

# QUASI-COMMUNITY PROPERTY IN ARIZONA: WHY JUST AT DIVORCE AND NOT DEATH?

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## INTRODUCTION

Married couples migrating to Arizona from common law states may face a distressing problem. Consider, for example, the following two hypotheticals: one about Fred and Wilma and one about Wild Bill and Calamity Jane. After thirty-five long years of operating heavy machinery in the local rock quarry, Fred was ready to retire, leave the East Coast weather behind, and head west to Arizona to live out the rest of his life with his high school sweetheart, Wilma. The couple had always been frugal and never spent more than necessary. Fortunately, their thriftiness had allowed them to accumulate a good amount of money for retirement, and they looked forward to finally living the good life—bowling everyday for Fred and a maid for Wilma. Before leaving for Arizona, Fred wanted to make sure that Wilma would be taken care of should anything bad happen to him. Fred did a little research and discovered that under their state's elective share laws, Wilma could elect to take one-half of Fred's gross estate regardless of what Fred did in his will. Relying on his research and wishing to avoid too much technicality, Fred prepared a will that left his entire estate to the Junior Bowling League of America. Fred fully expected that Wilma would get one-half of the estate, which would have been plenty to support her for the rest of her life.

Unfortunately, shortly after arriving in Arizona, Fred was tragically killed in a freak accident at the bowling alley. Wilma, still stricken with grief over Fred's sudden death, was shocked to learn that Arizona did not have a provision that would allow her to receive one-half of Fred's estate. The whole estate went to the Junior Bowling League and Wilma was forced to return to the East Coast to live out her life with her friend Betty.

And now the second story: after an eventful career as a sheriff, Wild Bill decided it was time to get out of Dodge (Kansas, a common law state). He took his wife, Calamity Jane, and headed west to Arizona. Bill's skills as a gunslinger had served him well as sheriff and he had collected several large rewards for doing away with unwanted outlaws. Those rewards had made him a rich man, and he

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looked forward to relaxing in the Arizona sun. Unbeknownst to Jane, Wild Bill had been a little too wild in his younger days, and had a daughter from a marriage that lasted only a few weeks. Feeling a little remorseful for not having helped raise the child, Bill prepared a will leaving his entire estate to his daughter. When Jane discovered Bill's plans, she sought her attorney's advice as to how she might be able to retain a portion of it. The attorney informed her that Arizona law would not allow her to keep any of the estate if Bill died, even though Bill had acquired everything after marrying Jane. Arizona law, however, would allow Jane to keep one-half of the marital property if she divorced Bill. Sadly, Jane concluded that divorce was her only option. She did not want to end their happy marriage, but she was getting along in years and had no other way to ensure that she would have sufficient resources to live out her life.

Although the above stories are fictitious, the scenarios underlying the stories are entirely possible.<sup>1</sup> The inequitable treatment of the non-acquiring spouse arises from the different treatment of property acquired during marriage by the common law system and the community property system.<sup>2</sup> Under the common law system, each spouse retains separate ownership of the property that he or she acquires during marriage, including wages and other earnings, and the other spouse has no interest in that property during the acquiring spouse's life.<sup>3</sup> Upon death, common law states use an elective share statute to award the non-acquiring spouse an interest in the marital property.<sup>4</sup> The community property system, on the other hand, recognizes the contributions of both spouses to the success of the marriage and awards to each spouse an undivided one-half interest in property acquired during marriage.<sup>5</sup> If one spouse dies, the surviving spouse retains his or her one-half of the marital property.<sup>6</sup> Thus, in community property states, the community property system itself protects the interests of the surviving spouse.<sup>7</sup>

Serious problems can arise, however, when a husband and wife who have acquired most of their marital property in common law states move to Arizona. If, for example, the husband provided the financial support for the family and the wife stayed at home to care for the family while living in a common law state, the

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1. See Mark Evans Harden & Barbara A. Lyndsay-Smith, *Beware, Migrating Spouses, Texas Lacks a Quasi-Community Property Probate Statute: It Could Be a Long Cold Winter*, 3 TEX. WESLEYAN L. REV. 91, 91-92 (1996) (detailing additional stories illustrating similar situations).

2. For purposes of this Note, the term "acquiring spouse" will refer to a spouse who acquires property through his or her efforts, often the spouse who works, and "non-acquiring spouse" will mean a spouse who does not acquire property, often a spouse who stays home to run the household. This distinction arises from the different treatment accorded to the different spouses under the common law system of marital property, in which the spouse who acquires property takes the property as his or her separate property. See *infra* text accompanying note 3.

3. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 473 (5th ed. 1995).

4. See *infra* text accompanying notes 99-103.

5. DUKEMINIER & JOHANSON, *supra* note 3, at 474.

6. *Id.*

7. *Id.*

husband may own all of the marital property as his separate property.<sup>8</sup> The husband will retain separate ownership of the marital property when the couple moves to Arizona, a community property state.<sup>9</sup> If the couple decides to divorce, Arizona's divorce statute will protect the wife's interests in the marital property by treating property acquired during marriage as community property.<sup>10</sup> But if the husband dies and leaves nothing for his wife in his will, the wife will not be able to rely on the community property system because there will be no community property. Furthermore, Arizona does not have an elective share statute, precluding that avenue of relief. Finally, because there is no probate statute comparable to the divorce statute, the wife could end up with nothing.

This Note proposes a resolution to this inequitable result. First, this Note will present in greater detail the disparate treatment of common law marital property upon death and divorce in Arizona.<sup>11</sup> The next section will present various methods for preventing the disinheritance of the surviving spouse, both where migration has and has not occurred. This section will include a review of how other community property states have protected the interests of the surviving spouse. Third, this Note will address the constitutionality of the proposed method. Finally, this Note will weigh the strengths and weaknesses of each potential method and propose the enactment of a statute to protect the interests of in-migrating non-acquiring spouses that is similar to the divorce statute currently in effect in Arizona.

Before proceeding any further, however, we must consider whether change is truly necessary. Are there a sufficient number of couples migrating to Arizona from common law states to merit the attention of the Arizona Legislature? The evidence strongly suggests so. Based on research by Professor Longino, approximately 35,000, 66,640, and 60,739 people over the age of sixty moved into Arizona from common law states in the periods from 1965–70, 1975–80, and 1985–90, respectively.<sup>12</sup> Because these numbers represent only the number of migrants in the five-year periods immediately preceding each census, the actual number of migrants over the age of sixty moving to Arizona from common law

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8. *Id.*

9. *Horton v. Horton*, 278 P. 370, 371 (Ariz. 1929) (stating separate or community character of property becomes fixed at time it is acquired).

10. ARIZ. REV. STAT. § 25-318(A) (2003).

11. For purposes of this Note, the term "common law marital property" will be used to describe property acquired by a couple while married and living in a common law state. Technically, this is a misnomer because property acquired during marriage in a common law state is the separate property of the acquiring spouse. *See supra* text accompanying note 3.

12. *See* CHARLES F. LONGINO JR., RETIREMENT MIGRATION IN AMERICA 119 (1995). An adaptation of Prof. Longino's research can be found at Appendix A. This research looks at the responses by a sample of respondents over the age of sixty to the Census question that asks in which state the respondents lived five years prior to that date. Professor Longino has updated his research for the 2000 Census, but has not yet tabulated the results by state. *See* Charles F. Longino Jr. & Don E. Bradley, *A First Look at Retirement Migration Trends in 2000*, 43 THE GERONTOLOGIST 904 (2003). A table from this article has been reproduced at Appendix B. This updated research shows that migration to Arizona by migrants over the age of sixty has increased since the 1990 Census.

states is likely nearly double this amount, for a total of approximately 320,000 from 1960 to 1990.<sup>13</sup> Furthermore, this figure does not include migrants under the age of sixty. Such a large number strongly suggests that the situation is prevalent enough to merit the attention of the Arizona Legislature.

### I. TREATMENT OF COMMON LAW MARITAL PROPERTY UPON DEATH AND DIVORCE IN ARIZONA

Arizona law treats a surviving spouse and a divorcing spouse seeking to recover a portion of the common law marital property in drastically different manners. This section will illustrate this discrepancy by first looking at how Arizona statutes dispose of common law marital property in both divorce and probate proceedings. Following the discussion of the statutes, this section will present two cases, one from Arizona and one from Texas, that further elucidate the varying results.

