
Movers
Bond
Stock

Community Property Across State Lines

Square Pegs and Round Holes

By Karen E. Boxx

The marital property systems of the nine community property states vary greatly from the systems in the 41 remaining states and also vary greatly from each other. Failing to recognize these variations can be dangerous for attorneys with clients who move from one type of marital property system to another and also for attorneys with clients who keep their residences in one state but own property and transact business in other states. This article addresses what can happen when community property crosses state lines, the classification of property for the migratory client, issues of creditor rights, and other implications. The cases discussed below give very little clear guidance other than the rule that the proper approach in these circumstances is to be cautious rather than cavalier.

Existence of Marital Community

For community property to exist, there must be a valid marriage. This can include a common law marriage (and perhaps a same-sex marriage) if valid in the state where the couple resided when the marriage was established. There is a great deal of variation among the community property states when there is no valid marriage, particularly in cases in which one or both spouses innocently believe the marriage is valid. These cases are called putative marriages, and in some states the spouses are granted interests in "quasi-marital" property. The putative (innocent) spouse is entitled to division of such property at death or on divorce on the same principles as community property. It gets more complicated when another party is involved—for example, if "A" has married spouse number one, never dissolved that marriage, and then "married" spouse number two, who does not know of the still valid first marriage. When "A" dies, the court has to decide how to divide the property between spouse number one, spouse number two, and the decedent's ("A's") estate. Courts in different states have come up with different formulations for dividing the property; it gets even more interesting when the bigamist crosses state lines (or even international borders).

Karen E. Boxx is a professor of law at the University of Washington School of Law in Seattle, Washington.

Jim Starr

A good illustration is *Seizer v. Sessions*, 940 P.2d 261 (Wash. 1997). In that case, Elmer and Rosalie Sessions were married in Texas. When Rosalie was diagnosed as mentally ill, Elmer moved to New York, and, although he visited Rosalie at least once, he never resumed living with her on a permanent basis. He never divorced Rosalie, but began a relationship with Barbara, going through a marriage ceremony in Tijuana in 1984 and staying with Barbara until he died in 1991. At some point during the relationship, they moved to Vancouver, Washington, having stayed long enough in Arizona in 1989 to win a $2.5 million lottery. Elmer was listed as the annuitant with Barbara the beneficiary upon Elmer's death. At issue, now that Elmer had died, was Rosalie's and Barbara's respective rights in the lottery winnings. Rosalie's rights under Washington law depended on whether the marriage was defunct. Washington law provides that even if the spouses are still legally married, all property acquired by the spouses after the marriage has become defunct is the separate property of the acquiring spouse. If the marriage was not defunct, the lottery money was community property, owned one-half by Rosalie, the other half owned by Elmer, and passing to Barbara under Elmer's beneficiary designation. If the marriage was defunct, the lottery money was separate property, and Elmer could give it all by beneficiary designation to Barbara. Under Texas law, however, there is no provision for the termination of the community upon the demise of the relationship before divorce. If Texas law applied, Rosalie would be entitled to one-quarter of Elmer's estate, Barbara would be entitled to half the proceeds as an equitable share, and Elmer would be entitled to dispose of one-quarter (which he did by making Barbara the beneficiary). The court relied on *Restatement (Second) of Conflicts of Laws* § 258 cmt. c, which directs the court to look at the law of the spouse's domicile at the time the asset (the lottery ticket) was acquired. That state was Washington. But that only creates a presumption that can be rebutted, depending on which state has the most significant contacts. The court further held that Washington had the more significant contacts and applied Washington law.

Another interesting scenario when the differences in two community property states' laws create havoc is illustrated in *Martin v. Martin*, 752 P.2d 1026 (Ariz. Ct. App.

