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Why New Hampshire Should Permit Married Couples to Choose Community Property

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Why New Hampshire Should Permit Married Couples to Choose Community Property

CALVIN MASSEY*

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INTRODUCTION

Two states, Alaska¹ and Tennessee,² offer married couples the choice of holding their property as separate or community property. Another nine states use community property as the default arrangement.³ Yet in each of

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¹ ALASKA STAT. ANN. § 34.77.010 (West, WestlawNext through Ch. 116 of the 2014 2nd Reg. Sess. of the 28th Legislature). Alaska permits community property to be created by agreement between the spouses or by establishing a community property trust.

² TENN. CODE ANN. § 35-17-101 (West, WestlawNext through end of the 2014 Second Reg. Sess.). Tennessee permits community property to be created only by means of a community property trust.

³ See generally TEX. CONST. art. 16, § 15; ARIZ. REV. STAT. ANN. §§ 25-111 (West, WestlawNext through the Second Reg. and Second Special Sess. of the Fifty-First Legislature); CAL. FAM. CODE §§ 761, 850 (West, WestlawNext with

those nine states a couple can opt out of community property rules by agreement.⁴ Only in the remaining thirty-nine states are married couples forced to accept separate property.⁵ There is no good reason for this condition to exist. This essay sets forth the advantages of offering married couples the choice of community or separate property and deals with some expected objections to this proposal. Section I details the benefits of choice. Section II examines likely objections and finds those objections insufficient to reject the proposal.

I. THE BENEFITS OF CHOICE

There are several advantages to community property, none of which are presently available to New Hampshire residents. The most important advantage is the federal estate tax treatment of community property upon the death of a spouse, but community property also affords couples the benefits of, what is in effect, a more generous spousal elective share. Community property also permits couples to create an equal economic partnership without making specific title decisions each time property is acquired.

all 2014 Reg.Sess. laws, Res. Ch. 1 of 2013-2014 2nd Ex.Sess., and all propositions on 2014 ballots); IDAHO CODE ANN. § 32-906 (West, WestlawNext through the 2014 Second Reg. Sess. of the 62nd Idaho Legislature); LA. CIV. CODE ANN. art. 2338 (West, WestlawNext through 2014 Reg. Sess.); NEV. REV. STAT. ANN. § 123.220 (West, WestlawNext through end of 28th Special Sess. (2014)); N.M. STAT. ANN. § 40-3-8 (West, WestlawNext through end of Second Reg. Sess. of the 51st Legislature (2014)); WASH. REV. CODE § 26.16.030 (West, WestlawNext through all 2014 Legis. and Initiative Measures 594 (2015 c 1) and 1351 (2015 c 2)); WIS. STAT. ANN. §§ 766.17, 766.31 (West, WestlawNext through 2013 Act 380, published 4/25/2014).

⁴ See statutes cited *supra* note 3.

⁵ Of course, community property acquired in a jurisdiction recognizing community property retains that status upon migration to a separate property state, absent some action transmuting the community property into joint tenancy, tenancy in common, or some other form of separate property. This is because the status of property is generally fixed at the time of acquisition and retains that character unless altered by agreement of the owners.

A. Tax Advantages

The principal tax advantage of community property occurs at the death of the first spouse to die. Under Internal Revenue Code § 1014, the tax basis of the entire community property is stepped up to market value on the date of death.⁶ The result is that the appreciation in value from acquisition to death is never taxed as a capital gain. Only appreciation following the first spousal death is subject to capital gains taxation.⁷ For couples in a lengthy marriage, these benefits may be considerable. Imagine a couple that purchased a home in 1970 for \$30,000, which is valued at \$830,000 in 2014, when the first spouse dies. In a community property state the tax basis of the home is stepped up to \$830,000. If the surviving spouse should later sell the house for \$880,000, only \$50,000 of gain is taxable.⁸ However, if the home was held as separate property, perhaps in joint tenancy, only the decedent's share is stepped up.⁹ The surviving spouse's tax basis would be \$415,000. Upon a later sale for \$880,000, the taxable gain would be \$465,000.¹⁰ A lengthy marriage of industrious, thrifty people who invest their savings produces even more startling benefits. Suppose the couple have amassed a securities portfolio of \$2,000,000 at the death of the first spouse, but the acquisition cost of that portfolio, and thus the tax basis, is \$200,000. Under community property, the surviving spouse has a tax basis of \$2,000,000, but under separate property, the surviving spouse's tax basis is only \$1,100,000.¹¹ As the portfolio is liquidated or its asset composition changes by sales, under separate property the surviving spouse will eventually realize a taxable gain of at least \$900,000.¹² The community property counterpart will

