

**Matrimonial Property Regimes in a Cross-Border Context:
Who Owns What (and When)?**

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I. Overview.

A. The Importance of Understanding Matrimonial Property Regimes

1. “Matrimonial property regime” means the law governing the property interests of spouses, as between them during the marriage and as of death of a spouse, and in relation to third parties. A couple’s property may be subject to more than one regime.
2. Estate planning and estate administration both require a determination of the property rights of a married couple (in the case of planning) and of the interests of a decedent’s estate and of a surviving spouse (in the case of administration). Neither planning nor administration can go forward until such a determination is made.
3. In the case of estate planning, the property rights of a married couple may also change depending on their ultimate jurisdiction of residence and death. Therefore, the question of “what” each spouse owns can depend on “when” the advisor is considering the issue.
4. Issues of “who owns what” also come up in the context of taxation (e.g. *Estate of Charania v. Commissioner*, 133 T.C. 122 (2009) and 608 F.3d 67 (1st Cir. 2010)) and of creditors’ rights.

B. Matters Treated

1. First, this presentation will provide an overview of the principles of separate and community property and provide examples of matrimonial property regimes that are typical of common law and civil law jurisdictions.
 - a. The presentation does not deal with property in the context of divorce, as there is typically a different set of rules for property settlements in divorce.
 - b. Furthermore, the presentation does not cover succession law. E.g. forced heirship (in civil law jurisdictions) or the

rights of a spouse outside of a will (in common law jurisdictions).

2. Second, under the heading “Choice of Law”, the presentation addresses the couple’s freedom (1) to elect a matrimonial property regime that will be respected as they move among jurisdictions; (2) to enter into a prenuptial (antenuptial or premarital) agreement that will be respected as they move; and (3) regardless of prior elections or agreements, to enter into a postnuptial (postmarital) agreement that will respected as they move.
3. Third, the presentation will cover the differing principles among jurisdictions regarding conflict of matrimonial property laws. These principles would apply where a choice of law has not been made or is not recognized in the forum state.
4. The presentation will conclude with suggested reforms.

II. A Synopsis of Matrimonial Property Regimes.

A. Community Property and Separate Property

1. Various community property regimes are typically found in civil law jurisdictions.
 - a. *E.g.* many countries of continental Europe, Scotland, the countries of South America, Mexico, Louisiana, Japan, Korea and Taiwan.
2. Some common law jurisdictions nonetheless embrace various forms of community property.
 - a. Arizona, California, Idaho, Nevada, New Mexico, Texas, Washington and Wisconsin.
 - b. In Alaska by statutory election (separate property by default).
3. Separate property regimes are the norm in common law jurisdictions, including England and Wales, India, Australia, New Zealand, most American states, and most Canadian provinces and territories.
4. Some jurisdictions have a matrimonial property regime that essentially embraces characteristics of separate and community property, which will be referred to as a hybrid regime. Examples are Germany, Québec and Ontario.

B. Typical (and Non-Typical) Elements of Separate Property Regimes

1. Property acquired by a spouse before marriage and during marriage is that person's own separate property, and he or she is free to use and dispose of it at will.
2. At the death of one spouse, the surviving spouse has certain protective rights, such as an elective share, the right to remain in the residence, and a support allowance. These rights may apply to only probate assets (as in Ohio) or to a greater augmented estate.
3. The mere joint titling of personal property does not change its separate nature; it may, however, act as a testamentary substitute. Uniform Probate Code §§ 6-103(a), 6-104(a).
4. Creditors of one spouse cannot reach the separate property of the other, except in the case of a fraudulent transfer.
5. Non-Typical: during coverture, a spouse not in title has a dower or curtesy interest in real property holdings of the other spouse.
6. Forms of joint ownership exist, depending on the jurisdiction.
 - a. Tenancy in common.
 - b. Joint tenancy with right of survivorship.
 - c. Tenancy by the entirety.

C. Generally Common Elements of Community Property Regimes

Community property elements can vary from jurisdiction to jurisdiction. The following should not be taken as universal.

1. Property acquired during marriage is held in community, regardless of how property is titled. Each spouse has a present undivided one-half interest in community property.
2. Community property is not subject to partition or to alienation of one spouse's undivided one-half interest.
3. One spouse cannot make a unilateral gift of community property to a third person. *See e.g.* Cal. Fam. Code § 1100(b). Some jurisdictions allow for limited unilateral gifting.
4. Management of community property, and the power to dispose of it, varies by jurisdiction. In all cases, however, each spouse owes

fiduciary obligations to the other under principles of relationships of personal confidence. *See e.g.* Cal. Fam. Code § 1100(e).

5. *Bone fide* third parties are generally protected in commercial transactions, regardless of the power of the spouse with whom they are dealing to enter into the transaction. In the case of community property with a joint title of record, however, a third party would necessarily need the consent of both spouses for the transaction to be valid.
6. Property owned by a spouse at the time of marriage remains the separate property of that spouse.
7. An inheritance or gift received by one spouse during marriage remains separate property.
8. Property acquired during marriage is subject to the rebuttable presumption that it is community property. Thus, a spouse who acquires property during marriage from the proceeds of his or her separate property or by gift or inheritance must prove that the property is separate.
9. Creditors of one spouse can reach the assets of the community. Some jurisdictions have modified this rule. *See e.g.* A.S. § 34.77.070(j).
10. The death of a spouse severs the community. The surviving spouse and the heirs or the estate of the deceased spouse share a present, undivided half interest, subject to alienation and partition, in the former community property.
11. Community property does not pass in survivorship unless otherwise elected under applicable law. *See e.g.* Tex. Prob. Code § 452.
12. The nature of income earned from separate property is a point of differentiation among regimes. For example, under California law, a spouse's income off of separate property remains separate. Cal. Fam. Code § 770. In Texas, however, income from separate property is community property. Tex. Fam. Code § 3.002.

