Community Property from State to State

June 10, 2019
11:20 a.m. – 12:20 p.m.

Connecticut Convention Center
Hartford, CT

CT Bar Institute Inc.

CT: 1.0 CLE Credits (General)
NY: 1.0 CLE Credits (AOP)

Seminar Materials Sponsored by

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Faculty Biography

Abby Wool Landon is an Estate Planning lawyer from Portland, Oregon, where she serves as the Chair of the Estate Planning Practice Group at Tonkon Torp LLP. In her practice, Abby creates estate plans that include wills, trusts, asset protection devices, and family business succession planning. She also assists clients in navigating probate and trust administration, and provides expert support for contested probate and other fiduciary disputes. She has significant experience in: corporate tax law and tax partnerships, multiple-generation trust and estate planning, tax domicile analysis (including international applications and planning for non-citizen residents), charitable planning, marital trust planning for step-families, and premarital and post-marital agreements.

In addition to her estate planning background, Abby has 27 years' experience in business law, helping individual and corporate clients with tax, complex business transactions, mergers and acquisitions, corporate management, business succession, and wealth management. As a small business owner, director, and member of several family partnerships, Abby brings hands-on experience to her clients.

A popular speaker, Abby has presented at CLE seminars throughout the Pacific Northwest, speaking on asset protection, managing community property from state to state, elder financial abuse, and estate planning for families in conflict. She is involved in community education and teaching to private groups in order to raise awareness of the importance of wills and trusts, corporate formalities, tax, and gift and estate tax planning to maximize profit and avoid conflict.

Community Property from State to State (CLC2019-B04)

Session B
10:50 – 11:50 a.m.

Speaker: **Abby Wool Landon**, Tonkon Torp LLP, Portland, OR

Agenda

Common Law vs. Community Property Law

Separate vs. Community Property

Titling of Property

Real Property

Debts and Liabilities

Quasi-Community Property

The Uniform Disposition of Community Property Rights at Death

Benefits of Community Property

FROM STATE TO STATE COMMUNITY PROPERTY IN TRANSIT

Presented by
Abby Wool Landon

Slides prepared with Sarah Einowski

ABOUT TONKON TORP LLP

Tonkon Torp was founded in 1974 as a nine lawyer firm by Moe Tonkon, Morris Galen, and Fred Torp. Today Tonkon Torp is one of the largest firms headquartered in Oregon, with over 80 lawyers dedicated to a sophisticated business practice throughout the United States. Though the firm's size and practices have grown over the past 40 years, our core values of excellent legal work, leadership, client service, and community involvement remain unchanged. We pride ourselves on our responsiveness and the personal quality of our services, and we consider the goodwill of our clients and our professional reputation to be our most valuable assets. Although we provide a full spectrum of business law and litigation services, we believe our focus on efficiency and results is what sets us apart from other law firms. Clients view Tonkon Torp as a trusted adviser because our relationships are rooted in a thorough understanding of their business and industries and a shared vision of their goals.

ABBY WOOL LANDON

Abby joined Tonkon Torp in 2017 as Chair of the Estate Planning Practice Group, and a partner in the Business Department and Tax Practice Group. She creates estate plans that include wills, trusts, asset protection devices, and family business succession planning. Abby also assists clients in navigating probate and trust administration and provides expert support for contested probate and other fiduciary disputes. She has significant experience in corporate tax law and tax partnerships, multiple-generation trust and estate planning, tax domicile analysis (including international applications and planning for non-citizen residents), charitable planning, and marital trust planning for step-families.

http://tonkon.com/attorneys/abby-wool-landon

COMMON LAW VS. COMMUNITY PROPERTY LAW

The United States has two property systems: common law and community property law.

- In a common law state, an individual whether married or single, is a separate individual with separate legal rights to property and separate tax obligations. Common law states are also called “separate property” states.
- In a community property state, the law treats a married couple much like business partners, participants own an undivided one-half interest in the “community.”

Internationally:

- Many non-English speaking European countries have systems similar to community property, the majority deriving from a Spanish law. Other non-English speaking countries have community property aspects of their marital law, China for example.
- English speaking countries, such as the UK and Canada, are separate property countries.
- Beware, your international clients may have signed an agreement binding them to the laws of the jurisdiction in which they married.