⁶ 26 U.S.C. § 1014 (2012).

⁷ See generally 26 U.S.C. §§ 1001(e), 1011, 1012, 1014, 1221(a), 1223(9) (2012).

⁸ 26 U.S.C. § 121(b) (2012) (providing that, in the case of a single taxpayer, the first \$250,000 of gain on the sale of a principal residence is excluded from gross income). In this example, the exclusion would insulate the surviving spouse from any tax liability.

⁹ See 26 U.S.C. § 1014(b) (2012).

¹⁰ 26 U.S.C. § 121 (2012) excludes \$250,000 of that gain from income, thus reducing the hypothesized taxable gain to \$215,000.

¹¹ See 26 U.S.C. § 1014(b) (2012).

¹² See *id.*

realize taxable gains only on the post-death appreciation.¹³

This disparity in treatment is significant. The median new home sale price in 1970 was \$23,400, and the average was \$26,600.¹⁴ By 2010, the median was \$221,800 and the average was \$272,900.¹⁵ The 2014 median sale price in New Hampshire is \$229,735.¹⁶ The Dow Jones Industrial Average has soared from 631.16 points in 1970 to over 17,000 points in 2014.¹⁷ While not everyone has shared equally in those gains, allowing married couples to reap the gains of their thrift without cost to New Hampshire—because New Hampshire has no estate or inheritance tax—would seem to be the very essence of good policy for a government dedicated to enhancing the welfare of its citizens.

B. An Alternative Version of the Spousal Elective Share

The New Hampshire elective share statute provides the surviving spouse the ability to elect a forced share of the decedent spouse's estate in lieu of taking under the decedent's will.¹⁸ The portion of the decedent's estate that the surviving spouse receives depends on the identity of other surviving kin.¹⁹ If children or grandchildren of the decedent survive, the spouse is entitled to one-third of the decedent's estate.²⁰ Otherwise, the surviving spouse is generally entitled to one-half of the decedent's estate.²¹

Under community property the elective share is irrelevant.

¹³ *See id.*

¹⁴ *See Median and Average Sales Prices of New Homes Sold in United States*, CENSUS.GOV, <http://www.census.gov/const/uspriceann.pdf> (last visited Sept. 11, 2014).

¹⁵ *See id.*

¹⁶ *See New Hampshire Home Prices & Values*, ZILLOW, <http://www.zillow.com/nh/home-values> (last visited Sept. 11, 2014).

¹⁷ *See Dow Jones Industrial Average (1900 - Present Monthly)*, STOCKCHARTS.COM, <http://stockcharts.com/freecharts/historical/djia1900.html> (last visited Sept. 11, 2014).

¹⁸ N.H. REV. STAT. ANN. § 560:10 (West, WestlawNext Chapter 330 of the 2014 Reg. Sess.).

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

Each spouse may dispose of their separate property as they desire,²² but the decedent spouse may only dispose of his or her one-half interest in the community property.²³ The result is that the surviving spouse remains the owner of the other half interest in the community property as his or her separate property.²⁴ Because community property consists of the earnings of each spouse and any separate property that has been commingled with or contributed to the marital community, absent agreement to the contrary,²⁵ the economic fruits of most long marriages will be in the form of community property. Thus, a married couple's decision to hold their property in community form guarantees that the surviving spouse will receive half of the pot.²⁶ The decedent spouse can always provide for children or grandchildren by will, governing his or her share of the community property.