1986). This case turned not on the validity of the marriage but on the end of the community. The Martins had been domiciled in Wyoming and then in California before Mrs. Martin changed her domicile to Arizona. Three years later, she filed for divorce in Arizona. During their three-year separation, the husband continued to work in California. California has a rule terminating accumulation of community property once the marriage is defunct, similar to Washington's, but Arizona does not. The husband argued that his post-separation earnings were separate as provided by California law. Mrs. Martin argued that such earnings would be community property in Arizona and that, furthermore, Arizona's quasi-community property statute would deem his California earnings to be community property, even if California would not, because this would have been community property if acquired in Arizona. The Arizona court applied its own law, rather than that of the husband's domicile, and concluded that these post-separation earnings should be considered community property.

Characterization Issues

Generally, real property purchased in a community property state with funds earned in a common law state will be characterized as separate real estate, because the out-of-state earnings are characterized as separate property. In *Brookman v. Durkee*, 90 P. 914 (Wash. 1907), Mr. and Mrs. Durkee were married and lived in New York, and, while married, Mr. Durkee used some of his New York earnings to purchase real property in Pierce County, Washington. Mrs. Durkee died intestate a year later and Mr. Durkee about thirteen years after that, with a will leaving his property to persons other than Mr. and Mrs. Durkee's children. Neither of the Durkees had ever lived in Washington. The children claimed that the Washington property was the community property of their mother and father, giving them a right to half of it through their mother's estate. The Supreme Court rejected their claim on the ground that the character of the Washington realty should be determined by reference to the character of the funds used to acquire it, and those funds were to be characterized by reference to the law of the place where the funds were acquired.

> [W]e are clear that personal property acquired by either husband or wife in a foreign jurisdiction, which is by law of the place where acquired the separate property of one or the other of the spouses, continues to be the separate property of that spouse when brought within this state; . . . whether real or personal, received in exchange for it or purchased by it, if it be money, is also the separate property of such spouse.

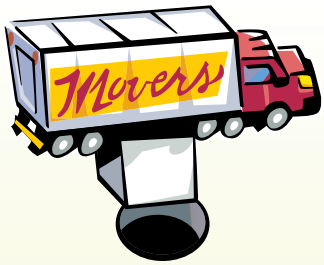
Id. at 915. Any other rule, the court suggested, raised serious legal questions, because "[i]t would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion and ownership, and vest an interest therein in the other." Id.

Using community property to purchase real property in a common law state should similarly preserve the community interests of the spouses. *Restatement (Second) of Conflicts of Laws* § 259. The estate of Billy Martin, the Baseball Hall of Famer, New York Yankee shortstop, and five-time Yankee manager, presents an interesting twist on this theme. Mr. and Mrs. Martin lived in California but had purchased a home in New York, taking title as tenants by the entirety. Before the New York home was purchased, the Martins signed a community property agreement that stated that all real property "'held of record in the name of both parties as individuals, or . . . hereafter acquired as joint tenants or as tenants-in-common, are so held for convenience only and are the community property of the parties.'" The court held that under California law, tenancy by the entirety was inconsistent with community property, and the agreement made no mention of tenancy by the entirety, so the New York residence was not community property. *In re Estate of Martin*, 686 N.Y.S.2d 195, 197 (N.Y. App. Div. 1999).

In the *Martin* case, the characterization of the property as community would have affected distribution of the property between the surviving spouse and Billy Martin's children from another marriage. A more common reason for wanting preservation of the community property characterization is the step-up in basis for the surviving spouse's one-half share of the community under Code § 1014(b)(6). A technique used by practitioners to protect the double step-up is an agreement similar to the one signed by the Martins, confirming the community property character of property regardless of where it is or how it is held. The *Martin* case is fair warning to be as broad and inclusive as possible when describing any alternate title-holding method.

Management and Creditor Claim Issues

A particularly thorny area is the treatment of out-of-state creditors who have dealt with residents of a community property state and who have assumed that the rules of the state of the transaction would apply. This can even create problems when two community property states are involved. For example, in *G.W. Equipment*



Real property purchased in a community property state with funds earned in a common law state will be characterized as separate real estate, because the out-of-state earnings are characterized as separate property.