#### A. Arizona Statutory Treatment of Divorce and Probate Matters

The Arizona statute for the disposition of property upon divorce provides that a spouse's separate property should be awarded to that spouse and that community property should be divided equitably between spouses.<sup>14</sup> The statute further provides that "property acquired by either spouse outside this state shall be deemed to be community property if the property would have been community property if acquired in this state."<sup>15</sup> Such property has been labeled "quasi-community property."<sup>16</sup> The statute authorizes a court essentially to reclassify the common law marital property, which is the separate property of one spouse, and award the other spouse a quasi-community property interest in that property.<sup>17</sup> Once the property has been classified as quasi-community property, it is treated the same as community property and divided equitably.<sup>18</sup>

In contrast, the Arizona probate statutes do not contain a quasi-community property provision. The statutes do provide some relief, albeit relatively modest, where no provision has been made for the surviving spouse in the decedent's will<sup>19</sup> by allowing a homestead allowance of eighteen thousand dollars.<sup>20</sup> In addition to the homestead allowance, a surviving spouse can retain an

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13. Longino & Bradley, *supra* note 12.

14. ARIZ. REV. STAT. § 25-318(A) (2003).

15. *Id.*

16. *Sample v. Sample*, 663 P.2d 591, 593 (Ariz. Ct. App. 1983). For other states' quasi-community property divorce statutes see CAL. FAM. CODE § 912 (West 2003); TEX. FAM. CODE ANN. § 7.002 (Vernon 2003). For other states' quasi-community property probate statutes see CAL. PROB. CODE § 101 (West 2003); IDAHO CODE § 15-2-203 (Michie 2003); TEX. FAM. CODE ANN. § 7.002 (Vernon 2003); WASH. REV. CODE § 26.16.230 (2003).

17. *Martin v. Martin*, 752 P.2d 1026, 1030-31 (Ariz. Ct. App. 1986); *Sample*, 663 P.2d at 601; *Woodward v. Woodward*, 571 P.2d 294, 296 (Ariz. Ct. App. 1977).

18. ARIZ. REV. STAT. § 25-318(A). *See, e.g., Martin*, 752 P.2d at 1030; *Sample*, 663 P.2d at 593; *Woodward*, 571 P.2d at 296.

19. *See* ARIZ. REV. STAT. §§ 14-2401 to 2405.

20. ARIZ. REV. STAT. § 14-2402(A).

aggregate amount of seven thousand dollars worth of household furniture, automobiles, furnishings, appliances, and personal effects.<sup>21</sup> The decedent's surviving spouse and minor children whom the decedent was obligated to support are entitled to a "reasonable" family allowance out of the estate.<sup>22</sup> Although not explicit in the Arizona statute, the Uniform Probate Code, from which the Arizona statute was adopted,<sup>23</sup> suggests that the family allowance is in addition to the right to the homestead allowance and exempt property.<sup>24</sup> The family allowance is determined based on need,<sup>25</sup> however, and it is capped at a one-time lump sum of twelve thousand dollars, or is spread out over payments of not more than one thousand dollars per month for a maximum of one year.<sup>26</sup> The statute requires a court order to obtain a greater allowance if reasonably necessary.<sup>27</sup> The family allowance is also limited to the time period of the administration of the estate.<sup>28</sup> Thus, where administration of the estate lasts less than a year or if a surviving spouse has other means of support, a lower amount may be warranted for the family allowance.<sup>29</sup>

In summary, if no provision is made for a surviving spouse in the decedent's will, then by Arizona statute the surviving spouse may receive a homestead allowance of eighteen thousand dollars,<sup>30</sup> a property exemption of seven thousand dollars,<sup>31</sup> and a family allowance of up to twelve thousand dollars.<sup>32</sup> Altogether, the surviving spouse can receive a maximum of thirty-seven thousand dollars. One court has noted that "[t]he purpose of the allowances is to ensure that a surviving spouse is not left penniless and abandoned by the death of a spouse."<sup>33</sup> Although thirty-seven thousand dollars is certainly better than nothing, it is hardly sufficient to support a widow or widower for much time.

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21. *Id.* § 14-2403.

22. *Id.* § 14-2404(A).

23. *Id.* § 14-2405.

24. *Id.* § 2-404(a) (amended 1991), 8 U.L.A. 141 to 142 (1998). *See also* 3 ARIZ. PRAC., MARRIAGE DISSOLUTION PRAC. § 21 (Supp. 2002).

25. UNIF. PROBATE CODE § 2-404(a), cmt. background, 8 U.L.A. 141 to 142 ("In determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of other resources available to the family to meet the current living expenses until the estate can be administered and assets distributed.").

26. ARIZ. REV. STAT. § 14-2405(C).

27. UNIF. PROBATE CODE § 2-404(a), cmt. background (amended 1990), 8 U.L.A. 141 to 142 (2003).

28. ARIZ. REV. STAT. § 14-2404(A).

29. UNIF. PROBATE CODE § 2-404(a), cmt. background (amended 1990), 8 U.L.A. 141 to 142.

30. ARIZ. REV. STAT. § 14-2402(A).

31. *Id.* § 14-2403(A).

32. *Id.* § 14-2405(A).

33. *In re Estate of Jewell*, 18 P.3d 334, 336 (N.M. Ct. App. 2001) (quoting *In re Estate of Lawson*, 721 P.2d 760, 762 (Mont. 1986)).

***B. Judicial Treatment of Common Law Marital Property in Divorce and Probate Matters***

A comparison of two cases will illustrate the disparity between a marriage that is dissolved through divorce and one that ends with death. This section presents the divorce example first. In *Sample v. Sample*,<sup>34</sup> Mr. and Mrs. Sample were married in Iowa, a common law property state, in 1945.<sup>35</sup> Both parties initially worked, but soon after the marriage Mrs. Sample stopped working to raise the couple's children.<sup>36</sup> In 1961, the couple moved to Nebraska, also a common law property state, to allow Mr. Sample to pursue a new job.<sup>37</sup> As part of the compensation package for the new job, Mr. Sample received, and later exercised, stock options in his employer, MEI.<sup>38</sup> Another job change led the Sample family to Arizona in 1970.<sup>39</sup> Three years later, Mr. Sample started his own company and made contributions to a pension fund.<sup>40</sup> Marital dissolution proceedings were filed in 1978, and a judgment was entered in 1980.<sup>41</sup> In the property settlement, the wife received one-half of the commingled assets, monthly spousal maintenance, 3,220 shares of MEI stock (valued at approximately \$40,636), and one-half of the pension fund.<sup>42</sup> The husband received the other half of the commingled assets, the remaining 72,922 shares of MEI stock (valued at approximately \$920,000),<sup>43</sup> and the other half of the pension fund.<sup>44</sup>

On appeal, Mrs. Sample contested, among other things, the division of the MEI stock acquired during the marriage but before the couple's move to Arizona.<sup>45</sup> After resolving concerns about the retroactive application and constitutionality of the statute, the court applied the Arizona divorce statute<sup>46</sup> and held that the MEI stock was to be divided between the parties as though the stock had been acquired in Arizona.<sup>47</sup> The court reversed the trial court's division of the stock and remanded the case with the order that the stock be treated as community property.<sup>48</sup> Thus, the court recharacterized the husband's separate property to quasi-community property and ordered it equitably divided.<sup>49</sup>

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34. 663 P.2d 591 (Ariz. Ct. App. 1983).

35. *Id.* at 592.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 592, 596.

43. *Id.* at 592.

44. *Id.* at 592, 596.

45. *Id.* at 592.

46. ARIZ. REV. STAT. § 25-318(A) (2003). *See also supra* text accompanying note 10.

47. *Sample*, 663 P.2d at 596.

48. *Id.*

49. *Id.*; *see also supra* text accompanying notes 16–18.