D. Examples of Community Property Regimes in Common Law Jurisdictions

1. *California.* All of the above common elements apply. A spouse's income off of separate property remains separate. Cal. Fam. Code § 770. Either spouse has the power to manage the community property, subject to the rules governing fiduciary relationships as they arise from relationships of personal confidence. Cal. Fam.

Code § 1100(e). A postnuptial agreement can transmute separate property to community property and *vice versa*. Cal. Fam. Code §§ 850 – 853.

2. *Texas*. The common elements all apply. Income from separate property, however, is community property. Tex. Fam. Code § 3.002. There are two peculiarities to Texas community property when it comes to management and gifting:
 - a. Management of community property is subject to special rules. Property that would have been a spouse's separate property if not for the community property law, such as personal earnings and income from separate property, is managed solely by that spouse. This is known as "special community property". On the other hand, when special community property has been commingled with the other spouse's special community property (as through joint titling), it must be managed jointly. Tex. Fam. Code § 3.102.
 - b. It is uncertain whether a spouse can make a unilateral gift of jointly-managed community property. Such a gift may be void, because one spouse can neither give away the other spouse's one-half interest nor alienate his or her own one-half interest. In the case of special community property, however, the courts have upheld unilateral gifts after considering various factors, such as the reasonableness of the gift in proportion to other assets, the adequacy of the remaining community property to support a surviving spouse, and the relationship of the donor spouse to the donee. *See Horlock v Horlock*, 533 S.W.2d 52 (Tex. Civ. App. – Houston, 1975); *Givens v The Girard Life Ins. Co.*, 498 S.W.2d 421 (Tex. Civ. App. – Dallas, 1972).
3. *Wisconsin*. By adopting its version of the Uniform Marital Property Act in 1983, Wisconsin enacted a community property regime going forward. Wis. Stat. Chp. 766. Under this regime, the income from separate property is community property, but a spouse may unilaterally elect to treat income on the spouse's separate property as non-marital. Wis. Stat. §§ 766.31(4), 766.59. The creditor of one spouse can reach all community property unless the spouses can overcome the presumption that the obligation was "incurred in the interest of the marriage or the family". Wis. Stat. § 766.55.

E. Examples of Community Property Regimes in Civil Law Jurisdictions

1. *Louisiana.*¹ The fundamentals of Louisiana community property are as follows: Property acquired during the marriage by either spouse is presumed to be community property. La.C.C. Art. 2340. Each spouse has a present ownership interest, and power to dispose at death, of his or her half of each item of community property. With the exception of immovables and certain other types of property, either spouse can manage and dispose of community property, but that spouse is liable to the other for fraud or bad faith in the management. La.C.C. Art. 2346-2354. A spouse (or his estate) can establish the separate nature of property by proving that it was acquired prior to the marriage, by gift or inheritance, or with the proceeds of separate property. The income from separate property remains separate only if the person owning the separate property filed a declaration stating the person's intention to keep the property separate from the spouse. La.C.C. Arts. 2339, 2341.
2. *France.*² Under the French Civil Code, the default regime (if no other election is made) is a community property regime called "legal community". The spouses' community property (the "joint estate") is made up of all property acquired during the marriage and the income earned on separate property. Pensions, however, are separate property. Inheritances and gifts received during marriage remain as separate property. Separate property is known as "proprietary assets". There are special rules as to creditors. Each spouse may manage and dispose of community assets by sale, with certain exceptions, such as immovables. Gifts of community assets must be approved by both. Upon death (or divorce), the community assets are divided evenly. The separate property remains separate.

F. Hybrid Property Regimes.

1. *Germany.*³ Under the German Civil Code, the default regime is "community of surplus". Property acquired by either spouse during marriage remains his or her separate property, subject to an equalization scheme at death or divorce. Under this system, premarital separate property also remains separate and is known as the "initial property". An inheritance or gift received by a spouse during marriage remains separate and is considered part of initial

¹ The author thanks Edward F. Martin of New Orleans, Louisiana for this summary of Louisiana law.

² The author thanks Philippe Xavier-Bender and Thomas Fleinert-Jensen of Gide Loyrette Nouel, Paris, France for this summary of French law.

³ The author thanks Dr. Martin Feick of Schilling Zutt & Anschütz, Frankfurt/Mannheim, Germany for this summary of German law.

property. At death or divorce, the accrued gains during marriage are equalized. For this purpose the value of the initial property of each spouse is deducted from the value of the property at the end of the marriage. The difference is the “surplus” of the spouses during the marriage. At death or divorce, the spouse that has achieved the greater gain must pay one-half of this greater gain (“surplus”) to the other spouse in cash. The claim is only a monetary claim. Depreciation of the value of initial property is considered when determining the surplus. For German inheritance tax purposes, a special marital allowance is available at death. Furthermore, under German succession law (forced heirship), the children’s compulsory portion is generally lower where the spouses lived under the community of surplus than if they lived under the regime of separation of property. A creditor of only one spouse cannot reach the assets of the other.