.

COMMUNITY PROPERTY STATES

There are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Alaska is an opt-in community property state that gives both parties the option to make their property community property.

Two states, Alaska and Tennessee allow non-residents to establish a community property trust with a trustee in their state.

COMMUNITY PROPERTY – MORE ABOUT ORIGINS

Community property law in the United States is primarily of Spanish origin, although there remains some French influence in Louisiana. Legal historians believe that community property law developed from Germanic tribal practices introduced in Spain following the fall of the Roman Empire. Early emigrants to the Spanish possessions in the New World carried with them elements of the Spanish legal system into the southwest. Other states, even though they had no substantial contact with Spanish culture, still adopted the community property system, and were perhaps motivated by their desire to attract women as settlers.

(Source: Portfolio 802-2nd: Community Property: General Considerations, Detailed Analysis, A. Origins of Community Property.)

Under original application, the community was a partnership where almost all control fell to the husband but women were allowed property ownership.

(Source: https://www.library.hbs.edu/hc/wes/collections/women_law/)

The "partnership" created by current community property laws strives for gender equality but vestiges of the past still exist. In the relatively progressive state of Washington, the statutes have clear broad restrictions against one spouse controlling both shares of the community property, but if only one spouse participates in the "management [related to such property] the participating spouse or participating domestic partner may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse." RCW 26.16.030(6); *see also* RCW 26.16.030(1)-(5).

COMMUNITY PROPERTY – WHY DO WE CARE?

Community property is the subject of distinct and different income and transfer tax (estate and gift) treatment. The applications of each have profound consequences for our clients during their lifetimes and after death.

Once property is characterized as community property, unless the property owner intentionally changes its character or unintentionally commingles it with separate property with such impunity that it cannot be traced, it retains its character as community property for all tax purposes and for many legal purposes. Legal applications include treatment on divorce or separation, transfers on death, and obligations for debts and liabilities. Choice of law decisions and conflict of law applications abound for the unwary practitioner.

DOCTRINE OF INCEPTION OF TITLE

The separate or community character of property is determined at the time the property is acquired. The name “Doctrine of Inception of Title” is misleading. Although there is a lot of law related to titling with respect to community property, this threshold doctrine is the common law application of characterization across the community property states.

Basic characterization: Property acquired before marriage is the acquiring spouse's separate property. Property acquired during marriage is presumed to be community property unless it is affirmatively shown that the property was acquired: (1) by gift, devise, or descent; or (2) with the separate property or separate credit of one of the spouses.

See, e.g., In re Borghi, 167 Wash.2d 480 (2009), holding that the original characterization of real property as separate at the time of acquisition was not overridden where both spouses’ names were on the deed. In *Borghi*, wife purchased real property in her name alone with her separate property. Later she titled the property to her and her husband. At the appeals court level in Washington, courts were finding in favor of a presumption that simply titling property to husband and wife was intended to create community property. The Washington Supreme Court upheld the general rule, that re-titling the property was not sufficient to show intent to change the character of the property as wife’s separate property.

COMMUNITY PROPERTY DEFINITIONS

Community property is defined with a few variations in the community property states.

A typical definition (after taking into account changes in the law recognizing same sex marriage*) provides that "property acquired after marriage by either spouse or both together" is presumed to be community property.

Some community property states include in the statutory definition that acquisition is by a married couple *domiciled* in that state when the property was acquired. (Washington, California, and Alaska)

Some only define community property as not being separate property. They imply that property is not community if the married couple acquiring the property are domiciled in a separate property state when the property was acquired. *See, e.g.,* A.R.S. § 25-211 (Arizona); N.M.S.A. § 40-3-8 (New Mexico).

*The Supreme Court held in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that states must license and recognize same-sex marriages, such state laws using the terms "husband" and "wife" to define marriage should be unconstitutional.

CHARACTER OF PROPERTY

Once property is characterized at inception, on application as a general rule, the character of movable property, which would include intangible personal property, is fixed at the time of acquisition in accordance with the law of the marital domicile.

