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COMMENT

MIGRATING COUPLES AND WISCONSIN'S MARITAL PROPERTY ACT

The Wisconsin Marital Property Act has as its foundation the belief that the contributions of both a husband and wife to their marriage are equally valid and important and that marriage is a cooperative economic effort. The Act recognizes and "rais[es] those contributions to the level of defined, shared and enforceable property rights at the time the contributions are made." The eight other community property states, however, have discovered that the path to equality is strewn with traps for unwary couples who change their domiciles, leaving common-law property states to establish new domiciles in community property states and vice versa. Fortunately, the hindsight of the Act's authors, coupled with the foresight and reasonableness with which the Act was written, should prevent Wisconsin from suffering the pitfalls that other states have experienced with in-migrating couples. However, those who leave Wisconsin for a common-law state will, in all probability, continue to find themselves mired in legal uncertainty.

2. See UMPA, supra note 1, prefatory note.
4. UMPA, supra note 1, prefatory note.
5. "Community property" is used synonymously with the term "marital property."
7. For general discussions of migrating couples, see Abel, Barry, Halsted & Marsh, Rights of a Surviving Spouse in Property Acquired by a Decedent While Domiciled Outside California, 47 Calif. L. Rev. 211 (1959) [hereinafter cited as Abel]; Lay, Marital Property Rights of the Non-Native in a Community Property State, 18 Hastings L.J. 295 (1967); Sampson, Interstate Spouses, Interstate Property, and Divorce, 13 Tex. Tech L. Rev. 1285 (1982); Comment, In-Migration of Couples From Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage, 9 N.M.L. Rev. 113 (1979).
I. THE ACT IN GENERAL

Under Wisconsin’s current common-law system of property, a spouse who owns property by virtue of earning, purchasing, or receiving it in any other manner, has exclusive control over that interest. Thus, the salary of a husband who works is his alone; it is not shared by the couple. The Wisconsin Legislature, of course, has over the last century promulgated a number of statutory protections for spouses in

8. Until only recently, that spouse was exclusively the husband. See Stimson v. White, 20 Wis. 562 (1866) (earnings of the wife during the marriage are her husband’s property); Elliott v. Bently, 17 Wis. 610, 614 (1863) (“[T]he legal existence of the wife, as a distinct person, is, for most purposes, merged in that of the husband, and the marriage is an absolute gift to the husband of the goods, personal chattels and estate of which the wife was actually and beneficially possessed at the time in her own right, and of such other goods and personal chattels as may come to her during the marriage.”) (emphasis omitted). Compare Rasmussen v. Oshkosh Sav. & Loan Ass’n, 35 Wis. 2d 605, 611, 151 N.W.2d 730, 733 (1967) (although wife was custodian of her husband’s earnings, any surplus remaining was his sole property) with Koldrich v. Koldrich, 40 Wis. 2d 373, 379, 162 N.W.2d 132, 134 (1968) (property purchased partially with wife’s funds, the title of which was in her name, was not part of her separate estate). See also Winslow, The Property Rights of Married Women, 1 MARQ. L. REV. 7, 11 (1916) (quoting M. Lush, A CENTURY OF LAW REFORM (1901)):

A century ago a married woman was, in legal text books, the associate of idiots and lunatics; she was, generally speaking, as incapable of enjoying rights over property, or creating rights by contract, as her own infant children. Upon the marriage the husband and wife become one person in law; that one person was the husband; the wife, for nearly all legal purposes, became on her marriage a nonentity. She was the shadow, and her husband the substance; he took practically all the property to which she was entitled, and endowed her with just as much or as little of his worldly goods as he pleased. She could not bring or defend an action in her own name or in her own right, and an injury done to her by the wrongful act of another person resulted, if an action were brought at all, in a pecuniary profit to her husband, into whose pocket the damages found their way. He could put her under lock and key if she didn’t please him, and could, it used to be said, administer moderate personal correction to her if she did not behave properly. She could not, even after her husband’s death, appoint a guardian of her infant children.

Id.

Those common law principles not derogated by statute remain in full force. See Wis. Const. art. XIV, § 13.

9. Despite changing values in the United States, the fact remains that while 77% of the men in the labor force are employed in wage earning jobs only 52.7% of women in the labor force are employed in wage earning positions. See U.S. DEP’T OF LABOR, HANDBOOK OF LABOR STATISTICS 7 (Dec. 1983). Further, on average women earn only about 60% of what men earn. See U.S. Dep’t of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES 469 (1984). Thus, it is more likely that the husband will be the primary wage earner. The fact that hypotheticals in this Comment reflect that reality should not be taken as an indication of chauvinism.
Nevertheless, it seems remarkable that despite Wisconsin's patchwork statutory attempts to "protect" married women, there exists no effective legislation which grants them full parity with married males in the context of immediate vested rights during the marriage.12

The Act13 changes all of this. It is based on the concept that contributions of both spouses may be qualitatively different and in flux but nevertheless of equal importance, and thus "[establish] present shared property rights of spouses during the marriage."14

Generally speaking, the Act recognizes three types of property. Marital property is all-inclusively defined as "[a]ll property of spouses . . . except that which is classified otherwise by this chapter."15 Individual property is exclusively defined and includes property owned by a spouse prior to marriage;16 property acquired by a spouse by gift, devise, or descent;17 property received in exchange for individual property of a spouse;18 and appreciation of individual property.19 Simply put, property which is acquired by either spouse within the framework of the marriage partnership is marital property; that which is acquired outside the marriage is individual property.20 All property is presumed to be marital property.21

12. The statutory protections noted supra note 10 do not grant any ownership rights during the marriage; they merely prevent either spouse (usually the wife) from facing unjust financial hardship. As such, the statutes do not amend the common law for the better because they do not recognize the contributions of both spouses; they merely "protect" them.
13. Most of the provisions in the Act will be found in chapter 766 of the Wisconsin Statutes. See 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. ch. 766).
14. UMPA, supra note 1, prefatory note (emphasis in original).
15. 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. § 766.31(1)).
16. See id. (to be codified at Wis. Stat. § 766.31(6)).
17. See id. (to be codified at Wis. Stat. § 766.31(7)(a)).
18. See id. (to be codified at Wis. Stat. § 766.31(7)(b)).
19. See id. (to be codified at Wis. Stat. § 766.31(7)(c)).
20. The characterization of property can always be changed by agreement of the parties through the use of pre- or post-nuptial agreements. See id. (to be codified at Wis. Stat. § 766.17).
21. See id. (to be codified at Wis. Stat. § 766.31(2)).
A third classification of property which is neither labeled nor defined but which is critically important to the workings of the Act can best be described as property which is neither marital nor individual.\textsuperscript{22} It includes property that was owned exclusively by either spouse prior to the effective date of the Act\textsuperscript{23} and property brought to the state from a common-law state, which retains the legal status affixed to it by the laws of that state.\textsuperscript{24} It cannot be overemphasized that such property is not "individual." Individual property is a creation of the Act; property acquired in another state is not so defined by the Act and, therefore, cannot be "individual."\textsuperscript{25} The confusion in semantics resulting from interchanging one term for the other has led to incorrect and harmful legal results.\textsuperscript{26} Wisconsin courts are well advised to note and maintain the appropriate property classification in future decisions.

Each spouse owns a present undivided fifty percent interest in the marital property,\textsuperscript{27} although either spouse may singly "manage and control" it.\textsuperscript{28} Further, all property which is neither marital nor individual but which would have been marital property had it been acquired after the determination

\textsuperscript{22} See UMPA, supra note 1, § 4 comment. Perhaps the best label for this type of property is "pre-determination date property." \textit{Id.} See also infra note 29.

\textsuperscript{23} Such property is not reclassified by the Act. See 1983 Wis.Laws 186, § 47 (to be codified at Wis. Stat. § 766.31(8)). Any attempt to recharacterize the property would presumably run afoul of the Constitution. \textit{See infra} notes 70-82 and accompanying text.