In practice, spouses often modify the community of surplus in a way that there will be no (or lesser) equalization of accrued gains at divorce.

2. *Québec*.⁴ The hybrid regime in Québec is called a “partnership of acquests”. Under this regime, there is “private property” and there are the acquests. Private property is entirely separate and consists of all property acquired before marriage and, in the case of a gift or inheritance, acquired after marriage. The acquests constitute all other property. Each spouse manages and can dispose of his or her own acquests as that spouse’s separate property, except that a spouse can not make a gift of acquests without the consent of the other spouse. At the death of a spouse, the estate or the surviving spouse may demand a division of the acquests, regardless of which spouse acquired them. Art 448 - 484 C.C.Q.

The partnership of acquests became the default matrimonial property regime in Québec for couples marrying on or after July 1, 1970. Previously, the default regime was community-type regime. Now a couple can elect into a community property regime, discussed further below.

Since July 1, 1989, there special rules with regard to the “family patrimony,” which consist of the residences, furniture and motor vehicles used by a family and the benefits accrued during the marriage under retirement plans. At the death of a spouse, these assets are divided equally. Art 414 - 426 C.C.Q. The “family

⁴ The author thanks Rachel Blumenfeld, Rahul Sharma and Christie Ngan of Miller Thompson LLP, Toronto, Ontario, Canada for this summary of Québec law.

patrimony” remains despite the applicability of any other matrimonial property regime. It cannot be altered by contract.

3. *Ontario*.⁵ In Ontario, spouses live under a hybrid separate property regime. During the marriage, property acquired by one spouse remains his or her separate property. Upon the death of a spouse, the Family Law Act, R.S.O. 1990, c. F.3 (“FLA”) provides that the surviving spouse is entitled to make a claim for an equalization payment with respect to the deceased’s estate (subs. 5(2) of the FLA). The estate of the deceased spouse, however, does not have an equivalent right to claim equalization payment against the surviving spouse. The surviving spouse can make a claim for an equalization payment when the net family property of the deceased spouse is more than that of the surviving spouse. The equalization payment is one-half of the difference between the net family properties of the spouses, although the amount may be adjusted if a court finds equalization unconscionable. A spouse’s “net family property” is the value of all the property he or she owns on the valuation date, other than “excluded property”.

Under the definitions of “net family property” and “excluded property,” the following are not included in the equalization: (a) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse’s debts and other liabilities; (b) gifts and inheritances, other than the matrimonial home, from a third person after marriage. (This includes gifts from the other spouse, but if the gifts make up a significant part of a spouse’s property this may make an equalization payment unconscionable. As a result, a court may award the spouse more or less than half the difference between the net family properties); (c) income from gifts and inheritances from a third person after marriage, provided that the donor or testator provided that such income be excluded; (d) damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship; (e) proceeds or a right to proceeds of a life insurance policy; (f) property into which the above property can be traced; and (g) unadjusted pensionable earnings under the Canada Pension Plan. The property must have been owned by the spouse on the valuation date. The “valuation date” is the day before the date that one of the spouses dies. If part of the property has been depleted or consumed, only the part that remains is excluded.

⁵ The author thanks Rachel Blumenfeld, Rahul Sharma and Christie Ngan of Miller Thompson LLP, Toronto, Ontario, Canada for this summary of Ontario law.

If the surviving spouse is a beneficiary under the deceased's will, he or she must make an election to take under either the will or the Family Law Act, unless the deceased had expressly provided that the surviving spouse is to receive gifts under the will as well as the entitlement under the FLA.

G. Elective Matrimonial Property Regimes.

1. *Alaska.*⁶ Under Alaska's elective regime adopted in 1998, a spouse has a present undivided one-half interest in the community property. The couple may "pick and choose" what property they desire to be community property. If a community property agreement provides that all property acquired by either or both spouses during marriage is community property, then the property of the spouses acquired during marriage and after the determination date is presumed to be community property. The Act does not require that each spouse's earnings be community property. Unless varied by the agreement, the following property is not considered community property: property acquired prior to the determination date; property acquired by gift or inheritance; appreciation or income from a spouse's separate property; or a recovery for damages to property or from personal injury. Special provisions focus upon life insurance policies and proceeds. Upon divorce, community property will be equitably divided between the spouses. If the words "survivorship community property" are used, then on the death of a spouse the ownership rights of that spouse vest solely in the surviving spouse by non-testamentary disposition.

The general management and control of Alaska community property depends upon title and agreement. A spouse acting alone may manage and control (a) community property held in that spouse's name alone; (b) a policy of insurance owned by that spouse; (c) deferred compensation benefits that accrue as a result of that spouse's employment; and (d) community property held in the name of both spouses in the alternative ("or"). Community property held in the names of both spouses other than in the alternative is managed and controlled by both spouses acting together. An individual's right to manage and control does not include the right to make gifts to third parties, except for relatively nominal amounts.

Pursuant to a 2002 amendment to Alaska law, a creditor of one spouse may reach only the separate property of that spouse and that debtor spouse's one-half of the community property.

⁶ The author thanks David G. Shaftel of Anchorage, Alaska, for this summary of Alaska law.