The example of a property disposition at death is illustrated by the Texas case of *Estate of Hanau v. Hanau*.<sup>50</sup> Mr. and Mrs. Hanau were married in Illinois, a common law state.<sup>51</sup> While married and in Illinois, Mr. Hanau accumulated numerous shares of stock through the use of his separate property that he acquired before marriage.<sup>52</sup> Under Illinois common law, the stock remained his separate property.<sup>53</sup> Mr. and Mrs. Hanau moved to Texas five years after marriage, and Mr. Hanau died in Texas three years later.<sup>54</sup> Mr. Hanau devised all of his separate property to his children from a prior marriage.<sup>55</sup> Pursuant to her duties as executrix, Mrs. Hanau transferred the stock to Mr. Hanau's children from the prior marriage according to Mr. Hanau's will.<sup>56</sup> Mr. Hanau's son subsequently accused Mrs. Hanau of embezzlement and mismanagement of the estate.<sup>57</sup> In response, she filed an inventory of the estate listing all of Mr. Hanau's property and claiming that all stocks obtained by Mr. Hanau during their marriage were community property.<sup>58</sup> Thus, she sought return of some of the stocks transferred to Mr. Hanau's children.<sup>59</sup>

Mrs. Hanau based her claim on a Texas divorce statute<sup>60</sup> and *Cameron v. Cameron*,<sup>61</sup> a case applying that statute.<sup>62</sup> The Texas divorce statute provides that upon divorce a court shall make a "just and right"<sup>63</sup> division of property including "property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been domiciled in the state at the time of the acquisition."<sup>64</sup> In *Cameron*, a husband and wife had lived in various common law states before moving to Texas.<sup>65</sup> While in those states, the husband accrued military retirement benefits and purchased savings bonds.<sup>66</sup> Upon their divorce in Texas, the wife sought to recover a portion of the retirement benefits earned and savings bonds purchased during the marriage while they had lived in common law states.<sup>67</sup> The *Cameron* court applied the statute to award Mrs. Cameron "her share" of the retirement benefits earned during

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50. 730 S.W.2d 663 (Tex. 1987). As noted, this case is from Texas and, as such, will obviously not be binding precedent in Arizona. However, the case is presented as an example of the likely result if the same issue arose in Arizona.

51. *Id.* at 664.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 664-65.

59. *Id.* at 665.

60. *Id.* at 666 (quoting TEX. FAM. CODE ANN. § 3.63, *renumbered to* TEX. FAM. CODE ANN. § 7.002 (2003)).

61. 641 S.W.2d 210 (Tex. 1982).

62. *Id.*

63. *Hanau*, 730 S.W.2d. at 666; *see also supra* note 60.

64. *Id.*

65. *Cameron*, 641 S.W.2d at 212.

66. *Id.*

67. *Id.*

marriage in the common law states, and divided the savings bonds equally between the two spouses.<sup>68</sup>

Mrs. Hanau urged the court to extend the principles of *Cameron* to probate issues, which would authorize the court to divide the property equitably.<sup>69</sup> She argued that the *Cameron* court “intended to make a fundamental change in its characterization of common law marital property.”<sup>70</sup> The court, however, refused to extend the principles of *Cameron* to probate matters.<sup>71</sup> The court’s reasoning was based in part on the fact that there was no probate statute equivalent to the divorce statute that authorized the division in *Cameron*.<sup>72</sup> The court denied Mrs. Hanau’s claim for relief, refusing to recharacterize the common law marital property as quasi-community property.<sup>73</sup>

Although *Hanau* is a case from Texas, the same result is likely in Arizona. The Arizona statute is expressly limited to divorce matters only.<sup>74</sup> Accordingly, unless a court is willing to expand the application of the divorce statute, the recharacterization provision will likely not apply in probate matters. The surviving spouse’s sole recourse would be to the statutory allowances.<sup>75</sup>

In his concurring opinion in *Hanau*, Justice Spears clearly identified the problem created in Texas by the court’s decision, stating that “[t]he court’s opinion creates two rules for the characterization of the same property.”<sup>76</sup> Justice Spears reasoned that a husband and wife could move or retire to Texas with the majority of their property characterized as the husband’s separate property under a common

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68. *Id.* at 223. The trial court originally awarded Mrs. Cameron thirty-five percent of the retirement benefits. The appellate court reversed this award. The Texas Supreme Court, without explanation why she should not receive an equitable portion of the retirement benefits as would be expected in a community property settlement, reinstated her award of thirty-five percent of the benefits. *Id.*

69. *Hanau*, 730 S.W.2d at 665.

70. *Id.* (internal quotations omitted).

71. *Id.*

72. *Id.* at 666. *See also Cameron*, 641 S.W.2d at 212–13.

73. *Hanau*, 730 S.W.2d at 666. It is important to note that even if the court had determined that the principle applied, Mrs. Hanau’s claim would still likely have been unsuccessful. Mr. Hanau had purchased the stock with his separate property. *See supra* text accompanying note 52. The divorce statute Mrs. Hanau sought to have extended to probate matters only reclassified property “that would have been community property if the spouse who acquired the property had been domiciled in the state at the time of the acquisition.” *Hanau*, 730 S.W.2d at 666 (quoting TEX. FAM. CODE ANN. § 3.63). Because Mr. Hanau purchased the stock with his separate property, the stock would remain his separate property and would not have been community property even if he had actually purchased the stock while domiciled in Texas. *See Ridgell v. Ridgell*, 960 S.W.2d 144, 148 (Tex. App. 1997) (“Property acquired in exchange for separate property becomes the separate property of the spouse who exchanged the property.”). And because the stock would not have been community property if purchased in Texas, the divorce statute would not have authorized the division of the stock. *See TEX. FAM. CODE ANN. § 3.63.*

74. ARIZ. REV. STAT. § 25-318(A) (2003) (stating “[f]or purposes of this section only”).

75. *See supra* text accompanying notes 19–33.

76. *Hanau*, 730 S.W.2d at 667 (Spears, J., concurring).



law marital property system.<sup>77</sup> If the couple divorced, the common law marital property would be characterized as quasi-community property, and the trial court would have authority to divide equitably the marital property between the spouses.<sup>78</sup> But the same husband could execute a will devising all the common law marital property to a third party, leaving the wife nothing.<sup>79</sup>

Justice Spears further noted that “[m]ost jurisdictions have some method to protect the interest and insure the support of surviving spouses. This court’s holding leaves surviving spouses without the protection afforded by either common law or community property statutory schemes in certain situations.”<sup>80</sup> He concluded by urging “the Legislature to eliminate this illogical and potentially inequitable difference in the characterization of marital property.”<sup>81</sup>

The same problem identified by Justice Spears exists in Arizona.<sup>82</sup> In a property disposition upon divorce in Arizona where the couples have migrated from a common law state, property acquired during the marriage that would be community property if it were acquired in Arizona is subject to equitable division by the courts under the Arizona divorce statute.<sup>83</sup> However, if the same property were disposed of by reason of the acquiring spouse’s death in Arizona, the courts are powerless to equitably divide the separate property acquired during the marriage outside of Arizona, even if that property would have been community property had it been acquired in Arizona.<sup>84</sup> The surviving spouse is left without the protection afforded by either the common law statutory scheme of the state in which the property was acquired, or by the Arizona community property statutory scheme.<sup>85</sup> The deceased spouse can devise, if he or she chooses, all of his or her separate property to whomever the spouse deems worthy, leaving the surviving spouse with nothing.<sup>86</sup>

Over time, many states have developed schemes to preclude the disinheritance of the surviving spouse. Sections III and IV present these different schemes.

## II. VARIOUS METHODS FOR PREVENTING THE DISINHERITANCE OF THE SURVIVING SPOUSE WHERE MIGRATION HAS NOT OCCURRED

### A. *Dower and Curtesy*

Historically, dower and curtesy were the methods used in common law states to prevent disinheritance of a surviving spouse.<sup>87</sup> Although the term dower is used in various ways today,<sup>88</sup> dower generally refers to the life estate a widow

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See supra text* accompanying notes 76–81.

83. ARIZ. REV. STAT. § 25-318(A) (2003).

84. *See, e.g., supra text* accompanying notes 74–75.

