

Matrimonial Property Regimes & Cross-Border Recognition

Presentation to the International Estate Planning Committee
of the American College of Trust and Estate Counsel
October 16, 2011

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I. Matters Treated.

- A. 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 civil law jurisdictions. “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.
 - 1. 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.
 - 2. Furthermore, the presentation does not cover succession law or the rights of a spouse outside of a will.
- B. 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 be respected as they move.
- C. 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.

II. An Overview 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.* the countries of continental Europe, Scotland, the countries of South America, Mexico, Louisiana, Quebec, Japan, Korea and Taiwan.

- b. Exception: Austria, a civil law jurisdiction where the default regime is separate property.
 - 2. Some common law jurisdictions nonetheless embrace various forms of community property.
 - a. Arizona, British Columbia, California, Idaho, Nevada, New Mexico, Ontario, 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, most Canadian provinces and territories, and about everywhere else the English have been.
- 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, right to remain in the residence, and a support allowance.
 - 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.
 - 5. Non-Typical: during coverture, a spouse not in title has a dower or curtesy interest in real property holdings of the other spouse.
- C. Generally Common Elements of Community Property Regimes.
 - 1. Property acquired during marriage is held in community, regardless of how property is titled.
 - 2. The spouses jointly manage their property.
 - 3. Either spouse has power to sell personal property. Third parties are protected in commercial transactions. Each spouse, however, owes fiduciary obligations to the other.

4. One spouse cannot make a unilateral gift of community property.
5. Community property is not subject to partition.
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. Creditors of one spouse can reach the assets of the community.
9. The death of a spouse severs the community. Each spouse (or the heirs or the estate of the deceased spouse) then has an undivided half interest as a tenant in common, subject to partition.
10. Community property does not pass in survivorship unless otherwise elected under applicable law.
11. 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. In Texas, however, income from separate property is community property.

D. Examples of Community Property Regimes in Foreign Civil Law Jurisdictions.

1. Germany. Three distinct regimes exist under the German Civil Code.
 - a. *Community of Surplus.* The default regime by statute is “community of surplus”. Premarital separate property remains separate. This is known as the “initial property”. An inheritance or gift received by a spouse during marriage remains separate and is considered part of initial property. Property acquired by either spouse during marriage also remains separate. A creditor of only one spouse cannot reach the assets of the other. 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 each spouse 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. Each spouse keeps his title in his or her property. 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.

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.

- b. *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.
- c. *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.

2. France. The French have four regimes.

- a. *Legal Community.* Under the French Civil Code, the default 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.
- b. *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.
- c. *Separation of Assets* (elective). 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.
 - d. *Net Additions Participation* (elective). 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.

III. Rules Respecting a Choice of Law Made by the Itinerant Couple.

- A. In General. A “choice of law” can mean the choice of a statutory regime (such as those discussed under heading II above) or a choice of governing law for a pre- or postnuptial agreement. Jurisdictions differ in their rules respecting choices.
 - 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 a 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.

B. Choice-of-Law Provisions in Prenuptial Agreements in States of the U. S.

- 1. In General. 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 U.S. States. For example, the required level of disclosure of assets differs.
 - a. The majority rule, as in states that have adopted the Uniform Premarital Agreement Act, is that financial disclosure is optional. In these states, the only exception is an unconscionable agreement. Even in that case, the unconscionable agreement is enforceable if the aggrieved

party expressly and voluntarily waived disclosure. Uniform Premarital Agreement Act (1983) § 6.

- b. The minority rule requires full and fair disclosure. *E.g.* *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990).

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 a U.S. 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 her 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.

C. The Postnuptial Agreement in States of the United States.

1. A majority of the States of the U.S. 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.*

2. A minority of states prohibit postnuptial agreements. *E.g.* Ohio Rev. Code § 3103.06.
3. 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?
 - a. 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).
4. 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 rules for contracts generally. The Restatement does not speak specifically to postnuptial agreements. §§ 187-88.

III. 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. English Principles (followed in much of the Commonwealth). 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.

In deciding the case, the House of Lords sided with the argument of the wife. The Earl of Halsbury, as Lord Chancellor, stated:

Here, however, as I have endeavoured to point out, the French marriage confers not only an implied but an actual binding partnership[-]proprietary relation fixed by the law upon the persons of the spouses, the binding nature of which, it appears to me, no act of either of the parties contracting marriage can affect or qualify.

Lord MacNaghten further opined:

But if there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicil. Why should the obligations of the marriage law, under which the parties contracted matrimony, equivalent according to the law of the country where the marriage was celebrated to an express contract, lose their force and effect when the parties become domiciled in another country? As M. Lax [the French law expert] points out, change of domicil and naturalization in a foreign country are not among the events specified in the [1804 French Civil] Code as having the effect of dissolving or determining the community.