2. *Germany.* German law provides for two elective regimes as alternatives to the Community of Surplus.
 - a. *Separation of Property.* Under this elective regime, the property of each spouse stays separate even after divorce or death. The nature of each spouse's property as separate is the same as under the community of surplus except that there is no equalization at divorce or death. Succession law, however, applies as to compulsory shares of spouse and children.
 - b. *Community of Property.* A second elective regime treats all property, whether acquired before or after marriage, as community property. This regime has no inheritance tax advantages. A creditor of either spouse can reach the community property. Few Germans elect into this regime.

These alternative regimes may be elected before or after marriage, but the contract must be prepared by and executed under the auspices of a German *notaire*.

3. *France.* France offers three elective regimes as alternatives to legal community.
 - a. *Contractual Community.* By written pre- or postnuptial agreement, the spouses may enter into permitted exceptions to the default "legal community" regime. Under the Civil code, these include:
 - i. The inclusion of all assets, including otherwise separate property, as community property. This is known as "universal community".
 - ii. The right of a spouse, upon liquidation of the community assets (at divorce or death), to take possession of certain designated assets (such as works of art), so long as monetary compensation is paid to the other at liquidation.
 - iii. An uneven sharing of the community assets.
 - b. *Separation of Assets.* By written agreement before marriage, the spouses elect into a separate property regime. If a spouse cannot later establish that a particular asset belongs to that spouse, the asset is presumed to be held equally as joint and undivided property.

- c. *Net Additions Participation.* By written agreement, the spouses can elect into a modified separate property regime. Under Net Additions Participation, each spouse participates upon the dissolution of the marriage in the net appreciation of the other's separate estate .

The elective regimes must be entered into under the auspices of a *notaire*, who is a French public official.

4. *Louisiana.* Spouses can enter into a matrimonial contract to be separate in property. La. C.C. Art. 2328. If entered during the marriage, the contract must be approved by a judge. La. C.C. Art. 2329.
5. *Québec.* Spouses can elect by marital contract into a separate property regime or a community property regime. Art 485-492 C.C.Q. Such a contract is valid only if executed under the auspices of a *notaire*. Art 440 C.C.Q.

H. Other Matrimonial Property Regimes.

1. *Sharī'a (Islamic Religious Law).* *Sharī'a* is the law in several predominantly Muslim countries, including Saudi Arabia and Iran. Under *Sharī'a*, property acquired by a husband and wife is the separate property of each, whether acquired before or after marriage. The bridegroom is obligated, however, to make a nuptial gift (*mahr*) to the bride, and this special gift remains the property of the wife throughout her life, even if divorce occurs. The husband also has the obligation to provide maintenance to his wife, even if she is gainfully employed, but the opposite does not hold.

III. **Rules Respecting a Choice of Law in Marital Contracts**

- A. In General. A "choice of law" can mean the choice of a statutory regime (such as those discussed above) or a choice of governing law for a non-statutory pre- or postnuptial agreement. All of these choices are made in the context of a marital contract. Jurisdictions differ in their rules respecting choices.
- B. The American States: Choice-of-Law Provisions in Prenuptial Agreements
 1. *Substantive Law: Varying Rules as to Disclosure and Fairness.* An effective choice of law in a prenuptial agreement can be outcome-determinative in an action to enforce the agreement, because the substantive law of premarital agreements varies among the American States. For example, the required level of disclosure of assets differs among states, and some states require a level of fairness in the agreement (regardless of disclosure).

- a. Disclosure.
 - i. The majority rule, as in states that have adopted the Uniform Premarital Agreement Act, is that financial disclosure is optional. In these states, even an unconscionable agreement will be upheld if either (i) fair and reasonable disclosure was in fact made, (ii) disclosure was voluntarily and expressly waived, or (iii) financial information was known or could reasonable have been obtained. Uniform Premarital Agreement Act (1983) § 6. *Cf.* Uniform Probate Code (2008) § 2-213 (as to waivers of elective share rights).
 - ii. The minority rule requires full disclosure. *E.g. Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990).
 - b. Fairness. Some states require, regardless of the level of disclosure, that the agreement not be unconscionable. *E.g. DeMatteo v DeMatteo*, 436 Mass. 18 (2002); *Edwardson v Edwardson*, 798 S.E.2d 941 (Ky. 1990); *MacFarlane v. Rich*, 132 N.H. 608 (1989); *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985); *Scherer v Scherer*, 249 Ga. 635 (1982). Others have a higher standard, namely, that the agreement is fair or equitable at the time of execution and enforcement (at death or divorce). *E.g. Estate of Benker*, 416 Mich. 681 (1982); Wis. Stat. § 767.255(3)(l) (division of property at divorce under premarital agreement must be equitable).
2. *Restatement (Second) of Conflict of Laws (1969).*
 - a. The Restatement commentary provides that the local law of the state selected by the parties will generally control the issue of a contract's validity in the event that the parties have chosen the law to govern their agreement. § 234 cmt. b; § 257 cmt. d; § 258 cmt. d (with reference in all of these comments to §§ 187-88 concerning the validity of choice-of-law provisions in contracts generally).
 - b. An exception to the general rule exists if the parties would have lacked the power to contract as to a particular provision under the law of the forum and one of two further criteria is satisfied:
 - i. The chosen state has no substantial relationship to the parties and there is no other reasonable basis for the choice; or