85. *Id.*

86. *Id.*

takes in her deceased husband's real estate under common law.<sup>89</sup> The purpose of dower is to ensure that the surviving spouse will not be left disinherited or destitute, without completely ignoring the testator's ability to devise his property as he desires.<sup>90</sup> There are three requirements for a widow's dower right to vest: a valid marriage, seisin of the husband (the husband must have owned real estate),<sup>91</sup> and the husband's death.<sup>92</sup> Once these requirements are satisfied, dower entitled the wife to a life estate in one-third of her husband's qualifying land.<sup>93</sup> Interestingly, dower "is of such antiquity that its origin cannot be traced with any degree of certainty."<sup>94</sup> The "great majority" of states have abolished dower.<sup>95</sup>

On the flip side, curtesy was the interest a widower took in his deceased wife's property.<sup>96</sup> Curtesy was comparable to dower with two exceptions: "the husband did not acquire curtesy unless children were born of the marriage," and "the husband was given a life estate in the entire parcel, not merely in one-third."<sup>97</sup> Like dower, a large majority of states have abolished curtesy.<sup>98</sup>

### *B. Elective Share Statutes*

Today, all but one of the common law states give the surviving spouse a share in the decedent's estate.<sup>99</sup> "The underlying policy . . . is that the surviving spouse contributed to the decedent's acquisition of wealth and [equitably] deserves . . . a portion of it."<sup>100</sup> This policy is carried out by elective share statutes (sometimes called "forced share" statutes) that provide an election to the surviving spouse.<sup>101</sup> The spouse can either take what was devised in the decedent's will, or if there is no will, what the spouse would receive through intestacy laws. Alternatively, the spouse may elect to take a fractional share of the decedent's

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87. See 28 C.J.S. *Dower and Curtesy* § 2 (1996).

88. *Id.*

89. *Id.* § 6. A life estate is an interest in land, "the duration of which is confined to the life or lives of some particular person or persons or to the happening or not happening of some uncertain event." 31 C.J.S. *Estates* § 28 (1996). For purposes of dower, the life estate would be determined by the widow's life. 28 C.J.S. *Dower and Curtesy* § 6 (1996).

90. 28 C.J.S. *Dower and Curtesy* § 5 (1996).

91. Seisin is synonymous with ownership. *Woolfolk v. Buckner*, 55 S.W. 168, 169 (Ark. 1900).

92. 28 C.J.S. *Dower and Curtesy* § 8 (1996).

93. *DUKEMINIER & JOHANSON, supra* note 3, at 482.

94. 28 C.J.S. *Dower and Curtesy* § 2 (1996). The antiquity of dower's origins shows that the need to protect the surviving spouse has long been recognized.

95. *DUKEMINIER & JOHANSON, supra* note 3, at 483.

96. *Id.* at 482–83.

97. *Id.* at 482.

98. *Id.* at 483.

99. *Id.* at 483–84. Georgia is the only common law property state that does not give the surviving spouse a share in the decedent's estate. *Id.* at 483–84 n.1.

100. *Id.* at 484.

101. *Id.*

estate that is usually either one-third or one-half of the estate.<sup>102</sup> The Uniform Probate Code, in contrast, proposes that the elective share percentage to which a spouse is entitled be tied to the length of the marriage.<sup>103</sup>

### C. Community Property

The community property system itself is a method for preventing the disinheritance of the surviving spouse. Today, eight states have adopted community property systems.<sup>104</sup> The premise of community property systems is that spouses should become co-owners of property acquired during the marriage.<sup>105</sup> This premise recognizes the contribution to such acquisitions by both the spouse who acquires the property through his or her efforts and the spouse who renders services such as homemaking through which no property is acquired.<sup>106</sup> Unlike dower and elective share statutes, each spouse shares an equal right of management and control over community property.<sup>107</sup> Upon the death of one spouse, the surviving spouse takes a one-half interest in the community.<sup>108</sup> The decedent's one-half interest in the community property is subject to the decedent's testamentary disposition,<sup>109</sup> as is the decedent's separate property.<sup>110</sup>

### III. VARIOUS METHODS FOR PREVENTING THE DISINHERITANCE OF THE SURVIVING SPOUSE WHERE MIGRATION HAS OCCURRED

Community property states use two general methods to protect the interests of spouses in common law marital property: a conflict-of-law approach and quasi-community property.<sup>111</sup>

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102. THOMAS L. WATERBURY, MATERIALS ON TRUSTS AND ESTATES § 9-1 (1986) (quoting Sheldon Jay Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681, 681-83 (1966)).

103. UNIF. PROBATE CODE § 2-202 (amended 1991), 8 U.L.A. 102 to 103 (1998). See generally Rena C. Sepowitz, *Transfers Prior to Marriage and the Uniform Probate Code's Redesigned Elective Share—Why the Partnership Is Not Yet Complete*, 25 IND. L. REV. 1 (1991) (providing a comprehensive review of the 1990 amendment of the Uniform Probate Code elective share statute).

104. See DUKEMINIER & JOHANSON, *supra* note 3, at 474 (identifying eight states with long existing community property laws as: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington).

105. *Id.*

106. *Id.* at 474-76.

107. 41 C.J.S. *Husband and Wife* § 158 (1991).

108. *Id.* § 186.

109. *Id.*; see also ARIZ. REV. STAT. § 14-3101 (2003).

110. ARIZ. REV. STAT. § 14-3101.

111. See Merrie Chappell, *A Uniform Resolution to the Problem a Migrating Spouse Encounters at Divorce and Death*, 28 IDAHO L. REV. 993, 1007-15 (1992); Hrant Norsigian, *Community Property and the Problem of Migration*, 66 WASH. U. L.Q. 773, 778-83 (1988) (referring to the conflict-of-law approach as "The Common Sense Approach") (citing RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 258-60, 263 (1971)).

### A. Conflict-of-Law

A conflict-of-law approach is governed by three general principles.<sup>112</sup> First, the laws of the state where the couple was domiciled when the property was acquired determine the characterization of that property.<sup>113</sup> Second, moving the property to another state does not change the characterization of that property.<sup>114</sup> Third, the laws of the state of the domicile at the time of death govern the disposition of property, which in community property states is driven by the characterization of the property.<sup>115</sup> Thus, for a couple living in a common law state, the acquiring spouse will take the acquired property as his or her separate property.<sup>116</sup> Moving to a community property state will not change the characterization of that property as separate property.<sup>117</sup> Upon the death of the acquiring spouse in the community property state, the community property system will govern the disposition of property.<sup>118</sup>

The community property system, however, gives an interest in property to a non-acquiring spouse only if the property is characterized as community property, which means it was acquired while the couple was domiciled in a community property state.<sup>119</sup> Consequently, if no property is acquired after the couple moves to the community property state, there is no community property to share.<sup>120</sup> All separate property brought into a community property state retains its separate status and is awarded to the acquiring spouse.<sup>121</sup> Thus, the non-acquiring spouse could “fall into the gap” between the common law system in the state where the property was acquired and the community property system in the state where the decedent died, ultimately being left with nothing.<sup>122</sup>

The case of *Rau v. Rau* illustrates a conflict-of-law approach in a divorce proceeding.<sup>123</sup> In *Rau*, the husband owned and operated a farm in Illinois.<sup>124</sup> During this time, the wife “performed all of the normal duties of the housewife” and also participated in the farming operations.<sup>125</sup> The farm was eventually gifted

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112. Norsigian, *supra* note 111, at 777–78. *See also* DUKEMINIER & JOHANSON, *supra* note 3, at 541.

113. Norsigian, *supra* note 111, at 777–78.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *See, e.g. supra* text accompanying notes 104–10.

120. Norsigian, *supra* note 111, at 777–78.

121. *Id.*

122. *Id.*

123. 432 P.2d 910 (Ariz. Ct. App. 1967). This case was decided before 1973, which was the retroactive effective date of the quasi-community property divorce statute as amended in 1980. ARIZ. REV. STAT. § 25-318. *See also* Sample v. Sample, 663 P.2d 591, 593–94 (Ariz. Ct. App. 1983) (discussing the retroactive application of the quasi-community property divorce statute). Had the case been decided after the statute became effective, the ruling of the trial court would likely have been affirmed on the theory of quasi-community property.

124. *Rau*, 432 P.2d at 911.