\textsuperscript{24} This results from a well settled conflict of laws principle:
A marital property interest in a chattel, or right embodied in a document, which has been acquired by either or both of the spouses, is not affected by the mere removal of the chattel or document to a second state, whether or not this removal is accompanied by a change of domicil to the other state on the part of one or both of the spouses.

\textbf{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 259 (1969). \textit{See infra} notes 37-49 and accompanying text. Property acquired in a common law state which would have been marital property had it been acquired while the couple was domiciled in the community property state has been labeled "quasi-community" property by California and Arizona. \textit{See} CAL. CIV. CODE § 4803 (West 1984); ARIZ. REV. STAT. ANN. § 25-318 (1976). \textit{See also infra} notes 63-82 and accompanying text.


\textsuperscript{26} \textit{See} H. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 17-19, 224, 226 (1952); Sampson, \textit{supra} note 7, at 1326-30.

\textsuperscript{27} See 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. § 766.31(3)).

\textsuperscript{28} \textit{Id.} (to be codified at Wis. Stat. § 766.51).
date$^{29}$ is treated as though it were marital property in the event of either the death$^{30}$ of a spouse or the dissolution$^{31}$ of the marriage.$^{32}$

Finally, it must be recognized that the Act is a property ownership act; it is not a property distribution act.$^{33}$ It "has the function of confirming the ownership of property"$^{34}$ during the period of time that the marriage is legally viable. Thus, upon such events as the death of a spouse or the dissolution of the marriage, the current statutes$^{35}$ governing distribution$^{36}$ will be controlling. This is one of the critical elements which will enable Wisconsin to avoid the legal headaches associated with couples changing their domiciles from a common-law property state to Wisconsin.

II. THE CONFLICT OF LAWS PARADOX IN A CHANGE FROM A COMMON-LAW STATE TO A COMMUNITY PROPERTY STATE

The problems associated with couples migrating from a common-law property state to a community property state arise primarily out of conflict of laws principles. One of those principles is that a property interest in personalty which has been acquired by either or both spouses is not affected by a

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29."Determination date" means the last to occur of the following:
(a) Marriage.
(b) 12:01 a.m. on the date of establishment of a marital domicile in this state.
(c)12:01 a.m. on the effective date of this chapter (1986).

Id. (to be codified at Wis. Stat. § 766.01(5)).

30. See id. (to be codified at Wis. Stat. § 766.77).

31. "Dissolution' means termination of a marriage by a decree of dissolution, divorce, annulment or declaration of invalidity or entry of a decree of legal separation or separate maintenance." Id. (to be codified at Wis. Stat. § 766.01(7)).

32. See id. (to be codified at Wis. Stat. § 766.75).

33. UMPA, supra note 1, prefatory note.

34. Id.

35. The statutes have been amended to reflect the change to the community property system. Compare, e.g., Wis. Stat. § 861.35 (1983-84) (special allowance for support and education of children of a decedent within discretion of the court) with 1983 Wis. Laws 186, § 84 (to be codified as amended at Wis. Stat. § 861.35 (reworded to include surviving spouse as a potential recipient of the special allowance)).

36. Because of the fundamental differences in the common-law and community property designs, several statutes have been repealed and replaced by new allocation schemes. See infra note 91.
change of domicile to another state.\textsuperscript{37} Thus, property which is acquired by a couple living in a common-law state and which would, under the laws of that state, be the husband's "separate"\textsuperscript{38} property, remains the husband's property even after a move to a community property jurisdiction.\textsuperscript{39}

This characterization of property can have dramatic results in cases dealing with taxation,\textsuperscript{40} quiet title suits,\textsuperscript{41} and the establishment of constructive trusts.\textsuperscript{42} However, the result is probably most vivid in cases involving the death of a spouse\textsuperscript{43} or divorce. This is due to a second conflict of laws principle: the law applied to succession of property at death or the distribution of property upon divorce is the law of the domicile of the couple when the event takes place.\textsuperscript{44} The effect of these two principles is that a couple may live in a common-law state and acquire wealth which is classified as the husband's. If the couple then moves to a marital property state, the property remains his "separate" property. If he dies and leaves his property to a third party, the wife may be faced with substantial financial hardships because the statutory protections of the common-law state are not available to her in the community property state. In addition, the protection of the fifty percent community property ownership is not available to her.

\textsuperscript{37} See supra note 24 and accompanying text. See, e.g., Paley v. Bank of America Nat'l Trust & Sav. Ass'n, 159 Cal. App. 2d 500, 324 P.2d 35 (1958); Reeves v. Schultmeier, 303 F.2d 802, 806-07 (5th Cir. 1962); Kraemer v. Kraemer, 52 Cal. 302 (1877); Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194 (1978). Accord Nelson v. American Employers' Ins. Co., 258 Wis. 252, 45 N.W.2d 681 (1951); But see. Edwards v. Edwards, 108 Okla. 93, —, 233 P. 477, 486 (1924) ("At the time the property was brought into Oklahoma, the law of this state attached thereto and governed the disposition of the same.").

\textsuperscript{38} Separate is used in the common-law sense and not in the context of marital property. See supra notes 22-26 and accompanying text.

\textsuperscript{39} Some cases follow this rule but anchor their rationale in substantive due process. See generally Sampson, supra note 7, at 1330.

\textsuperscript{40} See In re Drishaus' Estate, 199 Cal. 369, 249 P. 515 (1926); In re Frees' Estate, 187 Cal. 150, 201 P. 112 (1921);


\textsuperscript{42} See Brunner v. Title Ins. & Trust Co., 26 Cal. App. 35, 145 P. 741 (1914); Bosma v. Harder, 94 Or. 219, 185 P. 741 (1919).

\textsuperscript{43} The death of the husband has presented the majority of the problems. See supra note 9.

\textsuperscript{44} See, e.g., Brown v. Commissioner of Internal Revenue, 180 F.2d 946 (5th Cir. 1950); In re O'Connor's Estate, 218 Cal. 518, 23 P.2d 1031 (1933). See also Restatement (Second) of Conflict of Laws §§ 260, 263, 285 (1969).
because the property was not acquired in a community property state.

One of the earliest cases on record which demonstrates this paradox is *Kraemer v. Kraemer*, a divorce case. The couple had been married and domiciled in Illinois for over twenty years, accumulating several thousand dollars in the interim. The husband traveled to California and purchased land with the money acquired in Illinois. Subsequently, his wife and children joined him. Some years later, the wife sued for divorce and division of the property. The trial court granted her the divorce, but awarded all of the California land to the husband on the theory that since the purchase of the land was traceable to the husband's "separate" property, it likewise was his separate property within the community property context. The California Supreme Court affirmed the result and adopted the trial court's rationale.

III. THE AVAILABLE SOLUTIONS

The problems presented by the *Kraemer* case are not without solutions. However, the attempts of the community property states to find those solutions have been not unlike people in a dark cluttered basement stumbling about in an attempt to find the light switch. The image would be humorous were it not for the hardship and pain which must be felt by the spouse, usually the wife, who is left with little to show for years of marriage.

A. The Common Sense Approach

Probably the most obvious and palatable solution was best presented by the Arizona Court of Appeals in *Rau v.*

46. 52 Cal. 302 (1877).
47. Property which is traceable to separate property retains that classification. *See also* 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. §§ 766.31(7)(b), .63).
48. *See Kraemer*, 52 Cal. at 302-03.
49. *See id. at* 306.
51. One writer has called it a "logical process." *See Sampson, supra* note 7, at 1332.
The facts are classic in that money earned by the husband in Illinois, classified as his separate property, was used to buy a farm in Arizona after the couple moved to that community property state. They subsequently filed for divorce. Finding itself trapped by the conflict of laws between the two states, the trial court held that the farm was community property and it was divided accordingly.