- ii. The enforcement of the provision would be contrary to a fundamental public policy of the forum state. § 187(2), and see cmts. f and g.
 - c. The commentary gives an example of an unenforceable provision under trust law. A trust is created by a settlor and trustee who are domiciled in State X. The law of State Y is chosen. State Y allows for a higher maximum trustee fee than State X. Without a substantial relationship to State Y, the provision would be unenforceable in the forum state (X). § 187 cmt. c, Ill. 5.
3. *Example of a Decided Case in an American State*

- a. *DeLorean v. DeLorean*, 211 N.J.Super. 432, 511 A.2d 1257 (N.J.Super.Ch. 1986). John DeLorean was 48 years of age in 1973 when he married Cristina, age 23, in California. John was then a high-ranking executive at General Motors and had substantial wealth. Christina had some business experience in the modeling and entertainment industry. A few hours before they were married, John presented her with a prenuptial agreement and with an attorney to advise her on it. The attorney recommended not signing it, but she signed in anyway. The agreement provided that California law was to apply.

Thirteen years later, in an action in New Jersey for dissolution of the marriage, Christina asked the court to set aside the prenuptial agreement. After determining that John did not commit fraud or misrepresentation and that the agreement was not unconscionable (given subsequent accommodations made by John for Cristina's lifetime benefit and her own successful career as a talk show hostess), the New Jersey Chancery Court considered the adequacy of financial disclosure.

With respect to financial disclosure, the agreement recited as follows:

Husband is the owner of substantial real and personal property and he has reasonable prospects of earning large sums of monies; these facts have been fully disclosed to Wife.

John testified that he had told Christina that he had an interest in a farm in California, a large tract in Montana, and a major league baseball team.

The Chancery Court acknowledged that under New Jersey law, the financial disclosure would be inadequate to support the validity of the prenuptial agreement. The agreement itself, however, chose California law to determine validity. The Court examined California law and concluded that its disclosure standards were much looser, noting that, in the absence of fraud or misrepresentation, “a general idea” of the other’s assets was sufficient and that “there appears to be a duty to make some inquiry” into those assets.

The Court determined that California law should apply because the parties had substantial contacts with California and expected to retain many of the contacts, which indeed happened. The Court found in favor of the validity of the premarital agreement.

4. *Applicability to Elective Regimes.* The rules relating to the effectiveness of choice-of-law provision in prenuptial contracts would apply to premarital statutory elections into alternative matrimonial property regimes in jurisdictions such as Alaska, Louisiana, Québec, Germany and France.

C. The American States: Choice of Law in Postnuptial Agreements

1. *Substantive Law: Majority and Minority Views on Validity.* A great majority of the American States allow for postnuptial agreements to determine the same matters as could be covered in prenuptial agreements. *See* Ravdin, 849 T.M., Marital Agreements, Worksheet 10. A minority of states prohibit postnuptial agreements. *E.g.* Ohio Rev. Code § 3103.06.
2. *Choice of Law under the Restatement.* The Restatement (Second) of Conflict-of-Laws would apply the law of the state chosen by the parties, even where the parties could not have entered into such an agreement in the forum state, where the parties had a substantial relationship to the chosen state. Residency of the spouses in that state would constitute a substantial relationship. This Section, however, provides a conflict of laws rule for contracts generally. The Restatement does not speak specifically to postnuptial agreements. §§ 187-88.
 - a. Would a state in the minority (such as Ohio) recognize a postnuptial agreement entered into by the spouses while resident of a state in which such agreements are valid and specifically choosing the law of that state? An Ohio case suggests that Ohio may so recognize, but the court found

for invalidity of the postnuptial agreement because the spouses were residents of Ohio at the time of execution. The agreement was executed in New Mexico, where they often vacationed in a travel trailer for extended periods during the winter months. *Brewsbaugh v. Brewsbaugh*, 23 Ohio Misc.2d 19, 491 N.E.2d 748 (Probate Ct. of Montgomery County, 1985).

3. *Applicability to Elective Regimes.* The rules relating to the effectiveness of choice-of-law provision in postnuptial contracts would apply to postnuptial statutory elections into alternative matrimonial property regimes in jurisdictions such as Alaska, Louisiana, Québec, Germany and France.

D. Choice-of-Law Rules in Foreign Jurisdictions

1. *Germany.* Germany allows spouses, under a formally valid marital contract, to choose the law governing their property rights; however, their choice of jurisdictions is limited to:
 - a. The law of the state where one of them is a national.
 - b. The law of the state where one of them has his habitual residence.
 - c. If the law governing immovables is chosen, it must be the law of the state where the real estate is located. EGBGB, Art. 15, Sec. 2.
2. *The Hague Convention on the Law Applicable to Matrimonial Property Regimes (Concluded 14 March 1978).*
 - a. Of the five signatory countries to this Convention, three subsequently ratified it: France, Netherlands, and Luxembourg. It entered into force on 1 November 1992.
 - b. The Convention adopted the following principle: “The matrimonial property regime is governed by the internal law designated by the spouses before marriage”. The choice, however, is limited to the law of one of three states:
 - i. The law of the state in which either spouse is a national at the time of designation.
 - ii. The law of the state in which either spouse had his or her habitual residence at the time of designation.

