

**2017 HOUSE JUDICIARY**

**HB 1213**

# 2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee  
Prairie Room, State Capitol

HB 1213  
1/24/2017  
27293

- Subcommittee  
 Conference Committee

Committee Clerk Signature

*Virginia Emureth*

## Explanation or reason for introduction of bill/resolution:

Relating to the uniform disposition of community property rights at death act.

## Minutes:

1,2

Chairman K. Koppelman: Opened the hearing on HB 1213.

**Representative Klemin:** (#1.) Went through the testimony. Also went through the bill. (1:45-10:30) (#2) I am here in support of HB 1213.

**Rep. Vetter:** So we are changing this to community property rights so all their property is like tenants in common?

**Rep. Klemin:** When you say joint tenants in common that is two basic systems of joint ownership of real property in North Dakota. Joint tendency with the right of survivorship or tenants in common what joint tenancy is means that each of the spouses owns ½ of the whole. On the death of one of the spouses it automatically passes to the surviving spouse. If it wasn't for this act, we would have a lot of different rules that would apply in North Dakota in which are being applied now which deprived one of the parties of that benefit of being to own ½ of it.

Survivorship it does not have to be probated. Tenants in common means each owns one half and they can distribute it by will. That is the way community property is. Surviving spouse could get one third but not 1/2.

**Rep. Vetter:** So in that same situation the one spouse could get ½ regardless with this community property rights and then the other ½ they could say I am giving it to someone else.

**Rep. Klemin:** That is correct.

**Rep. Paur:** Why are we looking at this bill?

**Rep. Klemin:** Because in ND courts cannot treat community property that was acquired in another state while they are residents of another state as community property. This allows the people that own that property to decide whether they are going to continue having it as community property in North Dakota or they can sever it.

**Chairman K. Koppelman:** On one hand all community property in another state, when the proceeds of that property are used to purchase property in North Dakota would be treated according to the community property rights in the other state and yet I heard you say it is up to the other party to do that or not.

**Rep. Klemin:** That is correct. On page 3, Section 14.021-8. This chapter does not prevent married persons from severing or altering their interests to which this chapter applies.

**Chairman K. Koppelman:** So they could do that when they get here through a deed?

**Rep. Klemin:** Let's say that they bought a house in North Dakota and they took title as joint tenants with the right of survivorship. When one of the spouses dies the other spouses automatically becomes the owner of all the property.

**Chairman K. Koppelman:** If they had joint tendency would apply?

**Rep. Klemin:** Under ND law when that spouse dies that property goes where ever the survivor wishes if they have a will or if they didn't have a will it goes under the law of testate succession.

**Chairman K. Koppelman (20:00)** If a married couple had property in California, sold a home, sold the home and put it in one spouses name. That person dies does that property automatically would be treated under the California laws in North Dakota?

**Rep. Klemin:** Someone would have to do something. The estate of the spouse would have to say "this is community property and dad left the 1/2 to us". Unless they do something under this act they are going to apply the rules of North Dakota.

**Chairman K. Koppelman:** This just creates an option for those people.

**Rep. Magrum:** So you want California rules to apply here?

**Rep. Klemin:** Only with respect to property that was community property when they were residents of California.

**Rep. Magrum:** Would it be all community property states?

**Rep. Klemin:** It would be any community property state.

**Rep. Magrum:** Is there any reason ND isn't a community property state?

**Rep. Klemin:** (23:125-23:45) Went over history of this law.

**Rep Simons:** Couldn't a simple will do the same thing?

**Rep. Klemin:** I don't do a lot of probate work so I don't come across it very often. Attorney's that do this kind of work asked us to submit this bill.

**Tony Weiler:** Executive Director of the State Bar Association. I would stand for any questions.

**Rep. Jones:** How is this implemented? What happens if he dies? Does this give her the opportunity then to exercise her rights?

**Tony Weiler:** If they purchase property here they could look to follow the rules of North Dakota if they have taken those steps. If they haven't then it would relate back to the laws of community property.

**Rep. Jones:** What happens if he dies and they have not made any declaration of how the ownership is to be done. Does this allow her the right to own 1/2 of the property if she steps into the probate afterwards?

**Tony Weiler:** That is how I understand that. It would be in accordance with whatever document they set up. If they haven't set up anything then you look to how it was purchased.

**Chairman K. Koppelman:** I thought Rep. Klemin said the court would know how they bought the property that they wouldn't apply.

**Tony Weiler:** You would have to look at the property and how it was purchased.

**Chairman K. Koppelman:** I don't see an effective date on that act.

**Tony Weiler:** I only have two pages too. In accordance with drafting the laws when they take effect would affect only those prospectively.

**Rep. Klemin:** The application of this law would apply when it takes effect. It would apply to property that had been community property owned by the spouses and what happens when they die?

**Chairman K. Koppelman:** If someone moved here years ago from California and understanding the laws of North Dakota at the time and understanding those community property provisions would not apply here in North Dakota as they did in California this law would change all that.