The character of real property on application is generally determined by the law of the place where the land is situated. Reconciling this concept with the "Inception Doctrine" can be confusing. If either spouse owns separate personal property in a common law jurisdiction, that property maintains its character as separate property when brought into a community property state, and any realty purchased with that separate property will maintain its separate character. *See Brookman v. Durkee*, 46 Wash. 578, 90 P. 914 (1907). A couple can take an affirmative step or steps set forth in the law of the community property state to obtain community property treatment.

If community funds are used to purchase real property in a common law state, community property jurisdictions will recognize the community nature of the real estate, even if the common law property state will not.

(Source: Portfolio 802-2nd: Community Property: General Considerations, Detailed Analysis,L. Choice of Law Problems.)

SEPARATE VS. COMMUNITY PROPERTY

Presumptions play a significant role in determining the character of property as separate or community. The character of property becomes fixed at acquisition and can only be changed by an intentional act. The presumption that property is community once established can only be overcome by the evidence standards held by a state, in some it is a “preponderance of the evidence,” others like Washington apply a “clear and convincing” evidence standard.

As a general principal of law, a “presumption” is defined as a legal inference or assumption based on the known or proven existence of some other fact or group of facts. It is a rule of evidence, and shifts the burden of production or persuasion to the opposing party. Property acquired by a married couple in a community property state will carry a presumption, generally that the character of the property is community. The burden to prove otherwise is on the party opposing that characteristic. The presumptions govern on applications.

(Source: Bryan A. Garner & Henry Campbell Black, Blacks Law Dictionary (2016).)

COMMUNITY VS. SEPARATE PROPERTY, THE IMPORTANCE OF TRACING

Property that can be traced to community property maintains its characteristic as community, even if it is combined with separate property or has had its form converted many times. Separate funds that become so commingled with community funds that it is impossible to trace them are generally deemed to be community funds. There is a large body of state and federal tax law applying tracing to disposition of assets.

Example, if community funds are used to improve a separate property asset, the asset will typically stay separate, but spouse will be entitled to one-half reimbursement of community funds invested in separate property. *See, e.g., Potthoff v. Potthoff*, 128 Ariz. 557, 562 (Az. App. 1981).

TITLING OF PROPERTY

- In common law states like Connecticut, property titled to one spouse or another is presumptively that person's separate property. *See* General Statutes § 46b-36; *see also Cherniack v. Home Nat. Bank & Trust Co. of Meriden*, 151 Conn. 367, 370, 198 A.2d 58 (1964); *Porter v. Thrane*, 98 Conn. App. 336, 908 A.2d 1137 (2006).
- **In a community property state, titling is not determinative of ownership.** *See* Cal. Fam. Code § 760 ("[A]ll property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property."); N.M.S.A. § 40-3-8 ("Except as provided in Subsection C of this section, "community property" means property acquired by either or both spouses during marriage which is not separate property"); RCW 26.16.030(B) ("[Property acquired] by either husband or wife or both, is community property.").
- **Watch for survivorship provisions.** In some states, community property can also have rights of survivorship and in some states they cannot. The applications are varied and complex.

REAL PROPERTY: LAW OF SITUS CONTROLS

Idaho: Where community real property, which was subject to contract to convey, was located in Idaho, law of Idaho was controlling, not the law of Oregon where contract to convey was executed, and, under Idaho law, it was necessary that a contract selling the community property was signed and acknowledged by both spouses. *Fuchs v. Lloyd*, 80 Idaho 114, 326 P.2d (1958); I.C. § 32-912.

Texas: The court divided property acquired in Texas by a Colorado resident couple after death as a tenancy in common, applying its finding that Colorado is a common law and not a community property state, and as such has no concept of property acquired by both parties "belonging to the community." *McCarver* v. *Trumble*, 660 SW.2d 598 (Tex.App.Ct. 1983).

REAL PROPERTY CONT'D

Arizona: The character of property acquired during marriage is determined by the law of matrimonial domicile at the time of acquisition of the property. *Jones v. Weaver*, 123 F.2d 403 (9th Cir. 1941); *Potthoff v. Potthoff*, 128 Ariz. 557, 627 P.2d 708 (App. Div. 1 1981).