125. *Id.*

to the husband's son (presumably from a previous marriage).<sup>126</sup> With earnings acquired from the operations of the Illinois farm, the husband and wife purchased a farm in Arizona.<sup>127</sup> The husband and wife lived on the Arizona farm until their divorce.<sup>128</sup> The trial court determined that the Arizona farm was community property and divided it equally between the husband and the wife.<sup>129</sup>

The appellate court disagreed with the classification of the Arizona farm as community property because "[p]roperty interests . . . acquired by the spouses during a marriage are determined by the law of the matrimonial domicile at the time of acquisition. Property interests so acquired persist though such property be removed to another state."<sup>130</sup> Since the Illinois farm was the separate property of the husband, the proceeds from the operation of that farm also belonged to the husband.<sup>131</sup> The proceeds retained their character as the husband's separate property even after the proceeds were removed to Arizona.<sup>132</sup>

Nevertheless, the court upheld the equal division of the Arizona farm. The court looked to Illinois law to determine how such property would have been distributed if the divorce proceedings had been brought in an Illinois court.<sup>133</sup> Examining the "statutory and case law of Illinois," the court concluded that "if the monies earned from the farm in Illinois had been invested in Illinois real estate, taken in the husband's name, it would have been appropriate for the divorce court to have set aside to her a one-half interest in this property . . ." <sup>134</sup> The court affirmed the division of the property, giving the wife an equal portion of the farm.<sup>135</sup>

Applying this conflict-of-law approach to probate proceedings produces a similar result. If instead of getting divorced, Mr. Rau died without providing for Mrs. Rau in his will, then an Arizona court would look to the common law state's elective share statutes to protect Mrs. Rau's interests.<sup>136</sup> Mrs. Rau would then have an opportunity either to take what was devised to her in Mr. Rau's will (presumably nothing) or to elect a statutory percentage.<sup>137</sup>

Whether this approach could be used in Arizona, however, is not entirely clear because of the third general conflict-of-law principle, which requires the application of the laws of the state of domicile at the time of death to dispose of property.<sup>138</sup> Since there is no provision in Arizona's probate law that dictates

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126. *Id.*  
127. *Id.* at 911–12.  
128. *Id.* at 912.  
129. *Id.*  
130. *Id.* (internal citations omitted).  
131. *Id.*  
132. *Id.*  
133. *Id.* at 912–13.  
134. *Id.* at 913.  
135. *Id.* at 913–14  
136. *See supra* text accompanying notes 99–102.  
137. *See supra* text accompanying notes 19–33.  
138. *See supra* text accompanying note 116.

looking to the other state, an Arizona court could be prevented from looking to other states' laws unless a statute were enacted authorizing such an approach.

### *B. Quasi-Community Property*

Four of the eight community property states use a quasi-community property approach to protect the interests of the non-acquiring spouse upon the death of the acquiring spouse.<sup>139</sup> They are California, Idaho, Louisiana, and Washington.<sup>140</sup> The quasi-community property provisions of each of these states follow.

#### *1. California*

The California Legislature first enacted a quasi-community property statute in 1917.<sup>141</sup> "The obvious purpose of the legislation was to equalize fairly the rights of husband and wife in marital property."<sup>142</sup> Prior to that time, if a couple brought common law marital property into the state held in the acquiring spouse's name, it remained the separate property of the acquiring spouse.<sup>143</sup> Often, the husband was the acquiring spouse, and the husband's rights in the property were actually greater upon arrival in California because the wife lost her dower right upon entering the state.<sup>144</sup> The California Legislature initially attempted to solve the problem by expanding the definition of community property to include separate property acquired in common law states if that property would have been community property had it been acquired in California.<sup>145</sup>

In *In re Thornton's Estate*,<sup>146</sup> however, the California Supreme Court found that the statute was an unconstitutional impairment of the owner's vested property rights and declared the statute unconstitutional and void.<sup>147</sup> *In re Thornton's Estate's* dissenting opinion suggested that the court construe the statute

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139. See Chappell, *supra* note 111, at 1006–15. Wisconsin, considered by some as the ninth community property state after its adoption of the Wisconsin Marital Property Act, also uses a quasi-community property approach through a deferred marital property election. See Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 769. For further discussion of this election see Howard S. Erlanger, *Wisconsin's New Deferred Marital Property Election*, WISC. LAW., Apr. 1999 at 14.

140. See Chappell, *supra* note 111, at 1006. See CAL. PROB. CODE § 101 (West 2003); IDAHO CODE § 15-2-201(a) (Michie 2003); LA. CIV. CODE ANN. art. 3526 (West 2003); WASH. REV. CODE ANN. §§ 26.16.220, 26.16.230 (West 2003).

141. *In re Way's Estate*, 157 P.2d 46, 49 (Cal. Ct. App. 1945). See also Harden & Smith, *supra* note 1, at 114.

142. *Way's Estate*, 157 P.2d at 49.

143. *Id.*

144. *Id.*

145. See Harden & Smith, *supra* note 1, at 114.

146. 33 P.2d 1 (Cal. 1934).

147. *Id.* at 2. See also Harden & Smith, *supra* note 1, at 114. For further discussion of the constitutionality of California's quasi-community property statute, see *infra* text accompanying notes 174–91.

as valid to the extent that it regulated succession of this particular type of property.<sup>148</sup>

Following the counsel of this dissenting opinion, the California Legislature added a provision to the California Probate Code that defined a special class of separate property that would be subject to the same laws of succession that applied to community property.<sup>149</sup> Thus, the statute did not violate the property rights of the decedent because the surviving spouse acquired no interest in the property until the decedent's death.<sup>150</sup>

The current version of the statute enacted by the California Legislature reads: "Upon the death of a married person domiciled in this state, one-half of the decedent's quasi-community property belongs to the surviving spouse and the other half belongs to the decedent."<sup>151</sup> It defines quasi-community property as "[a]ll personal property wherever situated, and all real property situated in this state . . . acquired by a decedent while domiciled elsewhere that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time of its acquisition."<sup>152</sup>

Section 102 of California's Probate Code further protects the surviving spouse from certain donative transfers made by the decedent during the decedent's life in excess of the one-half interest belonging to the decedent in which complete ownership of the property was not transferred, such as a transfer where the decedent retained the right to possess the property for life.<sup>153</sup> However, if the transfer was of complete ownership and the decedent retains no interest in the property, the surviving spouse has no recourse against the transferee.<sup>154</sup>

## 2. Idaho

Idaho's quasi-community property probate statute is similar to California's.<sup>155</sup> The statute only gives the surviving spouse an interest in the decedent's property upon the decedent's death.<sup>156</sup> Idaho's definition of quasi-community property is similar to California's.<sup>157</sup> Furthermore, Idaho also protects the surviving spouse from some transfers made by the decedent without consideration and without the consent of the surviving spouse.<sup>158</sup> These protected transfers include transfers where the decedent transferred less than complete

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148. 33 P.2d at 3 (Langdon, J., dissenting). *See also* Harden & Smith, *supra* note 1, at 114; *infra* text accompanying notes 180–84.

149. CAL. PROB. CODE § 201.5 (repealed 1983). Section 201.5 is the section enacted in 1935 and is the predecessor to current section 101 of the California Probate Code. *See* Harden & Smith, *supra* note 1, at 114–15.

150. *See infra* text accompanying notes 180–84.

151. CAL. PROB. CODE § 101(a) (West 2003).

152. *Id.* § 66(a).

153. *Id.* § 102(a). *See also* Harden & Smith, *supra* note 1, at 115.

154. CAL. PROB. CODE § 102.

155. *Compare* IDAHO CODE § 15-2-201(a) (Michie 2003), *with* CAL. PROB. CODE § 101.

156. IDAHO CODE § 15-2-201(a).

157. *Compare Id.* § 15-2-201(b), *with* CAL. PROB. CODE § 66.