- iii. The law of the state where one of the spouses establishes a new habitual residence after marriage.
 - c. The designation applies to immovables as well as movables. The parties may choose, however, that the law of the situs will apply to immovables.
 - d. The high court of France subsequently acknowledged the freedom of a couple to choose the law applicable to their matrimonial property regime. Cour de cassation, 2 December 1997, Nr. 95-20.026.
3. *European Union.* Acknowledging the movement of EU citizens among the member states and the need for clarity on issues of choice of law and conflict of laws, an EU Justice Commission initiative is under way. On March 16, 2011, it published a proposal for an EU-wide regulation on “jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes”. EU COM(2011) 126/2 (see Appendix for complete text). The proposed regulation provides:

Article 16. Choice of applicable law.

The spouses or future spouses may choose the law applicable to their matrimonial property regime, as long as it is one of the following laws:

- (a) the law of the State of the habitual common residence of the spouses or future spouses, or
- (b) the law of the State of habitual residence of one of the spouses at the time this choice is made, or
- (c) the law of the State of which one of the spouses or future spouses is a national at the time this choice is made.

Id. at Chp. III, Art. 16.

The choice of governing law applies to all of the property acquired during marriage, whether movable or immovable, and wherever located. *Id.* at Chp. III, Art. 15 & Explanatory Memorandum, Sec. 5.3.

The EU proposal also provides rules respecting a choice which changes applicable law:

Article 18. Change of applicable law.

The spouses may, at any time during the marriage, make their matrimonial property regime subject to a law other

than the one hitherto applicable. They may designate only one of the following laws:

(a) the law of the State of habitual residence of one of the spouses at the time this choice is made;

(b) the law of a State of which one of the spouses is a national at the time this choice is made.

Unless the spouses desire otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall be effective only in the future.

If the spouses choose to make this change of applicable law retrospective, the retrospective effect may not affect the validity of previous transactions entered into under the law applicable hitherto or the rights of third parties deriving from the law previously applicable.

Id. at Chp. III, Art. 18.

IV. Conflict of Laws

A. In General

1. In the absence of an effective choice of law or valid pre- or postnuptial agreement, a forum state must determine the law or laws that determine and define matrimonial property.
2. The question of applicable law arises whenever an event occurs which forces the issue: the claim of a creditor, the taxation of property, or the death of a spouse.
3. The forum jurisdiction will apply its particular set of conflict-of-laws principles to determine the substantive law to be applied to the dispute.

B. Conflict-of-Laws Principles

1. *The American States (Rule of Acquisition)*. The Restatement (Second) of Conflict of Laws (1969) (the “Restatement”) provides a set of principles for determining the law applicable to matrimonial property.
 - a. General Principle. The Restatement provides the general rule that the interests of parties in property are determined by either the whole law or the local law of the state with the most significant relationship to the property and the parties. Restatement § 233.

- i. The “local law” (also known as “internal law”) is the substantive law of a state. *Id.* cmt. e.
 - ii. The “whole law” (or simply “law” in Restatement nomenclature) is a reference to both a state’s substantive law and its own conflict-of-laws principles. *Id.*
- b. Effect of Marriage on Interests in Immovables (Real Property).
 - i. Under the Restatement, the forum will refer to the whole law of the state of the situs of real property in determining the effect of marriage on the real property interest held by a spouse prior to marriage or acquired by a spouse during marriage. The Restatement notes that the courts of the situs state will normally apply its own substantive law. Restatement §§ 233-34. An example of a state that will indeed apply its own substantive law to immovables sited in that state is Louisiana. La.C.C. Art. 3523.
 - ii. In *Nolan v. Borger*, 32 Ohio Op.2d 255, 203 N.E.2d 274 (Probate Ct. of Montgomery County, 1963), an Ohio resident left his interest in Missouri real property to three person, two of whom died before him, and the question was whether the devise was to a class (*per capita*). The court looked to the whole law of Missouri and found that under Missouri’s conflict-of-laws principles, a Missouri court, despite being the forum where the real property is sited, would look back to the internal law of the decedent’s domicile to construe the devise). This reference back to the substantive law of the forum is known as *renvoi*.
- c. Movables (Personal Property).
 - i. Effect of Marriage on Interests in Personal Property Held by a Spouse at the Time of Marriage. To determine whether a spouse acquires an interest in the personal property held by the other spouse at the time of marriage, the Restatement looks to the local law of the state which has the most significant relationship to the spouses and the movables with respect to the issue at hand. The Restatement notes

that the law of the state of domicile of the spouse who holds the property at the time of marriage will likely apply. Restatement § 257.

- ii. Effect of Marriage on Interests in Personal Property Acquired by a Spouse during Marriage. In determining whether a spouse acquires an interest in the personal property acquired by the other spouse during marriage, the Restatement again looks to the local law of the state which has the most significant relationship to the spouses and the movables with respect to the issue at hand. In this context, however, the Restatement provides that greater weight will usually be given, over any other contact, to the state where the spouses were domiciled when the personal property was acquired. *Id.* at §258. The corollary to this rule is that *removal of the personal property to another state does not change the law applicable to the interest.* *Id.* at §259.
- a) *E.g.* La.C.C. Art. 3523; *In re McCombs' Estate*, 80 N.E.2d 583 (Probate Ct. of Montgomery County, Ohio, 1948); *See Stephens v. Stephens*, 93 N.M. 1, 2-3, 595 P.2d 1196, 1197-98 (1979) (declining to conclude that New Mexico's statutory provisions defining community and separate property should apply to all property acquired during coverture, regardless of the situs of acquisition).
 - b) The result is that the movement of spouses to and from community and separate property jurisdictions requires a complicated tracing of property and the proceeds of property. *Accord, In re Estate of Kessler*, 177 Ohio St. 136, 203 N.E.2d 221 (1964).
 - c) The Restatement provides an exception where the spouses have made “an effective choice of law”. *Id.* at §258.
 - d) Another exception is provided in the case of a “valid contract between the spouses”. *Id.* cmt. d. No distinction is made between pre- and postnuptial contracts.

