 Miss. 287, 62 So.2d 307, 63 So.2d 555 (1953); Depas v. Mayo, supra note 6; Stumberg, supra note 2 at 315; Bogert, Trusts & Trustees § 26 at 221, § 454 at 516 (2d ed. 1964).

Exhibit B

Estate of Thornton (1934) 1 Cal.2d 1

Estate of Thornton , 1 Cal.2d 1
[S. F. No. 14262. In Bank. May 17, 1934.]

In the Matter of the Estate of WILLIAM M. THORNTON, Deceased. JOSEPH A. GARRY, as Executor, etc., Appellant, v. LUCY CRESWELL et al., Respondents.

COUNSEL

Jos. A. Garry, in pro. per., for Appellant.

Chase, Barnes & Chase, and J. L. Royle, as Amici Curiae on Behalf of Appellant.

Carey Van Fleet, Treadwell, Van Fleet & Laughlin, Alan C. Van Fleet, Pillsbury, Madison & Sutro, Maurice D. L. Fuller, Frank D. Madison and Marshall P. Madison for Respondents.

Marcel E. Cerf, Henry Robinson, Herbert A. Leland, John Perry Wood, John F. McCarthy and Norman T. Mason, as Amici Curiae on Behalf of Respondents.

OPINION

PRESTON, J.

Appeal from order denying petition for distribution of one-half of the estate of William M. Thornton, deceased, to his widow, Helen H. Thornton, also now deceased.

The basic question is that of the constitutionality of so much of section 164 of the Civil Code as provides that all other property (than separate property as defined by sections 162 and 163 of said code) "acquired after marriage by either husband or wife, or both, including ... personal property wherever situated, heretofore or hereafter acquired while domiciling elsewhere, which would not have been the separate property of either if acquired while domiciled in this state is community property ..."

The findings of the court in this cause, which have ample support in the record, show the facts material to this discussion [1 Cal.2d 3] to be as follows: The property involved was acquired by said husband and wife during the years 1885 to 1899 and 1906 to 1919, while they were domiciled in Montana and, under the laws of that state, it was the husband's separate property, subject only to the wife's dower rights. The husband returned to California in 1919, bringing said property with him, and was here domiciled until his death on February 25, 1929. His widow

petitioned for distribution of one- half of his estate to her upon the theory that said property was converted into community property when it was brought into this state. The court below, however, upheld the testamentary attempt of the husband to dispose of all of said estate as his sole and separate property. The widow thereupon prosecuted this appeal from the order denying her petition for distribution and the executor of her will has now been substituted as petitioner and appellant in her stead.

[1] Further reflection upon the question presented convinces us that under the compulsion of well-understood constitutional provisions, as well as settled pronouncements of this court, no alternative remains but to declare the above-quoted provision unconstitutional and void.

[2] Since the statute of 1891 (Stats. 1891, p. 425, sec. 172, Civ. Code), enlarging the right of the wife in the community property, it has been consistently and repeatedly held that any interference with the right of ownership or dominion over the common property is a disturbance of a vested right of the husband. (Spreckels v. Spreckels, 116 Cal. 339 [48 P. 228, 58 Am.St.Rep. 170, 36 L.R.A. 497].) Each step taken in recognition of the wife's increasing claims upon said property has been met by express holdings of this court that such statutes are inapplicable to existing community property and could only apply to subsequent acquisitions of the marital union. (Spreckels v. Spreckels, 172 Cal. 775 [158 P. 537]; Roberts v. Wehmeyer, 191 Cal. 601 [218 P. 22]; Stewart v. Stewart, 199 Cal. 318 [249 P. 197]; McKay v. Lauriston, 204 Cal. 557 [269 P. 519].)

[3] If this be true as to the common property, how much plainer must the application of the same principle be to the separate property of either spouse. We then must consider whether separate property acquired by either [1 Cal.2d 4] 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. Again this court has repeatedly spoken with a negative answer over a period of more than fifty years. (Kraemer v. Kraemer, 52 Cal. 302; Estate of Burrows, 136 Cal. 113 [68 P. 488]; Estate of Niccolls, 164 Cal. 368 [129 P. 278]; Estate of Boselly, 178 Cal. 715 [175 P. 4].)

This was the unclouded holding until 1917 when section 164 of the Civil Code was amended to provide substantially as above quoted. The question then arises as to the competency of the state to pass such a statute in view of certain clear, related and co-ordinate inhibitions of section 1 of the 14th amendment to the Constitution of the United States and the due process provision of article I, section 13, of the state Constitution. In the following cases this question was partially determined by holding that the provision was without application to property brought into the state prior to passage of the enactment. (Estate of Frees, 187 Cal. 150 [201 P. 112]; Estate of Arms, 186 Cal. 554 [199 P. 1053].)

Still confident of its power to enact such a statute, the legislature in 1923 supplemented and clarified the amendment by the use of appropriate words to make its provisions apply to such property whether brought into the state before or after passage of the act. Power to legislate as to property reaching a California domicile before passage of the act was again held wanting. (Estate of Drishaus, 199 Cal. 369 [249 P. 515].)

As to property brought into the state subsequent to the amendments of 1917 and 1923, we have certain appellate court decisions which have assumed that the principles of the Frees and Drishaus cases (Estate of Frees, supra; Estate of Drishaus, supra) control and the statute was in those cases held inoperative as to separate property of the spouse brought into the state subsequent to passage of the act (Scott v. Remley, 119 Cal.App. 384 [6 PaCal.2d 536]; Melvin v. Carl, 118 Cal.App. 249 [4 PaCal.2d 954]; Estate of Bruggemeyer, 115 Cal.App. 525 [2 PaCal.2d 534]). This holding was also announced in Brookman v. Durkee, 46 Wash. 578 [90 P. 914, 123 Am.St.Rep. 944, 13 Ann. Cas. 839, [1 Cal.2d 5] 12 L.R.A. (N. S.) 921], and Douglas v. Douglas, 22 Idaho, 336 [125 P. 796].