Louisiana: Community property applies to spouses domiciled in Louisiana, regardless of their domicile at the time of marriage or place of celebration of the marriage. LA C.C. Art. 2334. But if only one spouse moves to Louisiana and is domiciled there, a community property regime is not established. *Hand v. Hand*, 812 So.2d 625 (La. 2002).

CHARACTERIZING CHANGES IN VALUE VS. INCOME FROM SEPARATE PROPERTY

Changes in value and natural enhancement of property do not change its characteristic as separate or community.

Income from separate property may be considered the spouse's separate property in some community property states including Washington and California, but in Texas, Idaho, Louisiana, and Wisconsin income from a spouse's separate property is a community asset.

DEBTS AND LIABILITIES

In Connecticut (and many other common law states including Oregon), with some exceptions, a debt acquired by a married person is that person's separate debt. *Utzler v. Braca*, 115 Conn.App. 261 (2009).

In a community property state, a debt acquired during the marriage by either party to the marriage is a debt against the community. Creditor rules vary among the community property states. Generally though, for debts incurred either before or during the marriage, creditors of either spouse may be able to reach the community property assets, and a spouse's separate property may not be reached by creditors of the other spouse.

Example, Washington Domiciled Spouse 1 owns Oregon real property. Washington Spouse 2 commits a heinous tortious crime. The creditors of Spouse 2 can look to the Oregon real property to satisfy the debts of Spouse 2.

QUASI-COMMUNITY PROPERTY

Quasi-community property laws have evolved in some community property states to treat separate property acquired outside the state subject later to the jurisdiction of the community property state as if it were community property for specific purposes.

- **Arizona**: Quasi-community property treatment on divorce, but not death. Ariz. Rev. Stat. Ann. § 25-318(A).
- **California**: Quasi-community property laws apply on both death and divorce. Cal Probate Code § 100-105; Cal. Fam. Code § 125.
- **Idaho**: Quasi-community property laws apply on death, but not divorce. I.C. §§ 15-2-201 to 205.
- **New Mexico**: Quasi-community property treatment on death and divorce. N.M.S.A. §40-3-8(C); N.M. Stat. Ann. §40-3-8(D);
- **Washington**: Quasi-community property treatment only on death. RCW § 26.16.220 – §26.16.250.

QUASI-COMMUNITY PROPERTY CONT'D

In Arizona, Nevada, and Texas there is no law requiring a deceased spouse's separate property to be shared with a surviving spouse.

The danger? Spouse 1 owns substantially all the assets of a married couple acquired in Connecticut. The couple moves to Arizona. They do not execute any community property agreement affirmatively creating community property. When Spouse 1 dies, Spouse 2 may be left with no share of Spouse 1's property and no right comparable to the elective share laws that governed in the original state of domicile.

THE UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH

17 common law states have adopted the Uniform Disposition of Community Property Rights at Death Act (the "Act"). (Source: https://www.uniformlaws.org/committees/community-home?CommunityKey=cc060023-d743-4d32-b7e5-35b12cba4fb8.)

Oregon was the first state to adopt it. Connecticut adopted it in 1985. C.G.S.A. § 45a-458 through 466.

The Act preserves each spouse's rights in property that was community property before the move to a non-community property state, unless the married couple severed or altered their community property rights. C.G.S.A. § 45a-459.

The Act covers "all or the proportionate part of that [real or personal] property acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, [property acquired as or which became, and remained] community property under the laws of another jurisdiction, or traceable to that community property." *Id*.

MORE ABOUT THE UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH

The Act contains two rebuttable presumptions for determining whether property falls under its ambit.

- The Act is presumed to apply to any property acquired during a marriage while living in a community property jurisdiction.
- The Act is presumed to not apply to any real property located in Connecticut and personal property wherever situated if such property was acquired during the marriage in a non-community property jurisdiction and title was taken in a form that created rights of survivorship. Therefore, if a married couple moves to Connecticut and uses the proceeds from the sale of community property to purchase property here as joint owners with survivorship rights (as S1 & S2 or “by entireties”) without more, the couple is presumed to have acquired the property as non-community property. C.G.S.A. § 45a-459.