Lord Brampton agreed and provided:

It was under this system, which had been for nearly half a century [since 1804] a very familiar and approved form of settlement, of the nature and provisions of which the parties

as French subjects must be presumed to have had knowledge, they were married, and upon the faith and under the belief that its provisions would regulate the property of both so long as their married life continued, and that on the death of either it would be divided between the survivor and the representatives of the deceased, the wife placed in the possession of her husband as part of the capital of their “conjugal partnership” such little property as she could then call her own; and from that time until the death of her husband it was never suggested that with the change of domicil to England the rights of property the wife had acquired by her marriage in France vested in her husband as absolute owner, as if they had been married in England without any settlement at all.

The judgment of the House of Lords was unanimous.

2. German Principles. The German rules of conflict of laws look to the law of the country of which both spouses are nationals. *This matrimonial property law governs the entirety of the marriage and does not change upon change of nationality or domicile*. If they 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.
3. 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.*

4. 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.

5. Common Thread to Non-American Rules. From a review of these jurisdictions other than the States of the U.S., it appears that a Rule of First Marital Domicile is generally applicable. The substantive matrimonial property law of that jurisdiction governs all property acquired during the marriage.
6. Principles of the American States. 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). 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. *Accord*, 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 Ohio 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).

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) This is the principle followed in all fifty States.
- 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.

- c) The Restatement provides a curious exception where the spouses have made “an effective choice of law”. *Id.* at §258. There is no comment on this “effective choice of law” provision.
- 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.

7. Origin of the American Principles. The seminal American case was *Saul v His Creditors*, 5 Maft. (n.s.) 569 (La. 1827). In this case, the insolvent had been married in Virginia in 1794. He and his wife moved to the Territory of Orleans in 1804, which became the State of Louisiana in 1812. The wife died in 1819. While the couple resided in Louisiana from 1804-1819, the husband acquired a great amount of property. Upon his later insolvency in the 1820’s, the children, through the Louisiana community property rights of their deceased mother, claimed half of the property acquired in Louisiana during the marriage. The creditors argued that the law of Virginia controlled all property acquired in the marriage and, as a result, it all belonged to the husband and was subject to their claims in the insolvency proceedings. The children argued that under Louisiana’s Civil Code, there was a “right of partnership, or community of acquests and gains”.

The Louisiana Supreme Court looked to the law of Spain to decide the issue, since Louisiana’s statutes furnished no guide. “Recourse,” Judge Porter said, “must be had to the former laws of the country.” *Id.* p. 3. (Louisiana, formerly and subsequently a French colony, had been a Spanish colony from 1762-1800).

The court was then confronted with a Spanish law. The Spanish Partidas provided, “[i]f they (i.e. the husband and wife) had not entered into any agreement; for the custom of the country where they contracted the marriage, ought to have its effect as it regards the dowry, arras and the gains they may have made; and not that of the place to which they may have removed.”

In interpreting this law, the court noted that in some countries the “common law” looks to the “decrees of their courts” while “in

others, [jurisprudence] is furnished by private individuals, eminent for their learning and integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating, as it were, for their country, and enforcing their legislation by the most noble of all means:—that of reason alone.” *Id.* p. 5. The court found that the scholars of Spain are of the opinion that the cited law applied only to property acquired in the country where the marriage was contracted.

The creditors of Saul argued that Spain was but one country and that the doctrines of international law required that comity be given equally to the laws of other countries. France was cited as an example which follows a different rule: “that where the parties marry without an express contract, they must be presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go.” *Id.* p. 11.

Ultimately, however, the court determined that Louisiana could only look to Spain. “The jurisprudence of Spain came to us with her laws. We have no more power to reject the one than the other. The people of Louisiana have the same right to have their cases decided by that jurisprudence, as the subjects of Spain have, except so far as the genius of our government, or our positive legislation, has changed it. How the question would be decided in that country, if an attempt were made there on the authority of French and Dutch courts, and lawyers, to make them abandon a road in which they have been travelling for nearly three hundred years, we need not say. The question is sufficiently answered by the auto already cited; in which the adoption of the opinions of foreign jurists, in opposition to those of Spain, is reprobated and forbidden.” *Id.* p. 14.

The court concluded that the community property law of Louisiana applied to property acquired while the couple was domiciled in Louisiana, and the heirs of the insolvents’ wife had first claim to half of the assets acquired during that time.

See also Hick’s Administrator v. Pope, 8 La. 554, 28 Am. Dec. 142 (1835); *Succession of Packwood*, 9 Rob. 438, 41 Am. Dec. 341 (La. 1845); *Succession of Popp*, 146 La. 464, 83 So. 765 (1919).