In some cases the value of the separate property of the decedent spouse may dwarf the value of the community property. Then, the functional equivalent of the elective share that community property provides becomes much less than one-half of the decedent's estate. There are several options to deal with this possibility. First, a spouse need not consent to holding the couple's property in community form, thus retaining the existing elective share.²⁷ Second, a person entering into a marriage with a prospective spouse possessed of a large sum of separate property may contract with the intended spouse, in consideration of his or her consent to hold property in community form, to provide by will that some specified portion of the separate property will be devised to the surviving spouse.²⁸ Third, the current elective share statute could be modified

²² See e.g., ALASKA STAT. ANN. § 34.77.040 (West, WestlawNext through Ch. 116 of the 2014 2nd Reg. Sess. of the 28th Legislature).

²³ See e.g., ALASKA STAT. ANN. § 34.77.155 (West, WestlawNext through Ch. 116 of the 2014 2nd Reg. Sess. of the 28th Legislature).

²⁴ See e.g., *id.*

²⁵ See e.g., ALASKA STAT. ANN. § 34.77.030 (West, WestlawNext through Ch. 116 of the 2014 2nd Reg. Sess. of the 28th Legislature).

²⁶ See e.g., ALASKA STAT. ANN. § 34.77.155 (West, WestlawNext through Ch. 116 of the 2014 2nd Reg. Sess. of the 28th Legislature).

²⁷ See e.g., ALASKA STAT. ANN. §§ 34.77.090, 34.77.100 (West, WestlawNext through Ch. 116 of the 2014 2nd Reg. Sess. of the 28th Legislature).

²⁸ See e.g., ALASKA STAT. ANN. § 34.77.030(f) (West, WestlawNext through Ch. 116 of the 2014 2nd Reg. Sess. of the 28th Legislature); UNIF. PROBATE CODE § 2-

to provide, where community property has been chosen, a new elective share in the separate property of the decedent spouse. The amount of that elective share could be a fixed portion or a percentage of the separate property that, when combined with the surviving spouse's share of the community property, represents some portion (e.g., one-third or one-half) of the sum of the decedent's separate property and the community property.

C. Facilitates Marriage as an Equal Economic Partnership

In separate property regimes, the spouse whose name is on the title owns the property. In marriages where one spouse earns considerably more than the other, it is entirely possible that title to the economic gains of the marriage can be disproportionately vested in the high earning spouse. Of course, the high earner could deposit savings in accounts and put realty in joint tenancy. But the high earner need not do so. The spousal elective share is the remedial measure to redress this imbalance at death, and equitable division statutes accomplish a similar result upon divorce.²⁹ Even so, community property facilitates the creation of an equal economic partnership without the necessity of making specific title decisions concerning assets acquired during the marriage.

Generally, in a separate property system only the assets of each spouse may be reached by his or her creditors.³⁰ Community property states diverge from this pattern. Each spouse generally has the right to manage the entire community property because each spouse owns an undivided interest in the community property, though some states require that both spouses join in transactions involving real property.³¹ Thus, if one spouse contracts a debt, community assets may be reachable by the creditor on the theory

514 (2010).

²⁹ See N.H. REV. STAT. ANN. § 458:16-a (West, WestlawNext through Chapter 330 of the 2014 Reg. Sess.).

³⁰ See, e.g., *Leasefirst v. Borrelli*, 17 Cal. Rptr. 2d 114 (Cal. App. Dep't Super. Ct. 1993).

³¹ See, e.g., CAL. FAM. CODE § 1102 (West, WestlawNext through all 2014 Reg. Sess. laws, Res. Ch. 1 of 2013-2014 2nd Ex.Sess., and all propositions on 2014 ballots).

that the debts of one spouse may be satisfied out of all property over which that spouse has control.³² Of course, this “managerial” approach leaves an innocent spouse exposed to debts of which he or she may not have been aware. An exception to this principle is the “community debt” approach, in which the creditor’s claim is characterized as either separate or community, and the assets available to satisfy the debt follow accordingly.³³ Much depends upon this characterization.