**Rep. Klemin:** They had community property from where they came from. This gives them an option to use the rule from the old state when one of them dies.

**Chairman K. Koppelman:** It may not be their option.

**Rep. Satrom:** This appears to giving people options and making things easier for people who have moved to this state. Are there any rights we are taking off the table when applying this?

**Rep. Klemin:** This would allow them to continue to apply the laws of the state of which they acquired the property.

**Tony Weiler:** I could have someone from my real property look at that.

**Rep. Paur:** I would like more clarification. basically this applies at one spouse's death. What happens now?

**Chairman K. Kopelman:** Is there Opposition? Any Neutral testimony? Meeting adjourned.

# 2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee  
Prairie Room, State Capitol

HB 1213  
1/24/2017  
27328

- Subcommittee  
 Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to uniform disposition of community property rights at death act.

Minutes:

**Chairman K. Koppelman:** Opened HB 1213. Community property that was held in another state and the proceeds from which were used to purchase property in North Dakota would be treated differently the day after this bill passes verses how they are treated today unless people make some kind of an effort to do something different with it.

**Rep. Klemin:** We are only talking about community property at death. Nobody is going to know it was community property unless somebody tells a probate court that they don't want to go by the rules of North Dakota in respect to the disposition of the will and personal property because this was community before they moved to North Dakota and then they will have to show a change of custody.

**Chairman K. Koppelman:** We do not have community property so are we transferring this community property to ND?

**Rep. Vetter:** I like this because the husband and wife buy this house in California and they bought it thinking she would get half. All of a sudden they move to ND and she wouldn't get half.

**Rep. Klemin:** That property isn't owned anymore.

**Chairman K. Koppelman:** This bill creates two sets of circumstances in North Dakota just because they live in a community property state.

**Rep. Roers Jones:** To me it seems like there is no benefit in carrying the community property benefits to ND.  
Why do we want to have the election when we can do the same thing in tenants in common?

**Rep. Klemin:** (7:23) In the community property state the husband buys the property and the title is only in his name. It still is community property and she has ownership of 1/2 of it even

though it is only in his name. They decide to move to North Dakota and they sell that property now they have the proceeds of that property and buy another house with those proceeds and put it only in his name. That puts it in a situation where they did the same thing as they did in California because they didn't know any different. Now when he dies she would get less than under the rule of community property law.

**Rep. Klemin:** It only applies to the married couple that came from a community property state.

**Rep. Paur:** Rep. Klemin can you think of any down side to this bill? It only applies to that particular couple who moved into this situation and if they have an estate plan that would alter that community property situation. There are some cases of people who have moved here from community property states that have this situation apply.

**Rep. Roers Jones:** People have no idea about joint tenants and tenants in common. I am tending to not approving this bill. When people move to this state they are usually given that choice at that time.

**Chairman K. Koppelman:** This would create a presumption that most people would not be aware of that might affect their assets in a way they didn't expect.

**Rep. T. Jones:** This is a tool in the tool box of a woman who had her husband died and she had come from a community property state.

**Chairman K. Koppelman:** I disagree with that I think it creates a presumption that if you own that asset in a community property state and it came to a common law state that those laws are going to apply to that asset that was acquired with those proceeds unless you do something different.

**Rep. Roers Jones:** It is common that one spouse would move to a different state by themselves.

**Rep. Klemin:** We are not just talking about a home here. It would be real or personal property like a checking account etc. This has to go through the court and we have provisions in sections 4-5 about perfection of the title of surviving spouse.

**Chairman K. Koppelman:** I am troubled by some of the discussions that have come up.

**Rep. Satrom:** Would we still be a common law state?

**Chairman K. Koppelman:** Correct. We are creating 2 different classes of ownership.

**Rep. T. Jones:** I think we are over thinking this. I don't see any way this can be abused.

**Rep. Roers Jones:** The other problem I have with this bill is there is no end. What happens with the rest of the assets while you are in North Dakota?

**Rep. Klemin:** If it was community property it would stay as community property.

**Rep. Roers Jones:** There would be no election to treat the property.

**Rep. Klemin:** This uniform law has been around since 1971. I think those kinks have been worked out.

**Chairman K. Koppelman:** So you have \$100,000 that was brought in from 10 years of appreciation in equity in property from Wisconsin and come to North Dakota and invest in property for \$500,000. You live here for 30 years and the house is paid for and is worth one million dollars. The probate is \$100,000 is that considered community property? Or is the \$900,000 considered community property?

**Rep. Roers Jones:** I would like to change your example to money earned in North Dakota.

**Chairman K. Koppelman:** Whatever the money is that game over as community property and you earn money in ND and eventually your loan is paid off so maybe the house is worth \$750,000 you die that house is now sold so you are dealing with only \$100,000 of that estate.

**Rep. Vetter:** The judge when you go through probate can rule on this.

**Rep. Klemin:** There is going to have to be competing interests, this all about fairness.

**Chairman K. Koppelman:** In North Dakota if someone owns a piece of property and moves to California is that property treated by community property state? Do we have a motion on the floor?