- e) The Restatement notes that, where the rights of third-party transferees or creditors are involved, the local law of the forum state may prevail. *Id.* at §259 cmt. c.
- e. Summary of American Principles. Because with respect to property acquired during marriage, the courts of American States will look to the law of the situs of the real property acquired and to the law of the jurisdiction of domicile of the couple for personal property acquired, the American principle can be referred to as the “Rule of Acquisition”.

2. *Ontario (Rule of Last Habitual Residence).*

The courts of Ontario apply a simple and practical rule provided by statute: “The property rights of spouses arising out of the marital relationship are governed by the internal law of the place where both spouses had their last common habitual residence or, if there is no place where the spouses had a common habitual residence, by the law of Ontario”. R.S.O. 1990, c. F.3, s. 15. This can be referred to as the “Rule of Last Marital Domicile”.

3. *England (Rule of First Marital Domicile).* The English principle is to look to the law of the first marital domicile. The seminal case is *De Nicols v. Curlier*, 1 App. Cas. 21 (1900). In that case, a French man and woman were married in France in 1854 and did not execute a marital agreement. They moved to England in 1863 with little money. In 1865 the husband became a naturalized British subject (*i.e.* a national or citizen) and amassed a large fortune. He died in 1897 and left all of his property in trust, giving only a life income interest to his wife with the remainder to their daughter and her children. The surviving spouse asserted that under applicable French law she had a community property interest in all movables acquired in France or anywhere during the marriage. Indeed, under French law, the parties were deemed, in the absence of a matrimonial property agreement, to have agreed to the default statutory community property regime. French law further provided that the deemed contract between the parties is not dissolved by vacating France or obtaining foreign nationality; instead, only divorce or death dissolves it. The House of Lords decided to apply French community property law. The English approach can be referred to the “Rule of First Marital Domicile”. It is also referred to as the principle of “immutability,” because that character of all property acquired during the marriage does not change. *See Estate of Charania v. Commissioner*, 133 T.C. 122 (2009).

4. *Germany (Rule of Nationality)*. The German rules of conflict of laws look to the law of the country of which both spouses are nationals at the time of marriage. This matrimonial property law governs the entirety of the marriage; it continues to apply despite a change of nationality or domicile. If the spouses have different nationalities, then the rules look to the law of the country where they had their habitual residence at the time of marriage. Failing that, the rules favor the laws of the country to which they are mutually most closely connected at the time of marriage. EGBGB, Art. 14, Sec. 1; Art. 15, Sec. 1. The primary German principle can be referred to the “Rule of Nationality”.
5. *The Hague Convention on the Law Applicable to Matrimonial Property Regimes (Concluded 14 March 1978)*.
 - A. This Convention has entered into force in only three countries: France, Luxembourg and the Netherlands.
 - B. The general conflict-of-laws rule of the Convention is that the spouses’ “matrimonial property regime is governed by the internal law of the State in which both spouses establish their first habitual residence after marriage.” *Id.* Art. 4. There are certain exceptions as to countries which apply their own internal law when the spouses are of that country’s nationality. If the spouses do not establish their first habitual residence in the same state and the nationality exception does not apply, then the Convention looks to the internal law of the state that is most closely connected. *Id.*
 - C. The law applicable under the Convention continues to apply regardless of change of nationality or habitual residence.
6. *European Union*. The EU Justice Commission proposal reads as follows:

Article 17. Establishing the applicable law where no choice is made.

1. If the spouses do not make a choice, the law applicable to the matrimonial property regime shall be:
 - (a) the law of the State of the spouses' first common habitual residence after their marriage or, failing that,
 - (b) the law of the State of the spouses' common nationality at the time of their marriage or, failing that,

(c) the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, in particular the place where the marriage was celebrated.

2. Paragraph 1(b) shall not apply if the spouses have more than one common nationality.

EU COM(2011) 126/2, Chp. III, Art. 17.

The Europeans further apply the substantive matrimonial property law of the applicable jurisdiction to all property of the couple:

Article 15. Unity of the applicable law.

The law applicable to a matrimonial property regime under Article 16 [Choice of applicable law], 17[Establishing the applicable law where no choice is made] and 18 [Change of applicable law] *shall apply to all the couple's property.*

The Commentary to the EU proposal elucidates:

5.3. Chapter III: Applicable law

Article 15

The option proposed in the Regulation is that of a single scheme: all the property of the spouses would be subject to the same law, the law applicable to the matrimonial property regime.