If New Hampshire offers community property as an option for spouses, it should clearly specify the status of creditor’s claims. The managerial approach is simple, but sometimes unjust. If characterization of the debt is preferred, there are two options. First, the debt may be characterized as community if it is incurred to provide benefits to the community, and as separate if it is more the benefit of one spouse alone. But even this is murky. What if a spouse incurs large gambling debts? Is this for personal benefit, the thrill of the gamble, or to contribute winnings, if any, to the community? A second option is to treat debts that are expressly incurred by both spouses as community debts; otherwise, a debt incurred by one spouse should be treated as separate obligations of the debtor spouse, and creditors may reach only that spouse’s separate property and share of the community property.³⁴ But what about tort obligations or fines or penalties? Because these obligations are generally incurred as a result of a single spouse’s malfeasance or nonfeasance, the creditor’s claim should be characterized as separate. The salient point, however, is that if New Hampshire were to permit voluntary adoption of community property, it would be wise to clarify these matters by statute.

D. Migrating Couples

The United States is a highly mobile society. From 1965 to

³² JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 549 (9th ed. 2013).

³³ *See, e.g.*, LA. CIV. CODE ANN. art. 2360 (West, WestlawNext through the 2014 Reg. Sess.).

³⁴ *See e.g.*, ALASKA STAT. ANN. § 34.77.070 (West, WestlawNext through Ch. 116 of the 2014 2nd Reg. Sess. of the 28th Legislature).

2010, the five-year mover rate³⁵ varied from 46.7 percent to 35.4 percent, and the five-year interstate mover rate varied from 9.7 percent to 5.6 percent.³⁶ Because the status of property is fixed at the time of acquisition, absent later consensual alteration, couples who have lived for a long time in a community property state before moving to a separate property state are apt to surrender unwittingly their community property status. Advisors in the separate property state are prone to tell newcomers that community property is not recognized in the state, so the newcomers must transmute their community property into some form of separate property—usually joint tenancy.

But this move means that the step-up in basis attributable to community property on the death of the first spouse is lost. Of course, the sophisticated migrant from a community property state will insist that the property retains its character as community; though that result may depend on a state's willingness to recognize that the status of property is fixed at acquisition.³⁷

In those states that have adopted the Uniform Disposition of Community Property Rights at Death Act,³⁸ the matter is settled in favor of preservation of the community property status of the migrating couple, absent agreement or action to change its

³⁵ The mover rate is the percentage of the total population that has moved within the five-year period. DAVID K. IHRKE & CAROL S. FABER, U.S. CENSUS BUREAU, GEOGRAPHICAL MOBILITY: 2005 TO 2010 1 (2012), <http://www.census.gov/prod/2012pubs/p20-567.pdf> (last visited Sep. 20, 2014).

³⁶ *Id.*

³⁷ See JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 511 (8th ed. 2009); 1 JEFFERY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 10.21 (25th Ann. ed. 2008); Karen E. Boxx, *Community Property Across State Lines: Square Pegs and Round Holes*, PROP. AND PROB. 9 (Jan/Feb 2005); CALVIN MASSEY, PROPERTY LAW, PRINCIPLES, PROBLEMS, AND CASES 385-386 (2012).

³⁸ Sixteen states—Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Minnesota, Montana, New York, North Carolina, Oregon, Utah, Virginia, and Wyoming—have adopted the Act. *Legislative Fact Sheet - Disposition of Community Property Rights at Death Act (1971)*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Disposition%20of%20Community%20Property%20Rights%20at%20Death%20Act%20%281971%29> (last viewed Sept. 20 2014).

character.³⁹ Even in the absence of the Act, the migrating couple can preserve their community property by transferring it to a revocable trust governed by the law of a community property state.⁴⁰ Yet only the most well advised couples will either know about, let alone adopt, this option. Permitting all couples to choose community property removes all uncertainty. In any case, New Hampshire should adopt the Uniform Disposition of Community Property Rights at Death Act, thus insuring that couples migrating from community property states can realize their expectations concerning the community property acquired before migration. Not to do this is a trap for the unwary, ignorant, and poorly advised.