The appellate court rejected the reasoning of the lower court and concluded that the property was clearly not community property. Nevertheless, it upheld the equal division of property by applying Illinois rather than Arizona law. Since the foreign law allowed for an equitable division of property upon divorce, the fifty percent division by the trial court was proper. The court dealt with the conflict of laws questions by stating:

We do not believe our legislature intended to prevent our divorce court from affecting the title to any and all property which under the law of the state of acquisition might bear the label "separate property." We construe the "separate property" as to which the statutory prohibition applies to be that defined in [the Arizona statute]. To apply this restriction to "separate" estates acquired in a common-law jurisdiction only leads to unjust and unreasonable results . . . . When the restriction is limited to the statutory definition, the division made here does no violence to either the statutes of Arizona, or Illinois, and carries out the basic law of both jurisdictions that a fair division of marital property be made upon divorce.

53. Id. at __, 432 P.2d at 912.
54. Id.
55. See supra notes 37-44 and accompanying text.
56. The farm, having been purchased with the husband's "separate" funds, was clearly his separate property and not community property. See 6 Ariz. App. at __, 432 P.2d at 912.
57. The court took judicial notice of the laws of Illinois — a rarity. Generally, the law of another state must be pleaded and proved. See 29 AM. JUR. 2D Evidence § 191 (1967); 14 A.L.R.3d 404.
58. See 6 Ariz. App. at __, 432 P.2d at 913.
This reasoning is sound and is followed by several other jurisdictions. It places substance over blind obedience to precedent by looking to the underlying philosophy of both property systems, which is to protect both spouses. However, the approach is not without its drawbacks. The complexity of such a case inevitably leads to additional legal research and excessive litigation, thus delaying resolution of the problem. The burden, in both monetary and psychological terms, will obviously be on the backs of the parties.

B. Quasi-Community Property

The most legally efficient solution to the problem, and that adopted by Wisconsin, is the “quasi-community” property concept. Under this theory, pre-determination date property acquired in the common-law state which would have been community property had it been acquired in the community property state maintains its “separate” characterization throughout the duration of the marriage. Thus, the spouse in

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60. This is virtually the same resolution to the problem as suggested by H. MARSH, supra note 26.

61. Those cases cannot be said to be authority against the contention made here that the wife should be given the nonbarrable interest granted [the wife] by the law of the former domicile. . . .

62. [The wife merely] proves that the law of both states would give her one-half on these facts and says: “I am claiming one-half of the property under one or the other of these rules — I don’t care which one. One of them must be applicable since the case has no factual connection with any other jurisdiction.” Obviously, in order to deny this claim altogether, as the court which decided the O’Conner case apparently would, it is necessary to characterize it as an issue of “marital property” when the wife attempts to bring it under the community-property statutes of the last domicile (thereby referring to the former domicile); and then to turn around and characterize it as an issue of “succession” when she attempts to bring it under the forced-heirship statutes of the former domicile (thereby denying the applicability of that law, which in the previous breath was said to be applicable). This procedure is, of course, merely characterization by the lex causae, or double characterization of the issue — an exploded theory in conflict of laws. Such a result is clearly both illogical and unjust, and a correct analysis of the problem does not support it.

Id. at 232-33 (footnotes omitted).


62. See Comment, supra note 7, at 119-20.

63. See Sampson, supra note 7, at 1331-32.
possession of the property retains sole ownership and is free to make *inter vivos* transfers even if no consideration is received in exchange. Upon the termination of the marriage, however, whether it be by death or dissolution, the property is treated, for allocation purposes, as though it actually were community property.\(^6\)

California was the pioneering state\(^5\) in the use of the quasi-community property concept, and the concept has suffered many false starts and setbacks in its development.\(^6\) In the wake of *Kraemer v. Kraemer*\(^6\) and other decisions,\(^6\) the California Legislature, in 1917, attempted to ameliorate the obvious glitch in the system by passing a provision which defined community property to include "personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state."\(^6\)

The effect of the statute was to divest a spouse of separate property rights merely by moving into the state of California. Following several cases\(^7\) which clearly indicated the path the California courts were going to follow, the statute was held to be unconstitutional in *In re Thornton's Estate*.\(^7\) The California Supreme Court held that because the statute took property which was vested in one spouse and gave it to the other, the

\(^6\) See infra notes 109-116 and accompanying text.


\(^6\) Id. at 297-317.

\(^6\) 52 Cal. 302 (1877). See supra notes 45-49 and accompanying text.

\(^6\) See, e.g., *In re Boselly's Estate*, 178 Cal. 715, 175 P. 4 (1918); *In re Niccolls' Estate*, 164 Cal. 368, 129 P. 278 (1912); *In re Burrows*, Estate, 136 Cal. 113, 68 P. 488 (1902).


\(^6\) See *In re Arms' Estate*, 186 Cal. 554, 199 P. 1053 (1921); *In re Frees' Estate*, 187 Cal. 150, 201 P. 112 (1921); *In re Bruggemeyer's Estate*, 115 Cal. App. 525, 2 P.2d 534 (1931).

\(^6\) 1 Cal. 2d 1, 33 P.2d 1 (1934).
enactment violated the due process and privileges and immunities clauses of the United States Constitution.\textsuperscript{72}

During the twenty-five years following the \textit{Thornton} decision, the California Legislature passed a number of provisions\textsuperscript{73} which achieved results similar to those sought by the 1917 legislation but only in the case of the death of one spouse.\textsuperscript{74} Finally, in 1961, the legislature made another attempt at protecting migrating couples. It passed a statute\textsuperscript{75} classifying as quasi-community property all personal property and local real property acquired "while elsewhere which would have been community property of the husband and wife had the spouse [who] acquired the property been domiciled in this State at the time of its acquisition."\textsuperscript{76} Upon dissolution of a marriage,\textsuperscript{77} both community and quasi-community property is divided equally.\textsuperscript{78}

This scheme passed constitutional muster in 1966 according to the California Supreme Court in \textit{Addison v. Addison}.\textsuperscript{79} The feature which distinguished the 1961 legislation from that in \textit{Thornton} was the fact that no vested rights were taken from either spouse except upon the happening of a certain event: dissolution of the marriage.\textsuperscript{80} Such an event triggers the "police power" which is inherent to all the sovereign states.\textsuperscript{81} Even vested rights are subject to interference by the state

\textsuperscript{72} 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. \textit{Id.} at \textendash, 33 P.2d at 3.

\textsuperscript{73} See 1935 Cal. Stat. 831, \textsection 1 (codified at CAL. PROB. CODE \textsection 201.5 (1984); 1957 Cal. Stat. 490 (codified at Cal. Prob. Code \textsection 201.7 (1984)).

\textsuperscript{74} See generally Abel, supra note 7.

\textsuperscript{75} 1961 Cal. Stat. 636 \textsection 2 (codified at CAL. CIV. CODE \textsection 140.5, amended by Cal. Civ. Code \textsection 4803 (West 1984)).

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} If the grounds are for adultery, insanity, or extreme cruelty, the division of property is to be an equitable one. \textit{See} CAL. CIV. CODE \textsection 146 (West 1984).

\textsuperscript{78} \textit{See id.}

\textsuperscript{79} 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

\textsuperscript{80} \textit{See id.} at \textendash, 399 P.2d at 902, 43 Cal. Rptr. at 102.

\textsuperscript{81} \textit{Id.}
“whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people.”

C. Wisconsin’s “Deferral” Solution

1. In general

Under the Act, Wisconsin becomes the fortunate beneficiary of decades of trial and error experienced by the other marital property states in dealing with migratory couples. Wisconsin also benefits from the hindsight and (one can only hope) the wisdom of the authors of the Act.