BENEFITS OF COMMUNITY PROPERTY

There are a number of wealth management benefits to owning community property:

- Each spouse is deemed to be an undivided one-half owner of community property. On the first death, with nothing more, in many community property states a deceased spouse can pass their one-half interest to someone who is not their spouse. The alternative is true, a member of the community cannot alienate a spouse's share in the community. There is no forced elective share or right to a percentage of the marital property because each spouse is deemed to own one-half of all community property.

- Tax benefits include full basis adjustment under IRC 1014(b)(6), the tax basis of all community property adjusts on the death of the first spouse. The surviving spouse receives a basis adjustment in both the decedent's one-half interest in community property as well as the surviving spouse's one-half interest.

- Income Tax is Different: On the first death, each spouse is immediately a separate taxpayer, whether the surviving spouse files a joint tax return or each of the estate and the spouse file separately for the year of death Whichever is decided, half the community income earned between the date of death and closing of administration is reportable by the estate and half by the surviving spouse. As a result, the possibility of shifting income among taxpayers with different tax brackets creates complexities not found in the final income tax return for a married couple in a common law state.

INCOME AND TRANSFER TAX (ESTATE + GIFT) TREATMENT STATE PROPERTY LAW VS. FEDERAL TAX LAW

In Internal Revenue Manual (IRM) 25, Chapter 18, Section 1, the IRS addresses the nexus between state property law and federal tax law this way:

- Federal law determines how property is taxed, but state law determines whether, and to what extent, a taxpayer has "property" or "rights to property" subject to taxation. *Aquilino v. United States*, 363 U.S. 509 (1960); *Morgan v. Commissioner*, 309 U.S. 78 (1940). Accordingly, federal tax is assessed and collected based upon a taxpayer's state created rights and interest in property.

- This interplay of federal and state law requires an understanding of relevant state property laws to properly analyze community property issues. Community and common law creates different rights and interests in property. There is a difference in the way that federal tax is assessed and collected under each system. Further, the appropriate method of analysis to employ is also different under each system. There are a vast number of cases where state and federal tax law interact, some dispositive on the state law application and others on the tax law application.

ADVISING CLIENTS

If you are practicing in a separate property state, like Oregon and all of the New England states including Connecticut, once a practitioner determines if marital property would be characterized as one of community or separate, or is determined to be a combination of each, then our goal in assisting our clients in managing and maintaining their assets is to advise them with respect to their rights and duties.

PLANNING WITH AND FOR COMMUNITY PROPERTY

A careful estate planning practitioner helps their client identify and trace community property. CPA's and wealth managers can help you by identifying community property (and recommending the client consult with competent legal counsel to confirm) and assisting the client in recognizing the significance of its separate management to retain its identity. You and your client should consider:

- Methods for separating community property: a separate revocable community property trust or a separate class of assets for community property in their revocable trust.
- Planning for the unique control provisions on the first death using a trust or trusts.
- For clients with asset protection goals, consider the additional creditor exposure in managing the assets. In that subset, if the client wants to maintain the tax benefits of community property, consider an asset protection trust plan. *Example:* Spouses live in Washington; S1 buys house in Connecticut with community property funds, puts house in S1's name alone. Under Connecticut Debtor/Creditor law, can S2's creditors get at house in S1's name?

SPOUSES: MIGRATION, EXAMPLE 1

Example

Ben and Ron life in California (community property) and want to get married. They execute a premarital agreement that keeps Ben's San Francisco rental as his separate property, but define the income from that property as community property. Ben and Ron get married, then move to Connecticut (separate property).

San Francisco rental is still Ben's separate property. But now that Ben and Ron live in a separate property state, is the income from the rental community property?

Recommendation: Use one or more revocable trusts to preserve community property and mimic community property desire in separate property state

SPOUSES: MIGRATION, EXAMPLE 2

Example

William's family is from Avon, own a summer house in Hilton Head, South Carolina. His parents intend for William to inherit and manage their interest in commercial real property.

William and Cate marry in Connecticut. William's Parents die leaving Connecticut commercial real property to William.