Leasing, Inc. v. Mt. McKinley Fence Co., 982 P.2d 114 (Wash. Ct. App. 1999), a husband and wife were residents of Arizona. The husband signed a guaranty in Washington, and the creditor was now trying to collect against the husband's marital community. Under Arizona law, the husband and wife must both sign a guaranty in order for it to be enforceable against the community; in Washington, the signature of one spouse would be sufficient. In determining that Arizona law applied, the court noted that

> Washington courts apply Washington law to determine the rights and authority of Washington spouses to enter into contracts affecting their community property. For Washington courts to conclude that residents of other community property states are bound by Washington community property law as well, rather than the law of their own state, would be illogical and unjust.

Id. at 117–18. The court also stated that "when management of community property is at issue, the state with the most significant interests is typically the state where the spouses reside." Id. at 117. Therefore, because Arizona law would require the wife's signature, and that was lacking, the guaranty was enforceable only against the husband's separate property.

Often, when dealing with a creditor from a common law state, community property state courts try to allow access to the same property as would be available in the common law state, but the categories of marital property do not fit very well. In *Blackwell v. Lurie*, 71 P.3d 509 (N.M. Ct. App. 2003), a husband and wife, while residents of Missouri, purchased a valuable sketch by Frederic Remington. The husband was a partner in a law firm that filed for bankruptcy. Around the same time as the bankruptcy filing, the husband and wife placed the sketch on consignment in a Santa Fe, New Mexico, gallery and then moved to Montana. In this action, the bankruptcy trustee had registered a deficiency judgment against the husband as a New Mexico judgment and was attempting to execute on the sketch. The husband and wife claimed that the sketch was held as tenants by the entirety, under Missouri law, which also provided that tenancy-by-the-entirety property was subject to claims only on which both spouses were jointly liable. The bankruptcy trustee argued that the sketch should be characterized as community property under New Mexico law, but the court disagreed, holding that New Mexico would look to the time and place of acquisition (Missouri) to determine the character of the property. Next the trustee argued that the debt represented by the deficiency judgment against the husband should be characterized under New Mexico law as a joint debt of the husband and wife.

The court struggled to characterize the debt as separate under the applicable New Mexico statutes because in the underlying bankruptcy action in Missouri, the court implicitly characterized the debt as the separate debt of the husband (even though the Missouri court would not be dealing with such notions as separate versus community liability because it is not a community property state). The court then said that the characterization was irrelevant, because the New Mexico statutes regarding what property is available for certain debts did not name tenancy by the entirety. The end result was that the court refused the creditor's attempt to execute on the Remington sketch.

The result in this case is not surprising because the only contact New Mexico had with this situation was that the sketch itself was located there at the time of the suit. This court's resolution differs significantly, however, from the Washington court's approach when dealing with out-of-state debts being enforced against marital property in this state. First, it should be noted that the category of separate debt in Washington is much broader than under the New Mexico statute and includes contractual debt incurred for no community purpose (such as debt in relation to separate property). Thus,

A particularly thorny area is the treatment of out-of-state creditors who have dealt with residents of a community property state and who have assumed that the rules of the state of the transaction would apply.

Washington law would not be as quick to characterize a debt as community. Also, only separate torts are enforceable against a tortfeasor's one-half of the community; separate contractual debts are only enforceable against the liable spouse's separate property. New Mexico statutes allow separate debts to be collected from the debtor's one-half of the community. Therefore, underlying Washington law regarding creditors of married persons is not as generous to creditors as New Mexico's.