The protections afforded couples who have acquired wealth in another state are grounded in two major aspects of the Act. Wisconsin avoids the snarl of litigation resulting from the use of another state’s law by adopting the quasi-community property approach, although the term itself is not mentioned. It is utilized in two situations: those in which a spouse dies and upon dissolution of a marriage. Thus, in either situation, the Act defines ownership rights of the spouses at the time of the happening of the event; it does not determine the actual allocation or distribution of that prop-

82. Id. See infra note 101 for similar Wisconsin holdings.
84. See supra notes 37-82 and accompanying text.
85. This includes property purchased or otherwise exchanged for property from a common-law state if it is traceable. See supra note 47.
86. The authors have chosen to term the concept the “deferred approach.” See UMPA, supra note 1 prefatory note; id. §§ 17-18 comments. The use of the term “deferred” was apparently chosen to emphasize that the characterization of the property is not altered when it is brought into the state, but rather, is postponed until the event occurs, thereby avoiding constitutional problems. See supra notes 65-72 and accompanying text.
87. Except as provided in sub. (2), at the death of a spouse domiciled in this state all property then owned by the spouse which was acquired during marriage and before the determination date and which would have been marital property under this chapter if acquired after the determination date shall be treated as if it were marital property.
88. Except as provided in s. 766.73: (1) In a dissolution, all property then owned by either or both spouses which was acquired during marriage and before the determination date and which would have been marital property under this chapter if acquired after the determination date shall be treated as if it were marital property.

Id. (to be codified at Wis. Stat. § 766.75).
That task is left to existing Wisconsin statutory procedures\textsuperscript{90} which, in turn, constitute the second touchstone of the protections for migrating couples.\textsuperscript{91}

Consider a couple living in Illinois, a common-law state, who, over a period of time, acquire $150,000 worth of property. Assume that $50,000 of this was devised to the husband individually by a relative and that the remaining $100,000 was earned by the husband while the wife raised the couple's children. Upon moving to Wisconsin, the character of the prop-

\textsuperscript{89} See UMPA, supra note 1, prefatory note. The Act leaves to existing dissolution procedures in the several states the selection of the appropriate procedures for dividing property. . . . [It] has the function of confirming the ownership of property as the couple enters the process. Thus reallocation of property derived from the effort of both spouses during the marriage starts from a basis of the equal undivided ownership that the spouses share in their marital property. A given state's equitable distribution or other property division procedures will depend on other applicable state law and judicial determinations. An analogous situation obtains at death, with the Act operating primarily as a property statute rather than a probate statute.

Id. \textsuperscript{90} See supra note 35.

91. In the case of divorce, Wis. Stat. § 767.255 continues to be determinative of the manner in which the property is divided. Ownership remains a factor in determining the manner of division and a new equitable factor has been added. See 1983 Wis. Laws 186, § 50 (to be codified at Wis. Stat. § 767.255).

The Act is not designed to interfere with such a division under the statutes and cases in an adopting state or to ordain an equal division when that is not otherwise indicated. What the Act will do is to create a different balance of ownership going in to the equitable division procedure from one which typically exists in common law jurisdictions in which title and ownership are synonymous.

UMPA, supra note 1, § 17 comment (emphasis in original).

Similarly, Wis. Stat. § 767.26 controls the payment of alimony with the division of property a factor in making the determination. See Wis. Stat. § 766.26(3)(1983-84).

The disposition of property upon the death of a testate spouse involves a new statutory scheme. The dower-elective share provisions of Wis. Stat. §§ 861.03 - .15 have been repealed since the deferred approach giving the spouse 50% of the property constitutes its equivalent. The surviving spouse retains the right to disclaim an interest passing under a will.

In the case of a spouse who dies intestate, Wis. Stat. § 852.01(1)(a) (1-2) was amended to provide the spouse with the entire estate if all surviving issue are also the spouse's and one-half of the individual property estate if there are issue who are not the surviving spouse's. See 1983 Wis. Laws 186, §§ 59, 61 (to be codified at Wis. Stat. § 852.01(1)(a) 1-2).

There are, of course, other statutory protections; the exact functioning of the Probate Code is beyond the scope of this Comment. The point remains that the new chapter 766 does not affect distribution of property except insofar as the determination of ownership rights affects that distribution.
property would not change. That is, the husband would still have vested ownership rights in all $150,000 worth of property. Further, the subsequent death of the husband would not cause the ownership rights to suddenly split in two. Nevertheless, for the purpose of distributing the property, the deferral concept would be engaged.

If the husband died testate leaving everything to a third person, the newly enacted section 766.77 would merely determine what is his to give. Under the statute, the money devised to him is not property “which would have been marital property . . . if acquired after the determination date” and thus, would be distributed through the husband’s will. The other $100,000, however, would have been marital property and, as a result, would be treated as if fifty percent were the husband’s and fifty percent the wife’s, thereby allowing the wife to receive $50,000 with the balance passing under the will. Of course, property acquired while the couple is domiciled in Wisconsin is marital and creates a fifty percent vested interest in the wife, which would obviously not be subject to the will.

In the case of a divorce, the same reasoning would apply but only so far as determining ownership rights. The final distribution may or may not end up reflecting those rights depending on the equitable allocation of the court under existing statutes.

It seems clear that this scheme, which has been adopted in other states, steers clear of constitutional violations. It is

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92. This assumes there are no marital property agreements that would vary the effects of chapter 766. See 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. § 766.17).
93. Remember, this would not be “individual property” as defined under the Act, but rather property which is neither individual nor marital. See supra notes 22-26 and accompanying text.
94. Assuming no marital property agreements.
95. See, e.g., In re O’Connor’s Estate, 218 Cal. 518, 23 P.2d 1031 (1933).
96. See supra note 87.
97. 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. § 766.77(1)).
98. See supra note 89.
99. See, e.g., Mack v. Mack, 108 Wis. 2d 604, 323 N.W.2d 153 (1982); Wilberscheid v. Wilberscheid, 77 Wis. 2d 40, 252 N.W.2d 76 (1977); Antholt v. Antholt, 6 Wis. 2d 586, 95 N.W.2d 224 (1959).
well settled in Wisconsin that the state's police power enables the legislature to statutorily divest a property interest if the divestiture serves the public interest.\textsuperscript{101} Certainly the state's interest in protecting the welfare of a spouse at death or dissolution is great enough to justify allocation of property under the deferral approach.\textsuperscript{102} It is, in fact, no different than the approach taken for years under the elective share statute and the statute allowing for distribution of property after a divorce.\textsuperscript{103}

It should also be clear that because this scheme does not transfer ownership prior to the happening of the event,\textsuperscript{104} the deferred property\textsuperscript{105} of one spouse is not subject to the testamentary disposition of the other if the second spouse predeceases the spouse owning the property.\textsuperscript{106} Thus, in the example above,\textsuperscript{107} if the wife predeceases her husband, she could not devise any of the $150,000 — that would be an unconstitutional divestment of his property. Because there would be no ownership rights in the wife, she would be powerless to devise it.

The next logical inquiry is whether a spouse can defeat the statutory protection under the deferred approach by making \textit{inter vivos} transfers of property. This has been done in the past by creating joint tenancies with third persons,\textsuperscript{108} making outright gifts,\textsuperscript{109} and creating trusts.\textsuperscript{110} At common law in

\textsuperscript{101} For an excellent discussion of the state's police power in general, see State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923). \textit{See also} Noranda Exploration, Inc. v. Ostrom, 107 Wis.2d 205, 320 N.W.2d 530 (1982); David Jeffrey Co. v. Milwaukee, 267 Wis. 559, 66 N.W.2d 362 (1954).

\textsuperscript{102} \textit{See} Andrews v. Andrews, 188 U.S. 14 (1903); Weichers v. Weichers, 197 Wis. 159, 221 N.W. 733 (1928).

\textsuperscript{103} \textit{See}, e.g., Bahr v. Bahr, 107 Wis. 2d 72, 318 N.W.2d 391 (1982); \textit{In re} Marriage of Lundberg, 107 Wis. 2d'1, 318 N.W.2d 918 (1982).

\textsuperscript{104} \textit{See supra} notes 85-91 and accompanying text.

\textsuperscript{105} \textit{See supra} note 86.