William and Cate later move to California. The commercial real property is inherited property, so characterized as his separate property. But what about the distributed income from the property?

> In **California**—Remains William's separate property. Cal. Fam. Code § 770. (Same for Arizona, New Mexico, Washington, and Wisconsin.)
>
> In **Texas**—Different result. Unless the spouses have agreed otherwise, all income acquired during marriage, whether from separate or community property, is community property. *Yaklin v. Clusing, Sharpe & Krueger*, 875 S.W.2nd 380 Tex.App. 1994). (Same for Idaho and Louisiana.)

Remember: A Premarital Agreement can address these issues. When drafting Premarital Agreement consider provisions for both principal and income to create flexibility in case couple moves to community property state.

THINKING ABOUT RETIREMENT PLANS

As a general rule, if a married couple contributes to a retirement plan while domiciled in a community property state, the plan account is community.

The Retirement Equity Act of 1984 ("REA") covers most qualified retirement plans but not IRA's, Roth IRA's and some 403(b) plans. All other retirement plans are either required to fully comply with REA or partially comply with REA. With respect to covered plans, the Supreme Court has held that REA preempts state spousal rights laws such as community property. *Boggs v. Boggs*, 570 U.S. 833. Under REA, benefits distributed by the plan to a married employee must be distributed in the form of a "qualified joint and survivorship annuity" or provide that the participants non-forfeitable accrued benefit is payable in full upon the participants death to the participants surviving spouse. A spouse can waive these rights in writing after care is taken to understand the restrictions on such a waiver. A spouse can consent to having their beneficial interested directed to a trust. Natalie Choate, Life and Death Planning for Retirement Benefits, 3.4 (7th edition). In Oregon, we are accustomed to thinking that a spouse has a separate property interest in their retirement plan. In a community property state, a married couple may assume that for all purposes, their retirement is community. It can come as a surprise to learn that the right of the non-participant spouse is so limited some characterize qualified plans as not being community property at all. This may be an overstatement because in divorce these rights can be affected by a qualified domestic relations order (QDRO) properly prepared in accordance with the plan provisions and federal law.

CONUNDRUM: QUALIFIED RETIREMENT PLAN

S1 and S2, long term marriage, adult joint children, all property community property and they are residents of a community property state.

Their primary asset is a 401(k) pension and profit sharing plan with S1's employer valued at over $4M. Other assets valued at approximately $2M.

Both parties want to benefit their children equally on the second death and want to protect their assets from "creditors and predators" by way of a trust on the first death.

If S2 were the first to die, the couple could plan for her to leave up to $1M in trust for her husband's benefit, with the residue to their joint children. If S2 agrees to their plan, then the entire $2M could be in trust. In the meantime, what about S1's $4M qualified plan proceeds?

It could wind up in the hands of S1's next spouse or a creditor and not in the hands of S1 and S2's joint children. In the alternative, if S1 was the first to die, he can name S2 or with the right provisions a trust for her benefit. In short, in a community property state, couples think they control all the assets as if in a partnership. They may decide together to disproportionally contribute to one or the other's qualified plan. However, if the primary asset is a qualified plan, the spouse participant has the greater estate planning control.

THINKING ABOUT INSURANCE POLICIES

Community property states take three different approaches to insurance:

1. "Inception of title" (also known as "inception of right") whereby if the contract of insurance was purchased before marriage, even when payments towards the policy ownership are made after marriage, it remains separate property. *See* T.C.A., Family Code § 3.006 (Texas); *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001).

2. Pro rata approach, where the investment portion of a whole life policy is prorated between separate ownership before marriage and payments made from community property after marriage. *See* Cal. Family Code § 2640; *McBride v. McBride*, 11 Cal.App.2d 521 (2d Dist. 1936).

3. In Washington, for a whole life or cash value policy, if the ownership is mixed, reported cases have applied a pro-rata division to the death benefit itself. *Wilson v. Wilson*, 35 Wn. 2d 364 (1949).

4. For a term policy there are more general rules. Term expires and is renewed with each payment, it is generally classified as community or separate depending on the character of the funds used to make the last payment.

Thank you!