III. OBJECTIONS TO CHOICE

Some of the probable objections to this proposal follow. No doubt I have not anticipated all possible objections, but none of these anticipated objections are sufficiently weighty to reject the proposal.

A. It Will Spawn Litigation

Because New Hampshire has no history of community property, it will require litigants and the judiciary to spend scarce resources on filling in the gaps and ambiguity in any statutory scheme. There are two responses to this objection. First, in eight states, community property has a long history with a substantial judicial gloss in each. Even Wisconsin, the latecomer to community property, has amassed considerable precedent in the 31 years since it adopted community property. In its enabling statute, New Hampshire could limit excessive litigation by specifically addressing points about community property where other states disagree.” For

³⁹ *Legislative Fact Sheet - Disposition of Community Property Rights at Death Act (1971) Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Disposition%20of%20Community%20Property%20Rights%20at%20Death%20Act%20%281971%29> (last viewed Sept. 20 2014).

⁴⁰ See JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 514 (8th ed. 2009).

example, in Idaho,⁴¹ Louisiana,⁴² Texas,⁴³ and Wisconsin⁴⁴ earnings from separate property are treated as community assets. But in the other five states, such earnings retain their separate character.⁴⁵ When property is acquired from both separate and community funds, states use one of three methods to characterize the property.⁴⁶ Some use “inception of right,” under which the property is characterized at the moment the asset is acquired or a contract made.⁴⁷ Under this rule, a single person purchasing a house acquires it as separate property, even though, after a subsequent marriage, the bulk of the mortgage payments are made from community assets.⁴⁸ Other states use a “time of vesting” rule, under which the property is characterized at the moment title passes.⁴⁹ Thus, an installment sale contract entered into by a single person who then marries will be treated as community property when all payments have been made and title passes to the single buyer, assuming the marriage is extant. Finally, some states employ a pro rata rule, under which the acquired property is part community, and part separate, in proportion to the funds of each type used to purchase the asset.⁵⁰ Once more, a well-drafted statute would specify which rule to employ.

In any case, when ambiguity arises, or a novel proposition is

⁴¹ IDAHO CODE ANN. § 32-903 (West, WestlawNext through the 2014 Second Reg. Sess. of the 62nd Idaho Legislature).

⁴² LA. CIV. CODE ANN. art. 2339 (West, WestlawNext through the 2014 Reg. Sess.).

⁴³ TEX. CONST. art. XVI, § 15; *Moss v. Gibbs*, 370 S.W.2d 452, 455 (Tex. 1963).

⁴⁴ WIS. STAT. ANN. § 766.31 (West, WestlawNext through 2013 Act 380, published 4/25/2014).

⁴⁵ See ARIZ. REV. STAT. § 35-213(A) (West, WestlawNext through the Second Reg. and Second Special Sess. of the Fifty-first Legislature); CAL. FAM. CODE § 770 (West, WestlawNext with all 2014 Reg. Sess. laws, Res. Ch. 1 of 2013-2014 2nd Ex. Sess., and all propositions on 2014 ballots); NEV. REV. STAT. ANN. § 123.130 (West, WestlawNext through End of 28th Special Session (2014)); WASH. REV. CODE ANN. § 26.16.010 (West, WestlawNext with all 2014 Legislation and Initiative Measures 594 (2015 c 1) and 1351 (2015 c 2)); *Conley v. Quinn*, 346 P.2d 1030, 1034 (N.M. 1959); *Morris v. Waring*, 159 P. 1002, 1003 (N.M. 1916). Cf. ALASKA STAT. ANN. 34.77.020 (d)&(g) (West, WestlawNext through Ch. 116 of the 2014 2nd Reg. Sess. of the 28th Legislature).

⁴⁶ See 15B AM. JUR. 2D *Community Property* § 19 (2012).