\textsuperscript{107} \textit{See supra} notes 92-97 and accompanying text.

\textsuperscript{108} \textit{See}, e.g. Estate of Mayer, 26 Wis. 2d 671, 133 N.W.2d 322 (1963).

\textsuperscript{109} \textit{See}, e.g., Mann v. Grinwald, 203 Wis. 27, 233 N.W. 582 (1930); Sederlund v. Sederlund, 176 Wis. 627, 187 N.W. 750 (1922).

\textsuperscript{110} \textit{See}, e.g., Whittington v. Whittington, 205 Md. 1, 106 A.2d 72 (1954); \textit{In re} Jeruzal's Estate, 269 Minn. 183, 130 N.W.2d 473 (1964). \textit{See generally} Abel, \textit{supra} note 7, at 220-23.
Wisconsin it was recognized that if such transfers were made with the intent to "frustrate the beneficent design of the [elective share] statute," the transfer could be set aside. This remedial concept was codified in section 861.17 in 1969. Under the new law, the section has been amended to reflect the change to a marital property system, but it retains intent as the test for establishing a fraudulent conveyance.

Finally, the ownership of property which is acquired as the direct consequence of property already in existence depends upon whether it is acquired by virtue of appreciation or income. Income which is earned during the marriage as a consequence of marital property, individual property, or property which is neither is characterized as marital property. This is a consequence of the recognition that assets which are gained during the marriage are the result of a consolidation of effort of the partnership. Therefore, if a spouse owns a number of limousines in a common-law state which

111. Sederlund v. Sederlund, 176 Wis. 627, 634, 187 N.W. 750, 752 (1922).
112. See Estate of Mayer, 26 Wis. 2d 671, 133 N.W.2d 322 (1965); Estate of Steck, 275 Wis. 290, 81 N.W.2d 729 (1957); Mann v. Grinwald, 203 Wis. 27, 233 N.W. 582 (1930).
114. If fraudulent intent is proved, the spouse is limited to a recovery of only that share which she would have received had there been no conveyance. See 1983 Wis. Laws 186, § 82 (to be codified as amended at Wis. Stat. § 861.17).
115. Some jurisdictions look to the amount of control that the conveying party retains in determining if there has been a fraudulent conveyance. See Abel, supra note 7, at 220-23.
117. "'Appreciation' means a realized or unrealized increase in the value of property." 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. § 766.01(2)).
118. "Income" means any of the following:
(a) Any wages, salary, commission, bonus, gratuity, payment in kind, deferred employment benefit or proceeds other than death benefits of any health, accident or disability insurance policy or of any plan, fund, program or other arrangement providing benefits similar to those forms of insurance.
(b) An economic benefit having value attributable to the effort of a spouse.
(c) Dividends, interest or income trusts.
(d) Net rents and other net returns attributable to investment, rental, licensing or other use of property, unless attributable to a return of capital or to appreciation.
Id. (to be codified at Wis. Stat. § 766.01(10)).
119. See id. (to be codified at Wis. Stat. § 766.01(10)). See supra notes 22-26 and accompanying text.
120. See 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. § 766.31(4)).
are rented to produce income, the limousines themselves remain "separate" property when the couple moves to Wisconsin, while the income they produce is marital.\(^\text{121}\)

The new section 766.31(7)(c) establishes that appreciation of a spouse's individual property is, likewise, individual. But what of property acquired by one spouse in a common-law state? Although it is not technically individual property,\(^\text{122}\) during the marriage it will be treated as though it is, making the classification of appreciation individual as well.\(^\text{123}\) Therefore, upon dissolution of the marriage or death of a spouse, any appreciation will accrue to the estate of the owning spouse to be distributed under the appropriate statutes.\(^\text{124}\) Of course, if the appreciation is due to the efforts of one of the spouses and is substantial, it is deemed marital property.\(^\text{125}\)

2. Classification of property left in a common-law state

When a couple moves from a common-law state to a community property state, leaving in the common-law state real or

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121. See UMPA § 4 comment.

By treating all income from any source as marital property, the Act affords a simple and understandable arrangement . . . .

The income rule poses some "front-end" and "tail-end" problems. The "front-end" problem pertains to income received shortly after the determination date from effort or accrual of rights before the determination date. Actual ownership of such income became fixed before the determination date and it should not be and is not classified as marital property. This is handled by providing that income is marital only if "earned or accrued" after the determination date and during marriage.

Id. (emphasis in original). See also Guye v. Guye, 63 Wash. 340, 115 P. 731 (1911).

122. See supra notes 22-26 and accompanying text.

123. See 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. § 766.31(9)).

124. See supra notes 89-91 and accompanying text. It has been noted that appreciation of pre-determination date property that has been reclassified due to the substantial efforts of one spouse and subsequently mixed with marital property such that it is untraceable presents an interesting legal slight of hand. The mixing of the two would cause the separate property to be reclassified as marital. This, however, would divest ownership rights existing before the determination date, an unacceptable situation precluding the reclassification in the first place, and thus requiring a contravention of the new section 766.63(1). See Furrh, Is the Marital Property Act Retroactive?, Wis. B. BULL., July 1984, at 15, 17 & 96.

125. See 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. § 766.63(2)). This scheme mirrors the result in Plachta v. Plachta, 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984), in which the court determined that under Wisconsin's common-law system of property, appreciation of a spouse's separate property retains its identity unless the increase in value was due to joint enterprise.
personal property acquired during the marriage, the property left behind must be classified upon a subsequent divorce or death of a spouse. For purposes of distribution, should the property be classified under the common-law system as "separate" or as deferral property (quasi-community property) under the community property system? Unlike the California statutes, the Wisconsin Act is not clear on this issue.

Choice of law principles have traditionally held that if property is realty, the choice of law for establishing title is that of the situs; whereas, for so-called movables, the choice of law has been either the domicile of the couple or the situs of the property when acquired. But rules regarding distribution of property in the event of divorce or death of a spouse are distinguishable from title principles. What is really at issue is not the right of ownership per se, but rather the incidents of ownership in particular distribution rights, after the couple has changed domicile and divorce or death has occurred. It is well settled that migration alone cannot alter ownership rights without violating the Constitution. However, vested rights to property left behind in a common-law state should be altered upon death or dissolution of marriage to ensure a proper and just distribution of property.

If the property is classified under the law of the situs, one spouse or the other will be open to all of the problems created by the conflict of laws. However, bringing all property, domestic or foreign, under the umbrella of the community property framework avoids inequities and potential hardships. It is therefore proper that out of state property acquired during the marriage be classified as deferral property.

Assuming that a court has personal jurisdiction over the husband and wife, a divorce decree creates obligations and

126. Obviously, property which even under community property principles is separate or is traceable to separate property should be treated as such.
127. CAL. CIV. CODE § 4803 (West 1985) reads in part: "Quasi-community property means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways . . . ." (emphasis added).
129. See LEFLAR, supra note 128, at 569-71.
130. See supra notes 65-72 and accompanying text.
131. See supra notes 37-49 and accompanying text.
rights of the parties.\textsuperscript{132} Clearly, the courts do not have power to directly affect the title to property located in another state,\textsuperscript{133} but it is equally clear that a court does have the power to indirectly affect title to property in another state through an order to convey the property effective upon a person over which it has personal jurisdiction.\textsuperscript{134} When a Wisconsin couple acquires property during marriage and leaves it in a common-law state, that property should be classified as deferral property \textsuperscript{135} for purposes of distribution.