In *Pacific States Cut Stone Co. v. Goble*, 425 P.2d 631 (Wash. 1967), two husbands, while domiciled in Washington, had incurred debt in Oregon. Previous case law had held that an out-of-state debt incurred by the husband was necessarily the separate debt of the husband, because it was not enforceable against the wife's property in the common law state. Then the court applied the Washington rule regarding a spouse's separate debt to determine liability. That meant that the out-of-state debt was unenforceable not just against the wife's property but against the husband's community property as well. The *Pacific States* court attempted to solve the square-peg-in-round-hole problem by looking instead to what property would be liable in Oregon and tried to carry out that rule in Washington. The result was still uneven, however, because the court held that because the debt was enforceable against everything but the

wife's separate property in Oregon, the debt was enforceable against everything but the wife's separate property in Washington. Of course, the wife's separate property in Washington was a smaller category than under Oregon law, because the wife's earnings in Oregon would be separate property.

This rule was refined in *Pacific Gamble Robinson Co. v. Lapp*, 622 P.2d 850 (Wash. 1980). In that case, the husband incurred the debt in a common law state while the couple lived there, and then the couple moved to a community property state. Unlike the creditor in *Pacific States*, the creditor would have no reason to question the vulnerability of the husband's earnings to the debt. The court characterized the question as: Is the creditor on an obligation incurred by one spouse in a foreign, noncommunity property state, where both spouses were domiciled, restricted in its recovery to the separate property of the obligor spouse, as the term "separate property" is defined by Washington law, after the couple moves to Washington? The court determined that under Colorado law, where the debt was incurred, all but the wife's separate property (which, unlike Washington, would include her wages) was liable for the debt. To properly apply Colorado law, the court held that the wife's separate property as well as her earnings (which were community property) were exempt from the debt but that the judgment was enforceable against the remainder of the couple's property. The creditors therefore fared better under the Washington cases, but, like the New Mexico case, the court in both these cases was attempting to treat the situation as if it had stayed in the state where it started.

In an Arizona case, *Alberta Securities Commission v. Ryckman*, 30 P.3d 121 (Ariz. Ct. App. 2001), the couple had been Canadian residents, where the husband had entered a settlement agreement with the Alberta Securities Commission, agreeing to pay $250,000 Canadian. The couple then moved to Arizona and defaulted on the obligation. The court stated the rule in Arizona to be that

> a judgment rendered against one spouse in a non-community property jurisdiction may be enforced against the community's property consistent with due process as long as (1) the obligation on which the foreign judgment was based would have been a community obligation if it had been incurred in Arizona, . . . and (2) the non-defendant spouse is joined in the Arizona domestication action and has an opportunity to contend that the foreign judgment was based on an obligation of the other spouse that would have been separate if incurred in Arizona.

Id. at 129. The court found that it would have been a community debt and that the spouse had been joined in the Arizona action. It further stated:

> We live in a mobile society: it is commonplace for people to move from state to state as they pursue job opportunities and better living conditions. Inevitably, some judgment debtors in non-community property states will move to Arizona, where community property is the law. It would be asking too much to require the creditor to foresee such a move, and to comply with Arizona laws at the time it files the original suit.

Id. at 130–31.

Community Property Agreements and Other Spousal Contracts

In *In re Estate of Erickson*, 368 N.W.2d 525 (N.D. 1985), a Washington couple had signed a community property agreement that converted all existing and after-acquired property to community and provided that upon the death of the first spouse, the property would vest in the survivor. The last provision, transferring all community to the survivor, is specifically authorized under Washington statute. The husband had inherited mineral interests in North Dakota. Several years after the husband's death, his son from another marriage petitioned the North Dakota court for distribution of the mineral rights under intestacy laws. The widow argued that the property passed to her under the community property agreement. The court concluded that the community property agreement did not operate to convert the North Dakota real property to community property, because North Dakota did not recognize community property. It distinguished another case in which North Dakota property was purchased with community funds by a California couple, and the court recognized an equal ownership of the property by each spouse, because in this case the wife did not contribute to the purchase of the property. The court did not address the possible application of the Uniform Probate Code provision (currently Section 6–101), adopted in North Dakota, that validates transfer at death provisions in nontestamentary instruments, including "marital property agreements."