⁴⁷ See 15B AM. JUR. 2D *Community Property* § 22 (2012).

⁴⁸ See *id.*

⁴⁹ See, e.g., *Winn v. Winn*, 673 P.2d 411, 414 (Idaho 1983).

⁵⁰ See, e.g., *Delaney v. McCoy*, 93 So. 3d 845 (La. Ct. App. 2012).

presented, New Hampshire courts and lawyers are not in a vacuum. There is a large body of decisional law that can be used to decide what the best reasoned outcome should be. There is less new ground to plow here than would be the case if the legislature were to enact a law covering a subject never before regulated.

B. Pitfalls of Conversion from Separate to Community Property

The common pitfall for couples that move from a separate property state to a community property state is that their pre-existing property remains separate property while the spousal elective share is lost. If the couple's property is mostly titled in the name of one spouse, the other spouse has no recourse should the propertied spouse devise his property entirely to a third party. The remedy in some community property states is the concept of quasi-community property.⁵¹ Property acquired by either spouse, while a domiciliary of another state that would have been community property if the couple's domicile had been in the community property state, is treated as quasi-community property.⁵² During the marriage, each spouse's quasi-community property is treated as his separate property, but upon divorce or death the surviving spouse is entitled to one-half of the quasi-community property.⁵³ Quasi-community property is analogous to the elective share that would have applied had the couple remained in a separate property state.

If a New Hampshire couple or a couple arriving from a separate property state elects community property, absent agreement to the contrary, their separate property should remain separate and only newly acquired assets from earnings become community property. Without an agreement between the couple to transmute

⁵¹ See CAL. PROB. CODE ANN. §§ 66, 101 (West, WestlawNext with all 2014 Reg.Sess. laws, Res. Ch. 1 of 2013-2014 2nd Ex.Sess., and all propositions on 2014 ballots); IDAHO CODE ANN. § 15-2-201 (West, WestlawNext through the 2014 Second Regular Session of the 62nd Idaho Legislature); LA. CIV. CODE ANN. art. 3526 (West, WestlawNext through the 2014 Reg. Sess.); WASH. REV. CODE ANN. §§ 26.16.220–30 (West, WestlawNext with all 2014 Legislation and Initiative Measures 594 (2015 c 1) and 1351 (2015 c 2)).

⁵² See *id.*

⁵³ *Id.*

separate property to community property or a statutory provision that perpetuates the elective share in the couple's separate property, the benefits of the elective share are lost.

There are several solutions to the problem. First, the proposed option of community property could incorporate quasi-community rules. This would ensure that the couple's pre-existing separate property, that would have been community property had it been acquired while a community property election was in effect, is treated as community property upon death or divorce. Second, the proposed community property statute could dispense with quasi-community property but stipulate that the elective share continues to apply to all of each spouses' separate property. Absent either of these alternatives, the couple must agree to transmute some or all of their separate property to community property in order to have the benefits of the elective share at death of the first spouse.

C. Burdens on the Bar

Because community property is, at present, not a feature of New Hampshire law, its introduction as an option for married couples would require New Hampshire lawyers to acquaint themselves with community property principles. While this is a burden, it is no more than might be expected should the legislature enact a regulatory scheme that encompasses a subject previously unregulated—or alters a present statutory scheme in some significant fashion. For example, enacting a state-wide land use and zoning scheme would require the bar to become familiar with the new arrangement. The fact that law changes is axiomatic, and one of the bar's obligations is to be abreast of current developments. In any case, the details of community property are readily absorbed by reference to treatises and practice aids that exist in the nation's community property jurisdictions. Nor would it be long before New Hampshire specific materials would be readily available.

IV. CONCLUSION

This essay is designed to raise the question of why New Hampshire deprives its married residents of the considerable advantages of community property, but it does not argue that New Hampshire should convert to community property. Rather, in the interest of maximizing individual choice, one of the cardinal precepts of freedom, New Hampshire should permit couples to choose the property regime that they prefer. The cost of such a change is negligible and the benefits of choice are large.