IV. MIGRATION FROM A COMMUNITY PROPERTY STATE TO A COMMON-LAW STATE

A. The Problem

Consider an example of a couple who take their property with them in a migration from a community property state to a common-law state.\textsuperscript{136} In the event of the subsequent death of the wage-earner spouse following the couple's domicile in the common-law state, the surviving spouse's interest in the couple's estate should not be diminished as a result of the move. In fact, assuming the decedent has been the wage earner, the surviving spouse should always be in a better position than if the couple had acquired all their assets in the common-law state.\textsuperscript{137} This financial gain assumes that a common-law state will properly apply traditional conflict of law prin-
A proper application would present the following situation:

H and W move from community property state X to common-law state Y. While domiciled in state X, H, the wage earner, and W acquire community assets of $300,000, of which H is entitled to $150,000 (his community property). H and W take the $300,000 with them to state Y, where H continues to earn income which is thereafter classified as H's separate property ($100,000). When H dies, W is entitled to her $150,000 of community property plus one-third of the combined total of H's community property and separate property (W's elective forced share). W's total inheritance: $233,333.140

This situation is ideal considering the wife in a common-law state would have received only $133,333141 and the wife in a community property state would have received only $200,000.142

Although the above situation is ideal, it is non-existent. The problems faced by couples migrating from a community property jurisdiction to a common-law jurisdiction are often handled incorrectly, unjustly or not at all. The follow-

138. For the purpose of determining marital property rights, the character of the assets is determined according to the state of marital domicile at the time the property was acquired, and that character is not altered when the couple moves to another state. See H. Marsh, supra note 26, at 225-33; Lay, supra note 7, at 330-331.

139. However, it must be remembered that "no reported case has ever held that a couple can own community property in a common law state." Clausnitzer, Property Rights of Surviving Spouses and the Conflict of Laws, 18 J. Fam. L. 471, 492 (1979-80).

140. This analysis divides in half the property acquired in the community property state. The property acquired after the change in domicile is then divided according to the common-law forced share provision.

141. Assuming the entire monetary estate was built up through H's efforts, one-third of W's total estate of $400,000.

142. One-half of the community estate of $400,000.

143. See, e.g., In re Estate of Kessler 177 Ohio St. 136, 203 N.E.2d 221 (1964) (although court recognized the wife's community property as vested, it went on to distinguish it from full ownership because the husband had full right of management and control). See also Lay, supra note 136, at 326; Lay, Migrants from Community Property States — Filling the Legislative Gap, 53 Cornell L. Rev. 832, 836 (1967-68).

144. See, e.g., In re Hunter's Estate, 125 Mont. 315, 236 P.2d 94 (1951); Commonwealth v. Terjen, 197 Va. 596, 90 S.E.2d 801 (1956). In both cases the court refused to recognize the wife's community property interest as vested, considering instead that the total estate was owned by the husband as the sole title holder. See also Clausnitzer, supra note 139, at 493.

ing portion of this Comment will focus on the problems faced by a lawyer in a common-law state who attempts to understand the law of community property.\textsuperscript{146}

Case law concerning the migration of couples from community property jurisdictions to common-law jurisdictions is scarce. This "dearth of judicial decisions in the area does not mean that it is inconsequential or that few problems ever arise."\textsuperscript{147} It is more likely that cases are settled out of court\textsuperscript{148} or that the problems created by such a move simply go unrecognized. Recognition is crucial, however, because the client suffers if the attorney remains ignorant of the community property concept.\textsuperscript{149} At present, community property statutes exist in Arizona,\textsuperscript{150} California,\textsuperscript{151} Idaho,\textsuperscript{152} Louisiana,\textsuperscript{153} Nevada,\textsuperscript{154} New Mexico,\textsuperscript{155} Texas,\textsuperscript{156} Washington\textsuperscript{157} and, as of January 1, 1986, Wisconsin.\textsuperscript{158} During the 1940s the states of Michigan,\textsuperscript{159} Nebraska,\textsuperscript{160} Oklahoma,\textsuperscript{161} Oregon,\textsuperscript{162} Pennsylvania\textsuperscript{163} and the territory of Hawaii\textsuperscript{164} adopted community property statutes to take advantage of federal tax laws. While these statutes were subsequently repealed\textsuperscript{165} or declared un-

\textsuperscript{146} For an expanded discussion of this problem, see Polasky, Mullin & Pigman, \textit{Estate Planning for Migrating Clients: Problems When Couple Moves from Community Property State to Common Law State}, 101 TR. & EST. 876 (1962).

\textsuperscript{147} Lay, supra note 143, at 839.

\textsuperscript{148} This is especially true in the tax area because the cost of the litigation almost always outweighs the amount of the tax. \textit{See}, e.g., Commonwealth v. Terjen, 197 Va. 596, 90 S.E.2d 801 (1956).

\textsuperscript{149} Lay, supra note 143, at 839.

\textsuperscript{150} ARIZ. REV. STAT. ANN. § 25-211 (1976).

\textsuperscript{151} CAL. CONST. art. 1, § 21; CAL. CIV. CODE § 162-64 (West 1984).

\textsuperscript{152} IDAHO CODE §§ 32.903-.906(A) (Supp. 1984).

\textsuperscript{153} LA. CIV. CODE ANN. art. 2336 (Supp. 1984).

\textsuperscript{154} NEV. REV. STAT. §§ 123.130, .180, .190, .220 (1979).

\textsuperscript{155} N.M. STAT. ANN. § 57-4A-2 (Supp. 1975).

\textsuperscript{156} TEX. FAM. CODE ANN. § 5.01 (Vernon 1975).


\textsuperscript{158} See 1983 Wis. Laws 186.


\textsuperscript{160} Ch. 156, §§ 1-17, 1947 Neb. Laws 427.

\textsuperscript{161} Tit. 32, §§ 1-18, 1947 Okla. Sess. Laws 118.

\textsuperscript{162} Ch. 525, §§ 1-17, 1947 Or. Laws 910.

\textsuperscript{163} Act 550, §§ 1-16, 1947 Pa. Laws 1423.

\textsuperscript{164} Ch. 301A, §§ 1-18, 1945 Hawaii Sess. Laws 312.

constitutional due to the enactment of tax legislation in 1948, the impact of community property law remains.

B. Practical Considerations of a Change in Domicile.

After a couple makes the decision to move from a community property state to a common-law state, an important problem, and one which is least often considered, relates to the legal implications of the move. The primary problem encountered at this point is the determination of which state's law governs the couple's rights and taxable interests as to property acquired after marriage. An accurate or inaccurate determination of whether the property is separate or community will have a profound effect on the rights of all parties when marital dissolution, death, tax liability or estate planning is concerned. The questions presented in this area are particularly relevant for those Wisconsin residents considering a future move. It is important to consider the way that courts have handled, or have refused to handle, the migration situation. The various circumstances in which this migration problem is likely to arise are outlined below.

1. Domicile changed; property remained

When a couple moves from a community property jurisdiction to a common-law jurisdiction and leaves property behind, the traditional conflict rules implemented by the

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168. It has been noted that the decision to move is often made for a couple. See Lay, supra note 136, at 298.
169. See id. at 298-99. The author points out that while "this determination . . . may be an exceedingly difficult task for one who has little knowledge of the community method of property ownership, it is imperative because the impact of the interstate move can be weighed and evaluated intelligently only after such determination." Id. at 299 (footnote omitted).
171. See W. DEFUNIAK & M. NAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 89 (2d ed. 1971).
172. See I. BAXTER, supra note 136, at 340.
173. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 223, 244 (1969) (regarding the conveyance of real and personal property).
courts may not be an accurate reflection of the relative rights of either party. The most widely recognized rule whenever there is any change in domicile is that "a change of domicile by a husband and wife from a community property state to a separate property state or vice versa, has no effect on the classification (as community or separate) of property acquired prior to the removal (or property into which such property can be traced)." The major problem, as demonstrated by the following cases, is that common-law courts have had great difficulty accurately applying this simple rule.