158. IDAHO CODE § 15-2-202.

ownership or a transfer made within two years of the decedent's death in excess of ten thousand dollars, or the federal gift tax exclusion.<sup>159</sup> Thus, if a decedent made a transfer of complete ownership more than two years before the decedent's death, the surviving spouse would have no recourse.<sup>160</sup>

### 3. Louisiana

Louisiana provides for a hybrid quasi-community property scheme that also embodies some elements of a conflict-of-law approach.<sup>161</sup> The Louisiana statute attempts to secure for the non-acquiring spouse the same protection as is provided by Louisiana substantive law for similarly situated Louisiana spouses.<sup>162</sup>

The statute envisions two separate "mental steps."<sup>163</sup> The first step requires the classification of property as either community property or separate property.<sup>164</sup> This classification is to be conducted as if the spouses were domiciled in Louisiana at all critical times, namely when the property was acquired.<sup>165</sup> The second step entails the determination of the respective rights of spouses with regard to the property that was classified in the first step.<sup>166</sup> Property acquired in a common law state that would have been community property had it been acquired while either spouse was domiciled in Louisiana is treated as community property in Louisiana.<sup>167</sup>

The Louisiana statute also provides protection to the non-acquiring spouse for property that is not treated as community property within Louisiana.<sup>168</sup> For such non-quasi-community property, the laws of the domicile of the acquiring spouse at the time of acquisition govern the distribution of property.<sup>169</sup> This treatment is essentially a conflict-of-law approach.<sup>170</sup>

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159. *Id.* § 15-2-202. *See also* 26 U.S.C.A § 2503 (West 2005). The federal gift tax exclusion for the year 2005 is eleven thousand dollars. Rev. Proc. 2004-71 § 3.28.

160. IDAHO CODE § 15-2-202.

161. LA. CIV. CODE ANN. art. 3526 (West 2003).

162. *Id.*

163. *Id.* cmt. b.

164. *Id.*

165. *Id.*

166. *Id.* cmt. c.

167. *Id.* cmt. a.

168. *Id.* cmt. f.

169. *Id.*

170. *See supra* text accompanying notes 112–17. The co-existence of the two subparagraphs might create an impression of overprotection of the non-acquiring spouse which has been discussed by some commentators. *Compare* William A. Reppy, Jr., *Louisiana's Proposed 'Hybrid' Quasi-Community Property Statute Could Cause Unfairness*, 13(3) COMMUNITY PROP. J. 1 (1986), *with* Symeon Symeonides, *In Search of New Choice-of-Law Solutions to Some Marital Property Problems of Migrant Spouses: A Response to the Critics*, 13(3) COMMUNITY PROP. J. 11 (1986). *See also* LA. CIV. CODE ANN. art. 3526, cmt. f.



#### 4. Washington

Washington extends quasi-community property treatment to non-acquiring spouses at the death of the acquiring spouse.<sup>171</sup> Similar to California and Idaho, Washington protects the non-acquiring spouse from transfers made by the acquiring spouse in excess of the acquiring spouse's one-half interest.<sup>172</sup> Interestingly, Washington departs from most other states by allowing limited divestiture of separate property upon dissolution of marriage by divorce.<sup>173</sup>

### IV. THE CONSTITUTIONALITY OF QUASI-COMMUNITY PROPERTY STATUTES

The constitutionality of California's quasi-community property statute has been tested multiple times.<sup>174</sup> These challenges were based on a familiar fact pattern: one spouse acquired property in a common law state during marriage, the couple migrated to California, and upon either death or divorce the non-acquiring spouse sought to have the common law marital property treated as community property.<sup>175</sup> In *In re Thornton's Estate*,<sup>176</sup> the California Supreme court held that the quasi-community property statute was an unconstitutional impairment of the owner's vested property rights.<sup>177</sup> The court interpreted the statute in effect at the time as changing the classification of common law marital property to community property upon a couple's migration into California, which gave the non-acquiring spouse a vested right in the property.<sup>178</sup> The court reasoned that taking the property of the acquiring spouse and giving it to the non-acquiring spouse was an unconstitutional taking of the acquiring spouse's property and was a violation of due process.<sup>179</sup>

In Justice Langdon's dissent in *In re Thornton's Estate*, he argued that the quasi-community property statute did not create a vested right in the non-acquiring spouse, but was only a definitional statute that defined how a certain class of property would be treated for testamentary disposition and succession.<sup>180</sup> Because "the rights of testamentary disposition and of succession are wholly subject to statutory control, and may be enlarged, limited, or abolished without infringing upon the constitutional guaranty of due process of law," Justice Langdon concluded that the statute was constitutional to the extent that it only affected the

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171. WASH. REV. CODE ANN. §§ 26.16.220 and 26.16.230 (West 2003).

172. *Id.* § 26.16.240.

173. See Harden & Smith, *supra* note 1, at 118–19.

174. See, e.g., Addison v. Addison, 399 P.2d 897 (Cal. 1965); *In re Miller*, 187 P.2d 722 (Cal. 1947); *In re Thornton's Estate*, 33 P.2d 1 (Cal. 1934). Challenges to the constitutionality of California's statutes are presented here because the Arizona Supreme court has expressly adopted the analysis of the California Supreme Court. See *infra* text accompanying note 191.

175. Addison, 399 P.2d at 898–900; *Miller*, 287 P.2d at 723–24; *Thornton's Estate*, 33 P.2d at 2–3.

176. 33 P.2d 1 (Cal. 1934).

177. *Id.* at 3.

178. *Id.* at 2.

179. *Id.* at 3.

180. *Id.* at 3–4.

distribution of property upon death and did not modify vested rights during the decedent's life.<sup>181</sup>

In the next legislative session following the *Thornton* decision, the California Legislature revised the quasi-community property statute.<sup>182</sup> The revised statute did not:

[R]earrange property rights between living husbands and wives in marital property brought into this state . . . . On the contrary, it is a succession statute apparently enacted in pursuance of the theory of the dissenting opinion in the *Thornton* case, that such legislation affecting the descent of property would not contravene constitutional guarantees since "the rights of testamentary disposition and of succession are wholly subject to statutory control."<sup>183</sup>

As a succession statute, the California Supreme Court deemed the revised statute constitutional in *In re Miller* on the theory that the state of domicile of the decedent at the time of death has full power to control rights of succession.<sup>184</sup>

The California Supreme Court subsequently took its confirmation of the statute's constitutionality one step further in *Addison v. Addison*.<sup>185</sup> After reaffirming the rationale of *Miller*,<sup>186</sup> the *Addison* court focused on the state's police power right to interfere with vested property rights whenever reasonably necessary to protect the health, safety, morals, and general well being of the people.<sup>187</sup> Instead of approaching the issue as whether the quasi-community property law impaired a vested right, the court looked to whether the goals effectuated by the quasi-community property law were sufficiently necessary to public welfare.<sup>188</sup> Quoting the United States Supreme Court, the court stated:

Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of [the] commanding problems in the field of domestic relations with which the state must deal.<sup>189</sup>

The court concluded that the statute was constitutionally justified under the police power because of the state's strong interest in the equitable distribution of marital

181. *Id.*

182. *In re Miller*, 187 P.2d 722, 725 (Cal. 1947).

183. *Id.*

184. *Id.* See also *Addison v. Addison*, 399 P.2d 897, 900 (Cal. 1965).

185. 399 P.2d 897.

186. See *supra* text accompanying note 184.

187. *Addison*, 399 P.2d at 902. The court also briefly addressed alleged violations of the Privileges and Immunities Clause of the fourteenth Amendment and section 2, article IV of the United States Constitution. *Id.* at 903–04. However, that brief discussion is not addressed in this Note.

188. *Id.* at 902.

189. *Id.* (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)).

property upon dissolution.<sup>190</sup> The Arizona Supreme Court has expressly adopted the constitutionality analysis of *Addison* in construing the constitutionality of Arizona's quasi-community property divorce statute.<sup>191</sup> The same result is likely for the proposed quasi-community property probate statute.

## V. PROPOSED SOLUTION

As described above, there are three potential solutions for preventing the disinheritance of a surviving spouse when the couple has moved from a common law state to Arizona. The potential solutions are an elective share statute,<sup>192</sup> a conflict-of-law approach,<sup>193</sup> and a quasi-community property statute for probate matters.<sup>194</sup> Each is discussed below, along with an explanation of why the first two solutions are less attractive than the third.