Immovable property has a special place in the property of couples, and one of the possible options would be to make it subject to the law of the country in which it is located (*lex situs*), thus allowing a measure of dismemberment of the law applicable to the matrimonial property regime. This solution is, however, fraught with difficulties, particularly when it comes to the liquidation of the matrimonial property, in that it would lead to an undesirable fragmentation of the unity of the matrimonial property (while the liabilities would remain in a single scheme), and to the application of different laws to different properties within the matrimonial property regime. The Regulation therefore provides that the law applicable to matrimonial property, whether chosen by the spouses or, in the absence of any such choice, determined under other provisions, will apply to all the couple's property, movable or immovable, irrespective of their location.

V. **Need for Reform.**

A. Choice of Matrimonial Property Regime.

1. Recognizing the autonomy of persons to a marital relationship, they should be able to affirmatively choose the law that will apply to them, and this choice of a regime should be respected in every jurisdiction to which they remove themselves.
2. Examples.
 - a. The French couple who, before or after their marriage, validly elect into the regime of universal community under French law, whereby all of their property (whether acquired before or after marriage) is held in community.
 - b. The Alaskan couple who validly elects into Alaska's community property regime and each party subjects all of his or her property to it.

B. Recognition of Prenuptial and Postnuptial Agreements.

1. In further recognition of the autonomy of persons, a couple's agreement as to their matrimonial property interests, whether occurring before or after marriage, should be respected in every jurisdiction to which they remove themselves.

C. General Limitations on the Foregoing Principles.

1. The election or agreement must be valid under the chosen governing law, and the couple must have a reasonable connection to that jurisdiction.
2. To guard against fraud, duress or undue influence, the forum's own law on the formal validity of wills is incorporated.
3. The election or agreement may not violate a fundamental public policy of the forum state.

D. Controlling Regime in the Absence of Agreement or Election.

1. The American States may be prohibited by the Constitution from adopting an EU-like "unity of applicable law". The issue is one of substantive due process under the Fourteenth Amendment to the U.S. Constitution. For example, if a spouse acquired separate property in Montana and then the couple moved to California, the characterization of the initially separate property as community property as an absolute proposition would be a taking of vested

property interests. *E.g. In re Thornton*, 1 Cal. 2d 1; 33 P.2d 1 (1934). *See also Brookman v. Durkee*, 46 Wash. 578, 90 P. 914 (1907).

a. The commentary to the Restatement provides: "...it would be inconsistent with state interests and perhaps unfair to the spouses themselves to hold, in the absence of an agreement on their part to the contrary, that irrespective of any change of domicile they nevertheless remain subject during the entire period of their marriage to the local law of one state." Restatement § 258, cmt. b.

2. Considerations.

a. Reasonable Expectations of the Couple.

i. A married couple may reasonably expect that the law of the jurisdiction by which they contracted to marry should govern their matrimonial property relations throughout the course of the marriage. *E.g. De Nicols v. Curlier*, 1 App. Cas. 21 (1900).

b. Uniformity of Result and Ease of Application.

i. Although the Restatement opted for a rule of changing matrimonial property interests, the commentary noted, "Other factors of importance are uniformity of result and ease in the determination and application of the law to be applied. These factors make it desirable that marital property interests in movables should to the extent possible be governed by a single law rather than perhaps that interests in each separate moveable should be determined by the local law of the state where the movable was situated at the time when it was acquired by a spouse." Restatement § 258, cmt. b.

ii. The reference in the Restatement commentary to "other factors of importance" is to the general factors of Restatement § 6(2), which include:

"(f) certainty, predictability and uniformity of result;

"(g) ease in the determination and application of the law to be applied."

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Appendices

- A. Client Questionnaire (Personal Information)
- B. European Commission, Proposal for a COUNCIL REGULATION on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. Brussels, 16.03.2011, COM(2011) 126/2.

Appendix A

Client Questionnaire

Personal Information

Husband's name (*full*): _____

Social Security No.: _____ Date of Birth _____

Place of Birth: _____

Residence Address: _____

Telephone (Home): _____ (Office): _____

(Cell): _____ Email address: _____

Employer/Business: _____

Citizenship(s): _____

If not a U.S. citizen, give visa/immigration status: _____

Wife's Name (*full*): _____

Social Security No.: _____ Date of Birth _____

Place of Birth: _____

Residence Address (if different): _____

Telephone (Home): _____ (Office): _____

(Cell): _____ Email address: _____

Employer/Business: _____

Citizenship(s): _____

If not a U.S. citizen, give visa/immigration status: _____

Date and place of marriage: _____

Name every state or country in which you have lived during your marriage, and the approximate dates (month/year) of each stay.

Have you entered into a marital contract or contracts which affect your respective property rights in relation to the other? (Examples would be a pre- or ante-nuptial agreement, a post-nuptial agreement, or an election into an alternate matrimonial property regime under the law of any jurisdiction.) _____ If so, please provide a copy.

Do you plan to remain a resident of this State, or do you plan to become a resident of another State or country?

Please name the descendants of both of you on a separate page. For each, provide the following:

- Name
- Relationship (*e.g.* child, grandchild)
- Date of Birth
- Place of Birth
- Citizenship(s)
- Residence Address

Please name any descendants of either of you (but not both of you) on a separate page. For each, provide the following:

- Name
- Relationship (*e.g.* child of wife, grandchild of husband)
- Date of Birth
- Place of Birth
- Citizenship(s)
- Residence Address

Please name the parents of each of you on a separate page. For each, provide the following:

- Name
- Parent of husband or wife?
- Date of Birth
- Place of Birth
- Living? If not, date of death
- Citizenship(s)
- Residence Address (or last address)