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 (see § 2 of the Proposal in Appendix A).
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 States of the United 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."

- E. Proposal for a Clarifying Rule: Law Applicable to Matrimonial Property.
 - 1. See Appendix A.

References

- Mezzullo, Louis A, 803-3rd T.M., *The Mobile Client: Tax, Community Property, and Other Considerations*.
- Ravdin, Linda J., 849 T.M., *Marital Agreements*.
- Restatement (Second) Conflict of Laws (1969)*, St. Paul MN: American Law Institute Publishers, 1971, 2 volumes.
- Schoenblum, Jeffrey A., *Multistate and Multinational Estate Planning, Second Ed.*, New York: Aspen Publishers, 1999, 2 volumes.
- Treacy, Gerald B., 802-2nd T.M., *Community Property: General Considerations*.

Acknowledgements

Prof. Jeffrey A. Schoenblum, Vanderbilt University Law School, Nashville TN, USA.
Prof. John Peschel (retired), New York University School of Law, New York, NY, USA.
Dr. Martin Feick, Schilling Zutt & Anschütz, Frankfurt/Mannheim, Germany.
Thomas Fleinert-Jensen, Gide Loyrette Nouel A.A.R.P.I., Paris, France.

Appendices

- A. Proposal for a Law Applicable to Matrimonial Property.
- 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.
- C. European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: Bringing legal clarity to property rights for international couples. Brussels, 16.03.2011, COM(2011) 125/3.

Appendix A

Law Applicable to Matrimonial Property

Proposed Sections of the [State Code]

Chapter ___ of State Code

§ 1 Definitions

As used in Section 1 through 5 of this Chapter:

(A) “State” means (1) a State of the United States of America or (2) the District of Columbia.

(B) “Foreign Jurisdiction” means any jurisdiction other than a State. A Foreign Jurisdiction includes a territorial unit of a country in which different Matrimonial Property Regimes apply among the units.

(C) “Internal Law” means the law of a State or Foreign Jurisdiction without reference to its conflict-of-laws rules.

(D) “Matrimonial Property Regime” or “Regime” means the Internal Law of a State or Foreign Jurisdiction governing the property interests of spouses as between them during marriage and at the death of a spouse, and in relation to third parties, whether established by statutory or common law, and including elections and contracts affecting such property interests that are validly made or entered into under such law.

§ 2 Designation of Matrimonial Property Regime

(A) Subject to divisions (B) and (C) of this Section, the Matrimonial Property Regime that determines the spouses’ interests in all property acquired during the marriage shall be the Regime designated by the spouses, whether designated before or after marriage.

(B) The Regime designated by the spouses pursuant to division (A) of this Section may be only one of the following:

(1) The Regime of the State or Foreign Jurisdiction of the domicile of either spouse at the time of designation.

(2) The Regime of the State or Foreign Jurisdiction under the laws of which the marriage was sanctioned.

(3) The Regime of the Foreign Jurisdiction of which either spouse was a citizen at the time of designation. If the country of which a spouse was a citizen includes territorial units in which different Matrimonial Property Regimes apply among the units,

the Regime designated must be one to which a spouse had close connections, taking into account all circumstances, in particular birthplace or prior domicile.

(4) In the case of a designation after marriage, the Regime of the State or Foreign Jurisdiction where the spouses established a common domicile during marriage.

(C) To the extent that a designation under division (A) of this Section supersedes a previously applicable Matrimonial Property Regime, the validity of transactions entered into under such Regime and the rights of third parties deriving from such Regime shall not be affected.

§ 3 Validity of Designation

(A) A designation of a Matrimonial Property Regime under Section 2 of Chapter ___ of the State Code must be formally and substantively valid under the Internal Law of the State or Foreign Jurisdiction designated as of the time of designation. In addition to any other formal requirements of the Internal Law of the State or Foreign Jurisdiction, the designation must be in writing and dated and signed by both spouses.

(B) An individual making a designation of a Matrimonial Property Regime under Section 2 of this Chapter must meet the requirements of Section ___ of Chapter ___ of the State Code [Who May Make a Will].

(C) A designation of a Matrimonial Property Regime under Section 2 of this Chapter shall be presumed to be valid until the contrary is shown by clear and convincing evidence.

§ 4 Public Policy Exception

The application of a Matrimonial Property Regime under Sections 1 through 3 of this Chapter may be refused only if the application would be contrary to a strong public policy of this State.

§ 5 Applicability to Third Parties

Regardless of the application of a Matrimonial Property Regime under Sections 1 through 4 of this Chapter, a bone fide purchaser for value may conclusively rely on the titling of property in the name of one or both spouses.

§ 6 Applicability to Divorce

Sections 1 through 5 of this Chapter shall have no applicability to the determination of marital property under Chapter 3105 of the State Code.