### A. Elective Share Statute

At least one commentator suggested that an elective share statute is the proper remedy for this problem.<sup>195</sup> However, there are numerous weaknesses in an elective share statute.<sup>196</sup> First, elective share statutes provide no control to the non-acquiring spouse of the common law marital property until the acquiring spouse's death.<sup>197</sup> Because the acquiring spouse takes the property as separate property, the non-acquiring spouse has no legal right to control the use or disposition of the property during the acquiring spouse's lifetime.<sup>198</sup>

Second, the equity of an elective share statute is questionable where the marriage is of a relatively short duration. "The underlying policy [of elective share statutes] . . . is that the surviving spouse contributed to the decedent's acquisition of wealth and deserves to have a portion of it."<sup>199</sup> This policy holds true in long marriages, but can produce inequitable results in short marriages. The case of *In re Estate of Neiderhiser*<sup>200</sup> presents an extreme example of such inequity. The groom "dropped dead" after the bride and groom said the equivalent of "I do" but before the minister pronounced them man and wife.<sup>201</sup> The court upheld the marriage,<sup>202</sup> entitling the bride to "an elective share in the groom's estate."<sup>203</sup>

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190. *Id.*; see also *Sample v. Sample*, 663 P.2d 591, 594–95 (Ariz. Ct. App. 1983).

191. *Sample*, 663 P.2d at 594–95.

192. See *supra* text accompanying notes 99–102.

193. See *supra* text accompanying notes 112–37.

194. See *supra* text accompanying notes 14, 39–73.

195. Norsigian, *supra* note 111, at 783–84.

196. DUKEMINIER & JOHANSON, *supra* note 3, at 488–89.

197. *Id.*

198. See *supra* text accompanying note 3.

199. DUKEMINIER & JOHANSON, *supra* note 3, at 484.

200. 2 Pa. D. & C.3d 302 (1977). See also DUKEMINIER & JOHANSON, *supra* note 3, at 485, n.2.

201. DUKEMINIER & JOHANSON, *supra* note 3, at 485, n.2. See also *Neiderhiser*, 2 Pa. D. & C. 3d at 303–06.

202. *Neiderhiser*, 2 Pa. D. & C.3d at 310. See also DUKEMINIER & JOHANSON, *supra* note 3, at 485, n.2.

203. DUKEMINIER & JOHANSON, *supra* note 3, at 485, n.2.

Lastly, an elective share statute only protects the non-acquiring spouse if that spouse dies after the acquiring spouse.<sup>204</sup> Thus, where the non-acquiring spouse pre-deceases the acquiring spouse, the non-acquiring spouse may have little or no property to devise.<sup>205</sup> This is consistent with the rationale behind elective share statutes,<sup>206</sup> but it fails to compensate the non-acquiring spouse for his or her contribution to the marriage.<sup>207</sup>

Admittedly, a well-drafted elective share statute could probably resolve these issues. However, a quasi-community property approach can resolve all of these issues and has the benefit of other strengths that an elective share statute lacks.<sup>208</sup> Consequently, an elective share statute is not the best solution.

### ***B. Conflict-of-Law***

As previously discussed, the conflict-of-law approach presents a problem.<sup>209</sup> It applies the law of the state where property is acquired to determine the character of the property,<sup>210</sup> but applies the law of the state where the decedent was domiciled at the time of death to determine the proper disposition of property.<sup>211</sup> Where a couple has acquired their property in a common law state, it will be characterized as separate property. Upon death in Arizona, separate property is subject to the testamentary disposition of the separate property owner with no provision for the surviving non-acquiring spouse. If no property is acquired in Arizona, there will be no community property to divide equitably, and the surviving spouse could be left with nothing. Like the elective share method discussed above, this problem could probably be solved by statute. However, there are other weaknesses inherent in a conflict-of-law approach.

One of these shortcomings is that the conflict-of-law method requires a court to look to the law of another state to determine the proper disposition of property.<sup>212</sup> Although courts are certainly capable of doing so, it still presents the uncomfortable situation where a court of one state is called upon to interpret and apply the laws of another state. In *Hughes v. Hughes*, the New Mexico Supreme Court reluctantly went through just such an exercise in a divorce case when it was called upon to divide a husband's separate property that was acquired in a common law state.<sup>213</sup> The court concluded the only equitable result was to look to the laws of the state of acquisition to determine the proper distribution.<sup>214</sup> The court, however, twice praised the California Legislature for its adoption of a quasi-

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204. *Id.* at 488.

205. *Id.*

206. *See supra* text accompanying note 100.

207. DUKEMINIER & JOHANSON, *supra* note 3, at 488.

208. *See infra* text accompanying notes 218–31.

209. *See supra* text accompanying notes 115 and 138.

210. *See supra* text accompanying note 113.

211. *See supra* text accompanying note 115.

212. *See, e.g., supra* text accompanying notes 123–37.

213. 573 P.2d 1194 (N.M. 1978).

214. *Id.* at 1201.

community property statute because it avoided all of the problems inherent in applying another state's laws.<sup>215</sup>

Finally, at one time, Arizona had a conflict-of-law approach in place for divorce as demonstrated by *Rau v. Rau*.<sup>216</sup> Despite this fact, the legislature enacted a quasi-community property statute for divorce purposes, in effect overruling the conflict-of-law approach.<sup>217</sup> Thus, at least in divorce cases, the legislature has specifically chosen a quasi-community property approach over the conflict-of-law approach. It is logical to extend the same treatment to probate matters.

### C. *Quasi-Community Property Statute*

The quasi-community property statute proposed below provides the most feasible solution for numerous reasons. First, it reduces the need for litigation to resolve the marital estate,<sup>218</sup> which in turn makes it a less costly and more legally efficient approach.<sup>219</sup> Although there will undoubtedly be litigation contesting what property qualifies as quasi-community property, it avoids the extensive court intervention that arises in nearly all cases that rely upon the conflict-of-law approach.

Additionally, unlike the conflict-of-law approach, there would be no need to apply another state's laws. The courts would have to determine only whether any particular property would have been community property when it was acquired—a fact-driven question.

The proposed solution also avoids problems associated with marriages of short duration. By definition, only property acquired during marriage would be treated as quasi-community property. In short marriages, a correspondingly small amount of property would be acquired, limiting the amount of property subject to treatment as quasi-community property.

Moreover, a quasi-community property statute could be used to rectify the situation where the non-acquiring spouse has nothing to devise because he or she pre-deceases the acquiring spouse.<sup>220</sup> Such a statute would provide that upon the death of either spouse, all property acquired by either spouse that would have been community property had it been acquired in Arizona would be treated as community property. This would give the estate of the deceased non-acquiring spouse a community property interest in the common law marital property that would be subject to his or her testamentary disposition. However, other states have yet to take this principle so far. Those states have stopped short of providing the non-acquiring spouse with property before the acquiring spouse dies, instead only providing a property interest to the non-acquiring spouse when the acquiring

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215. *Id.*

216. 432 P.2d 910 (Ariz. Ct. App. 1967); *see also supra* text accompanying notes 124–35.

217. *See supra* text accompanying notes 14–18.

218. Frank L. Spring, *In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage*, 9 N.M. L. REV. 113, 120–21 (1978).

219. Patrice E. Patterson & Michael H. Ahrens, *Migrating Couples and Wisconsin's Marital Property Act*, 68 MARQ. L. REV. 488, 496 (1985).

220. *See supra* text accompanying note 205.

spouse dies first. Accordingly, the proposed statute below does not provide for the deceased non-acquiring spouse to receive half of the quasi-community property, although it would be a good idea.

Lastly, a quasi-community property statute for probate matters would be similar to the statute already enacted for divorce.<sup>221</sup> This would provide some consistency between the statutes and would assist courts having to interpret either one of the statutes in the future by providing analogous law.

One scholar posits that a weakness of a quasi-community property statute is its inconsistency with the expectations of couples who have migrated to Arizona concerning how their common law marital property will be distributed upon the acquiring spouse's death.<sup>222</sup> Hrant Norsigian correctly states the proposition that in a common law state the couple expects the non-acquiring spouse to receive an elective share of the decedent spouse's estate.<sup>223</sup> He then suggests that quasi-community property treatment would be inconsistent with this expectation and is therefore the wrong answer.<sup>224</sup> However, Mr. Norsigian seemingly fails to consider the fact that the couple migrated to a community property state. He provides no support for his assertion that a couple would maintain their expectation of the application of common law principles upon entering a community property state. Although, it may well be true that they maintain such an expectation,<sup>225</sup> it could be just as true that they would assume they would receive community property treatment. Without further study, it is unclear which assumption is more accurate.