So long as we are bound by the holding that to limit the right of one spouse by increasing the right of the other in property acquired by their united labors, is the disturbance of a vested right, we entertain no doubt of the application of at least two provisions of the 14th amendment to the Constitution of the United States. If the right of a husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen. Again, to take the property of A and transfer it to B because of his citizenship and domicile, is also to take his property without due process of law. This is true regardless of the place of acquisition or the state of his residence.

[4] The doctrine that a change of domicile to this state, accompanied by an importation of the personalty is an implied consent to a submission to requirements of this statute, cannot be sustained, for to do so would be to give effect to a restriction prohibited by the Constitution. (Frost v. Railroad Com., 197 Cal. 230 [240 P. 26]; Hartford Acc. etc. Co. v. Delta & Pine Land Co., 292 U.S. 143 [54 S.Ct. 634, 78 L.Ed. 1178, 92 A.L.R. 928], decided by Supreme Court of the United States, April 9, 1934.)

[5] Neither can we hurdle these barriers by holding the amendments in question to be part of our succession laws and hence valid as a statute of succession. For we are met with plain holdings of our own court that such is not the effect of said statute. (Estate of Frees, supra; Estate of Drishaus, supra.)

The judgment is affirmed.

Waste, C.J., Shenk, J., and Seawell, J., concurred.

LANGDON, J.,

Exhibit C

The Florida Uniform Disposition of Community Property Rights at Death Act

732.216 Short title.—Sections 732.216-732.228 may be cited as the "Florida Uniform Disposition of Community Property Rights at Death Act."

732.217 Application.—Sections 732.216-732.228 apply to the disposition at death of the following property acquired by a married person:

(1) Personal property, wherever located, which:

(a) Was acquired as, or became and remained, community property under the laws of another jurisdiction;

(b) Was acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, community property; or

(c) Is traceable to that community property.

(2) Real property, except real property held as tenants by the entirety, which is located in this state, and which:

(a) Was acquired with the rents, issues, or income of, the proceeds from, or in exchange for, property acquired as, or which became and remained, community property under the laws of another jurisdiction; or

(b) Is traceable to that community property.

732.218 Rebuttable presumptions.—In determining whether ss. 732.216-732.228 apply to specific property, the following rebuttable presumptions apply:

(1) Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as, or to have become and remained, property to which these sections apply.

(2) Real property located in this state, other than homestead and real property held as tenants by the entirety, and personal property wherever located acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property and title to which was taken in a form which created rights of survivorship are presumed to be property to which these sections do not apply.

732.219 Disposition upon death.—Upon the death of a married person, one-half of the property to which ss. 732.216-732.228 apply is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this state. The decedent's one-half of that property is not in the elective estate.

732.221 Perfection of title of personal representative or beneficiary.—If the title to any property to which ss. 732.216-732.228 apply is held by the surviving spouse at the time of the decedent's death, the personal representative or a beneficiary of the decedent may institute an action to perfect title to the property. The personal representative has no duty to discover whether any property held by the surviving spouse is property to which ss.732.216-732.228 apply, unless a written demand is made by a beneficiary within 3 months after service of a copy of the notice of administration on the beneficiary or by a creditor within 3 months after the first publication of the notice to creditors.

732.222 Purchaser for value or lender.—

(1) If a surviving spouse has apparent title to property to which ss. 732.216-732.228 apply, a purchaser for value or a lender taking a security interest in the property takes the interest in the property free of any rights of the personal representative or a beneficiary of the decedent.

(2) If a personal representative or a beneficiary of the decedent has apparent title to property to which ss. 732.216-732.228 apply, a purchaser for value or a lender taking a security interest in the property takes that interest in the property free of any rights of the surviving spouse.

(3) A purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.

(4) The proceeds of a sale or creation of a security interest must be treated as the property transferred to the purchaser for value or a lender.

732.223 Perfection of title of surviving spouse.—If the title to any property to which ss. 732.216-732.228 apply was held by the decedent at the time of the decedent's death, title of the surviving spouse may be perfected by an order of the probate court or by execution of an instrument by the personal representative or the beneficiaries of the decedent with the approval of the probate court. The probate court in which the decedent's estate is being administered has no duty to discover whether property held by the decedent is property to which ss. 732.216-732.228 apply. The personal representative has no duty to discover whether property held by the decedent is property to which ss. 732.216-732.228 apply unless a written demand is made by the surviving spouse or the spouse's successor in interest within 3 months after service of a copy of the notice of administration on the surviving spouse or the spouse's successor in interest.

732.224 Creditor's rights.—Sections 732.216-732.228 do not affect rights of creditors with respect to property to which ss. 732.216-732.228 apply.

732.225 Acts of married persons.—Sections 732.216-732.228 do not prevent married persons from severing or altering their interests in property to which these sections apply. The reinvestment of any property to which these

sections apply in real property located in this state which is or becomes homestead property creates a conclusive presumption that the spouses have agreed to terminate the community property attribute of the property reinvested.

732.226 Limitations on testamentary disposition.—Sections 732.216-732.228 do not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.

732.227 Homestead defined.—For purposes of ss. 732.216-732.228, the term "homestead" refers only to property the descent and devise of which is restricted by s. 4(c), Art. X of the State Constitution.

732.228 Uniformity of application and construction.—Sections 732.216-732.228 are to be so applied and construed as to effectuate their general purpose to make uniform the law with respect to the subject of these sections among those states which enact them.