Three leading cases in this area reflect the current judicial trend. Wallack v. Wallack is a 1955 divorce action in which the Georgia Supreme Court considered the disposition of property acquired during the couple's marriage. The parties were originally domiciled in Texas, a community property jurisdiction. There, they acquired personal property and a large bank account. While still living in Texas, the parties obtained a divorce, thereafter changing their domicile to Georgia, a common-law jurisdiction. Because the property settlement had not been litigated in Texas, the wife brought an action in Georgia to determine her property rights in the personal property acquired in Texas. In the suit, she claimed a one-half community share of the Texas property. Texas courts, and other community property state courts, hold that "where the rights of the spouses to community property are not determined in the divorce action, the former spouses hold the property as tenants in common." This established legal theory allowed the court to dispose of the issue on grounds with which it was more familiar: the law of tenancy in common.

174. I. BAXTER, supra note 136, at 341.
176. Id. at 748, 88 S.E.2d at 156.
177. See H. MARSH, supra note 26, at 247: "By the law of all the American community states at the present time, an absolute divorce, with no division of property in the decree, makes the spouses tenants in common of the former community property, and the wife can recover one-half thereof from the husband. Hence, she should also be permitted to do so in the common-law state."
178. Note, supra note 170, at 85.
179. Obviously, tenancy in common is a familiar concept in common-law jurisdictions. Therefore, the court embraced this more familiar theory in order to sidestep the crucial legal issue, that is: what are the property interests of common-law domiciliaries in community property? This type of legal sidestepping has been criticized. See, e.g., Polasky, Mullin & Pigman, supra note 146, at 880.
This left unanswered the question of the appreciation of community property when the community property interest remains unchanged.

In more carefully reasoned decisions, two New York courts considered the respective property rights of a surviving spouse. In the first, *In re Warburg’s Estate*, the court considered the effect of a change in domicile from Germany to New York. The Warburgs were originally domiciled in Hamburg, Germany, a city governed by community property laws. The rise of Nazism resulted in the confiscation of their assets. Fearing death, the couple fled to New York where they obtained citizenship and became domiciliaries. The husband subsequently died, and the German government made restitution to the wife for the value of the property it previously confiscated. In a well reasoned opinion the court, apparently applying traditional conflict rule, separated the two primary issues. First, the court looked to German law to determine the relative rights and interests of each party in the personalty acquired in Germany. Second, given those rights, the court looked to the law of New York to determine the proper disposition to be made at death. Several commentators have found this approach “to be very satisfactory and workable.” Because the couple was domiciled in New York at the time of the husband’s death, the law of New York was the proper basis for disposition considerations. Moreover, the simple fact that they were forced to move should not affect their rights in the property acquired during their domicile in Germany.

The second New York case, *In re Estate of Crichton*, is said to have effectively revolutionized American marital property conflict law. In this 1967 case, the decedent, a native of Louisiana, had accumulated a substantial estate consisting

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181. Id.
182. See Note, supra note 170, at 83.
183. See 38 Misc. 2d at 999, 237 N.Y.S.2d at 558-59.
184. Lay, supra note 136, at 321. See also Note, supra note 170, at 83.
185. See Lay, supra note 136, at 321.
of bank accounts, stocks, and bonds. After a period of time, the decedent moved from Louisiana to New York, leaving a large portion of his acquired assets in Louisiana. After being domiciled in New York for several years thereafter, the decedent died, survived by his second wife (from whom he had been separated for twenty-seven years) and by four children from his first and second marriages. Upon disposition of the husband's estate, the wife appeared in court claiming community rights in one-half of the decedent's estate.

While the court acknowledged the traditional conflict of law rule and recognized that the proper application of that rule would allow Louisiana law to govern the disposition of the assets which were acquired there, the court rejected this rule. The court took a jurisdictional approach instead and looked at the contacts between the decedent and the state of Louisiana. Finding that decedent's contacts with Louisiana were minimal and insignificant the court determined that the case should be disposed of under New York law. Applying New York law, the court determined that the surviving spouse was entitled to only one-third of the estate. The court disavowed the traditional conflict rules because it felt they failed to consider the policies of other jurisdictions and the interests that those other jurisdictions have in the application of their own laws. While this may be true and one may wish to apply it to the particular facts of this case, thereby feeling comfortable in denying the wife's community interest, the reality is that the court failed to accurately apply established law. As a result of this failure, the wife's interests were diminished.

7 COMM. PROP. J. 200, 219 (1980) (contending that Wisconsin's consideration of the Uniform Marital Property Act is truly the revolution of our time).

188. See 20 N.Y.2d at 133, 228 N.E.2d at 805, 281 N.Y.S.2d at 819.
189. Id.
190. Id. at 135, 228 N.E.2d at 806, 281 N.Y.S.2d at 820-21.
191. "New York, as the domicile of Martha and Powell Crichton, has not only the dominant interest in the application of its law and policy, but the only interest." Id. at 134, 228 N.E.2d at 806, 281 N.Y.S.2d at 820.
193. 20 N.Y.2d at 133, 228 N.E.2d at 805, 281 N.Y.S.2d at 819.
2. Domicile changed; property transferred

As a general rule, when a couple changes their domicile from a community property state to a common-law state and take their personal property with them, their relative interests in the property acquired during marriage are governed by the laws of the state of acquisition. The simplicity of this rule is apparent, yet common-law courts have found it difficult to apply in a strict sense. There has been a general hesitation on the part of common-law courts to classify community property as community property. Although the courts tend to follow the applicable conflict rules, "the means of reaching the desired conclusion often varies from state to state." Courts have imposed constructive or resulting trusts or have treated property as commonly owned, but have done so under the traditional and more familiar common-law theory. The exact nature of this legal sidestepping is demonstrated in the following divorce and tax cases.

In the early case of Depas v. Mayo a husband and wife accumulated a large estate while domiciled in Louisiana. After several years of marriage they moved to Missouri, where the husband invested in real property, taking title in his name alone. Shortly thereafter, Mrs. Mayo (Depas) divorced her husband. In an attempt to defraud his wife, Depas put the remainder of his personal property beyond the reach of legal process. Mrs. Mayo, claiming that she was entitled to her community share of her husband's real and personal property, brought legal action to determine her interests. Although the Missouri Supreme Court acknowledged that while the couple was domiciled in Louisiana the wife had a community inter-


195. "[N]o reported case has ever held that a couple can own community property in a common law state. This precise question has always been sidestepped. The reason for it is, of course, that the notion of community property does not exist in the common law state." Clausnitzer, supra note 139, at 492. See also Johanson, The Migrating Client: Estate Planning for the Couple from a Community Property State, 9 INST. ON EST. PLAN. 8.1, § 811 (1975).


197. Note, supra note 170, at 86.

198. 11 Mo. 314 (1848).
est, it held that Missouri's common law governed because the property was no longer located in Louisiana. In holding as it did, the court changed the character of the interest of each party. Although the court imposed a constructive trust on behalf of Mrs. Mayo, recognizing the vested nature of her interests, the fact is that the move across state lines recharacterized her interest.

The following two examples demonstrate the use of the constructive interest theory in a succession case. In the 1924 decision Edwards v. Edwards, the plaintiff and the decedent, original domiciliaries of Oklahoma, moved to Texas in an attempt to cash in on the oil business. After living in Texas for a little over a year, the couple acquired assets in excess of $80,000. After their stay in Texas, the couple moved back to Oklahoma, where Mr. Edwards was killed. Before Mr. Edwards' death, he invested most of the assets he had acquired in land and bank accounts, taking title in his mother's name. In an attempt to determine the wife's rights in the property, the Oklahoma Supreme Court looked at the law of Texas and determined that she held a vested interest in the property of her husband. Having made this determination, the court imposed a constructive trust in favor of the wife.