It may be possible for a couple in a common law state to create community property in another state, following the model of the Alaska community property trust. For example, in *Stein-Sapir v. Stein-Sapir*, 382 N.Y.S.2d 799 (N.Y. App. Div. 1976), a couple domiciled in New York married in Mexico, where they had to elect community property or separate property. They elected community property, and when they later divorced, the New York court held the election to be valid, so that the wife owned one-half of the property earned by the husband. *Restatement (Second) of Conflicts of Laws* § 258 cmt. (b) (1969) provides that a couple can choose the law of a state other than their domicile to govern their property, and that choice will

govern unless the spouses' choice "is outweighed in the particular case by the intensity of the interest of another state, which would usually be the state of the spouses' domicile at the time of the acquisition, in having its own rules applied." Therefore, it may be possible, at least for some purposes, for a couple in a common law state to elect community property status.

A prenuptial agreement was at issue in *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001). The couple had been married in Egypt, and the prenuptial agreement asserted by the husband in the dissolution proceedings was a one-page document signed by the husband and the wife's father at the time of the wedding. Translations differed, but, according to the husband, the document was an agreement to have all issues regarding the marriage, including property rights, governed by "Islamic law." Under such law, according to the husband, earnings and accumulations of each party remain that party's separate property. The couple had moved from Egypt to California, where the husband established a medical practice. In the dissolution action, the court noted that "Islamic law" is vague, in that there are several interpretations of Islamic law. In addition, the court noted that certain protections provided under Islamic law for the wife's benefit, such as a deferred dowry payable to the wife upon divorce, would not be enforceable in California, thus illustrating the difficulty of "grafting one part of another system" onto a very different marital property regime. Because of the agreement's insufficient specificity, the court applied California law and treated the couple's property as community.

In *Robinson v. Robinson*, 778 So. 2d 1105 (La. 2001), a husband and wife had lived in several different states during the marriage, but most of their married life was spent in Louisiana. When they split, the husband moved to North Carolina. The dissolution was finalized by a North Carolina court, under a settlement agreement prepared by the husband's North Carolina attorney. The agreement provided that North Carolina law would control. Years after the divorce was final, the parties were fighting over the wife's interest in the husband's pension plan. The agreement did not address the pension plan specifically, except to require the husband to name the wife as beneficiary of the annuity upon his death (which was intended as a backup to alimony payments). There was a general release by the wife of all claims in the husband's property. In determining which state's law would apply, the court stated, "A husband may not divest a wife of her interest in property by choosing a state law that may benefit his interests to the detriment of his spouse." Id. at 1117. Because Louisiana had far more extensive contacts with the subject matter, Louisiana law was held to apply. The conflict between Louisiana and North Carolina law was that North Carolina would have held the general release effective as against her rights in the pension, whereas Louisiana would require a showing that the wife understood the general release to include the pension. The court went on to hold that the wife had a community interest in the pension, which was not released by the boilerplate in the agreement, and then remanded for a determination of the ownership rights in the pension. One of the dissenters would have respected the choice of North Carolina law, because overriding such a choice is allowable only when the choice contravenes public policy, and it is not contrary to Louisiana public policy for a wife to contract away her rights in a pension in exchange for other property.

Conclusion

The possible conflicts issues that can arise when community property and married persons cross state lines is seemingly infinite because of the variations among the community property states, the variations between the two basic systems, and the application of those variations to the possible interstate transactions that spouses may enter. This article has tried to identify the vast potential for conflicts of laws when dealing with marital property and to illustrate how some courts have dealt with the issue. Although it is difficult to predict which law will apply to the property in these cases, courts will often look to the state that had the most contacts with the property, including where the parties resided at the time. In drafting any agreements in these situations, practitioners should make sure to specifically identify the choice of law and possibly even recite that both spouses understand the implications of such choice of law. ■