## VI. THE PROPOSED QUASI-COMMUNITY PROPERTY STATUTE

For all of the above reasons, the following quasi-community property statute is proposed. The majority of this proposed statute is substantively similar to the Idaho quasi-community property statute,<sup>226</sup> while subsection (b) of the augmented estate statute below is modeled after the Washington statute.<sup>227</sup> The proposed statute is as follows:

Quasi-community property; Ownership upon death. Upon the death of a married person domiciled in this state, one-half of the quasi-community property shall belong to the surviving spouse and the other one-half of such property shall be subject to the testamentary disposition of the decedent.

Quasi-community property; Definition. Quasi-community property includes:

(a) All personal property, wherever situated, and all real property situated in this state which has heretofore been acquired or is hereafter acquired by the decedent while domiciled elsewhere and

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221. ARIZ. REV. STAT. § 25-318(A) (2003).

222. Norsigian, *supra* note 111, at 782–83.

223. *Id.*

224. *Id.*

225. In the first hypothetical presented at the beginning of this Note, Fred does assume that the elective share statute will continue to govern the disposition of his property.

226. IDAHO CODE § 15-2-201 (Michie 2003).

227. *See* WASH. REV. CODE ANN. § 26.16.240 (West 2003).

which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time of its acquisition; and

(b) All personal property, wherever situated, and all real property situated in this state, which has heretofore been acquired or is hereafter acquired in exchange for real or personal property, wherever situated, which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired, provided that real property does not and personal property does include leasehold interests in real property; and

(c) All real property situated in another state and owned by a domiciliary of this state if the laws of such state permit descent and distribution of such property to be governed by the laws of this state.

Quasi-community property; Subject to debts of the decedent. All quasi-community property is subject to the debts of the decedent.

Quasi-community property; Augmented estate. (a) Whenever a married person domiciled in the state has made a transfer of quasi-community property to a person other than the surviving spouse, the surviving spouse may require the transferee to restore to the decedent's estate such property, if the transferee retains such property and, if not, its proceeds or, if none, its value at the time of transfer, if:

(1) The decedent retained, at the time of death, the possession or enjoyment of or the right to income from the property; or

(2) The decedent retained, at the time of death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit; or

(3) The decedent held the property at the time of death with another with the right of survivorship; or

(4) The decedent had transferred such property within two (2) years of death to the extent that the aggregate transfers to any one (1) donee in either of the years exceeded ten thousand dollars (\$10,000) or the amount of the annual exclusion for the federal gift tax set forth at 26 U.S.C. section 2503, whichever is greater.

(b) Notwithstanding subsection (a) of this section, no such property may be required to be restored to the decedent's estate if:

(1) Such property interest was transferred for adequate consideration; or

(2) Such property interest was transferred with the consent of the surviving spouse; or

(3) The transferee purchased such property interest in property from the decedent while believing in good faith that the

property or property interest was the separate property of the decedent and did not constitute quasi-community property.

The Idaho statutes<sup>228</sup> are favorable as models for the proposed statute for two reasons. First, they provide a slightly more accurate definition of community property by defining quasi-community property to include only real property situated in this state.<sup>229</sup> This definition is more accurate because courts do not have jurisdiction to determine title to real property located in another state.<sup>230</sup> But if the laws of the state where the real property is situated permit descent and distribution of such property to be governed by the laws of the state where the decedent died, then under subsection (c) of the definitional statute, that real property is also included in the definition of quasi-community property.

Second, other statutes only provide a right to the non-acquiring spouse to recover lifetime transfers made by the acquiring spouse if the acquiring spouse retained some interest in the property transferred during his or her lifetime.<sup>231</sup> Thus, if the acquiring spouse made transfers in which no interest was retained, the non-acquiring spouse cannot recover the property. The surviving spouse should be able to recover transfers in which the decedent retained no interests. This assimilates the control that a surviving spouse would have in true community property. It also prevents the acquiring spouse from gifting all of the quasi-community property to keep the surviving spouse from receiving a property interest. This provision is found in subsection (a)(4) of the augmented estate statute above.

### CONCLUSION

Under current Arizona law, it is possible for a non-acquiring spouse who has migrated into Arizona from a common law state to be disinherited from his or her spouse's estate and be left with virtually nothing. This disinheritance could be done intentionally, as in the story of Wild Bill and Calamity Jane presented at the beginning of this Note, or it could be unintentional, as in the story of Fred and Wilma. Regardless of whether the disinheritance is intentional or not, Arizona has a strong interest in protecting non-acquiring spouses from ending up penniless, especially since it would often occur in the twilight of their lives. Practically all states protect the surviving spouse from disinheritance, either by use of elective share statutes or through the community property system.<sup>232</sup> The Arizona Legislature has already extended protection to non-acquiring spouses in divorce proceedings.<sup>233</sup> The Legislature should provide the same protection in probate matters by adopting a quasi-community property statute similar to the one suggested in this Note.

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228. IDAHO CODE § 15-2-201 to 202.

229. *Id.*

230. Noble v. Noble, 546 P.2d 358, 361 (Ariz. Ct. App. 1976).

231. See CAL. PROB. CODE § 102 (West 2003); WASH. REV. CODE ANN. § 26.16.240.

232. Hanau v. Hanau, 730 S.W.2d 663, 667 (Tex. 1987) (Spears, J., concurring).

233. ARIZ. REV. STAT. § 25-318(A) (2003).



## APPENDIX A

NUMBER OF MIGRANTS OVER THE AGE OF SIXTY MIGRATING  
INTO ARIZONA FROM COMMON LAW STATES

	1965-70	1975-80	1985-90
Alabama	0	200	173
Alaska	0	240	266
Arkansas	500	320	476
Colorado	1,800	3,640	5,461
Connecticut	500	1,320	774
Delaware	0	80	190
D.C.	0	40	21
Florida	1,200	1,400	2,714
Georgia	0	200	423
Hawaii	0	200	435
Illinois	5,200	11,520	8,460
Indiana	900	2,480	1,903
Iowa	1,500	2,800	2,257
Kansas	300	1,160	1,599
Kentucky	100	480	105
Maine	0	160	247
Maryland	100	760	574
Massachusetts	500	1,600	868
Michigan	4,100	5,280	4,857
Minnesota	1,700	3,000	3,704
Mississippi	200	120	128
Missouri	2,000	2,640	1,740
Montana	1,000	840	802
Nebraska	800	1,600	851
New Hampshire	0	200	101

## APPENDIX A

**NUMBER OF MIGRANTS OVER THE AGE OF SIXTY MIGRATING  
INTO ARIZONA FROM COMMON LAW STATES**

	1965-70	1975-80	1985-90
New Jersey	1,200	2,760	2,414
New York	3,300	6,840	5,116
N. Carolina	0	40	266
N. Dakota	800	560	465
Ohio	2,400	5,080	3,375
Oklahoma	200	640	1,178
Oregon	500	1,800	1,971
Pennsylvania	1,900	3,280	2,686
Rhode Island	100	0	146
S. Carolina	0	120	232
S. Dakota	300	520	859
Tennessee	0	440	347
Utah	400	1,080	1,058
Vermont	100	40	67
Virginia	700	680	621
West Virginia	200	200	116
Wyoming	500	280	693
Total	35,000	66,640	60,739

*Adapted from* CHARLES F. LONGINO JR., RETIREMENT MIGRATION IN AMERICA 119 (1995).

## APPENDIX B

TEN STATES RECEIVING THE MOST MIGRANTS  
OVER THE AGE OF SIXTY

1985-1990		1995-2000	
State	Number	State	Number
Florida	451,709	Florida	394,254
California	131,514	Arizona	134,583
Arizona	98,756	California	127,757
Texas	78,117	Texas	100,700
N. Carolina	64,530	N. Carolina	74,937
Pennsylvania	57,538	Nevada	61,627
New Jersey	49,176	Pennsylvania	60,430
Washington	47,484	Virginia	59,976
Virginia	46,554	Georgia	57,992
Georgia	44,475	New Jersey	54,657

*Adapted from* Charles F. Longino, Jr. & Don E. Bradley, *A First Look at Retirement Migration Trends in 2000*, 43 THE GERONTOLOGIST 904 (2003).