This same result was reached in Quintana v. Ordone, a 1967 decision. In Quintano, the children of the decedent brought an action to determine the rights of their stepmother in their father's estate. While the couple lived in Cuba, the

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199. Id. at 319.
200. "Since trust doctrine is equitable perhaps the court approached the problem with an idea of doing 'justice' between the parties rather than with the idea of applying a particular legal concept. . . . An important aspect . . . is that the court treated the wife's interest in the community property as a vested one." Lay, supra note 136, at 334. 201. 108 Okla. 93, 233 P. 477 (1924).
202. Apparently, the couple did "cash in" on a good deal somewhere, but not in the oil business. The court makes particular note of "the questionable character of the businesses they conducted." Id. at __, 233 P. at 479.
203. The wife was charged and acquitted of the murder. See H. Marsh, supra note 26, at 242.
204. 108 Okla. at __, 233 P. at 485. See also H. Marsh, supra note 26, at 242-43 (suggesting that the court engaged in pure dictum when it agreed with the trial court that one-half of the property belonged to the wife, the other one-half to her husband, and that neither could dispose of the other's interest).
205. 108 Okla. at __, 233 P. at 485.
decendent-husband invested in $100,000 of stock in a Florida corporation. The stock was acquired with community funds.207 Eventually, the couple moved to Florida, and upon selling the stock, the husband received a promissory note in the amount of $810,000.208 His surviving spouse claimed one-half the value of the note as her community interest. The court held that under the law of Cuba the stock did not vest solely in the husband, but instead, the wife held a vested interest in it equal to that of her husband.209 In addition, "[t]he interest which vested in the wife was not affected by the subsequent change of domicile from Cuba to Florida . . . ."210

Even though these common-law jurisdictions have attempted to protect the interests of all parties, this protection has not evolved from a well-reasoned recognition of the legal interests of each party. It has been observed that:

[c]even where the interests of the parties have been protected in a common law state, protection has not always been accomplished through a recognition of the rights of a spouse in the property as community property. . . . [T]he courts have . . . resorted to an equitable trust doctrine to effectuate this protection. Such legalistic reasoning would be totally unnecessary if the interests were entirely unaffected by the move since the court could simply reason that it was community before the move, ergo, community after the move.211 This conflict creates significant constitutional problems,212 as well as general confusion within the field of marital property law. This confusion is increased when common-law courts

207. "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 . . . ." Id. at 580.
208. Id. at 578-79.
209. Id. at 580.
210. Id. The court also noted that since the promissory note was acquired while the couple lived in Florida that transaction was controlled by Florida law. Id. The court concluded by succinctly denoting the theories underlying its reasoning:

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. 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. Therefore, while the husband held legal title to the note and contract, he held a one-half interest in trust for his wife. Id. (footnotes omitted).
211. Lay, supra note 136, at 300.
212. See infra text accompanying notes 219-21.
have attempted to assess gift or estate taxes on property which was acquired in a common-law jurisdiction.

Three cases in particular demonstrate both the failures and success of the common-law states in attempting to define the rights of all interested parties. In *Commonwealth v. Terjen*, the Virginia Supreme Court of Appeals vested in the husband sole interest in property which the husband and wife had acquired in California. While the couple was domiciled in California they had accumulated a substantial amount of property which they brought with them when they moved to Virginia. During their domicile in Virginia, the husband bought a house with community funds and took title in his wife’s name. Although the husband filed a tax return and paid the gift tax for his one-half of the purchase price of the home, the Virginia Department of Taxation contended that the entire cost of the home was a gift to the wife. The court agreed and assessed the full value of the home as a gift to the wife, effectively denying that the wife had half ownership in the purchase monies by virtue of her prior community interest.

*In re Kessler’s Estate* is a similar case involving the transportation of property from a community property jurisdiction to a common-law jurisdiction. In *Kessler*, while the couple lived in California, the husband acquired shares of stock in his own name. Later, they moved to Ohio where the husband died. The tax commissioner argued that upon the husband’s death, the wife inherited the full value of the stock, and therefore, she was liable for a succession tax as to that full amount. The wife argued that she owned half the stock prior to her husband’s death and that therefore, she was only liable for a tax as to half the full value — that being her husband’s share. This case varied from *Terjen* in that the Ohio Supreme

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213. 197 Va. 596, 90 S.E.2d 801 (1956).
214. *Id.* at __, 90 S.E.2d at 804. The husband had contended that because the property “was held as community property in California where his wife had a present vested interest in one-half, . . . [the] one-half interest was not divested by the transfer of the property and domicile from California to Virginia.” *Id.* at __, 90 S.E.2d at 802.
215. *Id.* at __, 90 S.E.2d at 802. It should be noted that the additional tax was only $140.00, a factor which discourages potential original suits or appeals in these tax cases. *See supra* note 148 and accompanying text.
216. 177 Ohio St. 136, 203 N.E.2d 221 (1964).
Court "labeled" the wife's interest as a vested one, but the court proceeded to redefine the concept of the wife's vested interest according to what it considered to be the nature of the wife's interest. The court concluded that the wife's one-half interest was not in the nature of outright ownership until her husband's death. In effect, the court employed a type of tenancy-in-common approach. The court finally held that the wife was only responsible for the tax applicable to her husband's one-half portion of the estate.

Kessler's Estate and Terjen serve to demonstrate a constitutional problem at issue in the majority of the migration cases: how can a court reclassify an interest following migration without violating the fourteenth amendment? Any attempt to recharacterize property interests merely because there has been an interstate change in domicile is potentially violative of due process. "Therefore, any attempt to recharacterize ownership as a tenancy by the entirety, joint tenancy, or tenancy-in-common . . . merely because of a move to a common law state, could very well encounter constitutional difficulties . . . [resulting from] the loss of vested property interests."

One common-law case succeeded in correctly defining the wife's community property interest. The question in People v. Bejarano involved the assessment of an inheritance tax on one-half of the proceeds from a retirement fund to which Mr. Bejarano had contributed during the couple's domicile in California. The wife argued that she held a vested one-half interest in the retirement fund prior to her husband's death, and that this one-half interest was not subject to inheritance tax upon her husband's death. The tax commissioner argued according to the precedent set in Terjen and Kessler's Estate, claiming that full ownership rights did not arise in the wife

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217. Id. at 139, 203 N.E.2d at 223.
218. Id. at 144, 203 N.E.2d at 226.
219. For an example of the difficulties one state has encountered in the reverse situation, see In re Thornton's Estate, 1 Cal. 2d 1, 33 P.2d 1 (1934). See generally Lay, supra note 7.
220. Lay, supra note 7, at 295.
221. Id.
until Mr. Bejarano's death, and therefore such ownership was a taxable event. In a 1961 decision, the Colorado Supreme Court disagreed. Recognizing and applying the traditional conflict rule to the laws of California, the court held that the wife's one-half interest had been previously vested and was not subject to tax. Bejarano has been noted as "one of only a handful of state tax cases in which the question of community ownership has been litigated . . . [and] is the only tax case in which the question has been handled intelligently."  

V. CONCLUSION

As has been demonstrated, the state of the law with regard to the migration issue is far from settled. Although the common-law states have begun to effectively deal with the problem, some of the central issues have not yet been considered by the courts. Accurate determination of the rights and interests of migrating couples is a timely issue, and the courts are losing ground. The issue speaks at every stage of a marriage and should not only be considered upon its dissolution.

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223. Id. at 307, 358 P.2d at 868.
224. See supra note 138 for the rule.
226. See, e.g., 8 U.L.A. 61. The Uniform Disposition of Community Property Rights at Death Act was enacted by the legislatures of Colorado (COLO. REV. STAT. §§ 15-20-101 to -111 (1973)); Hawaii (HAWAII REV. STAT. §§ 510-21 to -30 (Supp. 1983)); Kentucky (KY. REV. STAT. §§ 391.210 to .260 (Supp. 1976)); Michigan (MICH. COMP. LAWS ANN. §§ 557.261 to .271 (West Supp. 1984-85)); and Oregon (OR. REV. STAT. §§ 112.705 to .775 (1983)). The statute applies to the disposition of all personal property which was community property in another state and all assets acquired with such property. The attempt was made to relieve some of the conflicts of law problems through statutory classification of interests. See Clausnitzer, supra note 139, at 496-97.
227. See generally, Polasky, Mullin & Pigman, supra note 146.