**Rep. Maragos:** I move a do pass on HB 1213.

**Rep. Satrom:** I seconded.

Roll Call Vote: 10 Yes No 2 Absent 3 Carrier: Rep. Paur

**2017 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 1213**

House Judiciary Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Place on Consent Calendar  
 Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Rep Maragos Seconded By Rep. Satrom

Representatives	Yes	No	Representatives	Yes	No
Chairman K. Koppelman		✓	Rep. Hanson	✓	
Vice Chairman Karls	✓		Rep. Nelson	✓	
Rep. Blum	✓				
Rep. Johnston	✓				
Rep. Jones	✓				
Rep. Klemin	✓				
Rep. Magrum	✓				
Rep. Maragos	✓				
Rep. Paur	✓				
Rep. Roers-Jones	✓				
Rep. Satrom	✓				
Rep. Simons		✓			
Rep. Vetter	✓				

Total (Yes) 10 No 2

Absent 3

Floor Assignment : Rep. Paur

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1213: Judiciary Committee (Rep. K. Koppelman, Chairman)** recommends **DO PASS**  
(10 YEAS, 2 NAYS, 3 ABSENT AND NOT VOTING). HB 1213 was placed on the  
Eleventh order on the calendar.

2017 TESTIMONY

HB 1213

#1  
1213  
1-24-17

TESTIMONY OF REP. LAWRENCE R. KLEMIN  
HOUSE JUDICAIY COMMITTEE  
HOUSE BILL NO. 1213  
JANUARY 23, 2017

Mr. Chairman and Members of the Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I also serve as a Commissioner representing North Dakota on the national Uniform Law Commission (ULC).

The ULC is a non-profit organization formed in 1892 to draft non-partisan model legislation in the areas of state law for which uniformity among the states is advisable. The State of North Dakota has had a long and successful history of enacting ULC acts, including the Uniform Commercial Code, Uniform Anatomical Gifts Act, Uniform Trade Secrets Act, Uniform Transfers to Minors Act, the Uniform Partnership Act, Uniform Probate Code, as well as many others. North Dakota has been a member of the ULC since 1893. I have been a Commissioner since 1999 and have served on many ULC study and drafting committees. North Dakota has enacted 78 uniform acts (a total of 170 separate enactments, including original acts, revisions and model acts).

I am appearing before you today to testify in support of House Bill 1213, the Uniform Disposition of Community Property Rights at Death Act. This Act was drafted by the ULC in 1971. It has a limited scope and is intended to be enacted by non-community property rights states. It is being introduced in ND in order to resolve how community property is to be handled for people who have moved to ND from a community property state.

Spouses who have been domiciled in a community property state frequently move to a common law state which does not have the same system of marital rights. Community property law concerns the distribution of property acquired by a couple during marriage in the event of the end of the marriage, whether by divorce or by the death of one of the parties. In community property states, all property accumulated by a husband and wife during their marriage becomes joint property, even if it was originally acquired in the name of only one partner. There are 9 community property states, including AZ, CA, ID, LA, NV, NM, TX, WA and WI. AK and TN have an optional community property system. All other states, including ND, are common law states where there is no presumption that property acquired by spouses during their marriage is the property of both spouses. Common law states have different rules for determining the ownership of property at the time of a divorce or at death.

House Bill 1213 only applies to the disposition of property at death and does not apply to the division of property at the time of a divorce. Currently, under North Dakota law, the disposition of real property at death is determined by following the ND rules regardless of whether the property was originally acquired as community property in a community property state or with the income or proceeds of community property. The purpose of the Act is to preserve the rights of each spouse in property which was

#1  
1213  
1-24-19

community property prior to the change of domicile, as well as property substituted for that property where the spouses have not indicated an intention to sever or alter their "community" rights.

Section 14-21-01 describes the "application" of this chapter and states that it only applies to the disposition of property at the death of a married person. It applies to personal property, wherever located, which was acquired as community property or with the income or proceeds of community property, and to real property located in ND, which was acquired with the income or proceeds of community property.

Section 14-21-02 sets out rebuttable presumptions concerning the status of property, depending on when and where it was acquired.

Section 14-21-03 describes the disposition of community property in ND at the death of a married person. The surviving spouse is entitled to one-half of the property and the estate of the deceased spouse is entitled to the other half.

Section 14-21-04 provides that the title of the surviving spouse can be perfected by an order of the probate court.

Section 14-21-05 provides that the estate of the decedent or an heir or devisee can institute an action in court to perfect the title.

Section 14-21-06 describes the rights of a purchaser for value or a lender in specific property if the surviving spouse or the estate has apparent title to the property. The purchaser for value or lender takes free of the rights of the surviving spouse or estate.

Section 14-21-07 provides that creditor's rights are not affected.

Section 14-21-08 states that married persons are not prevented from severing or altering the status of community property.

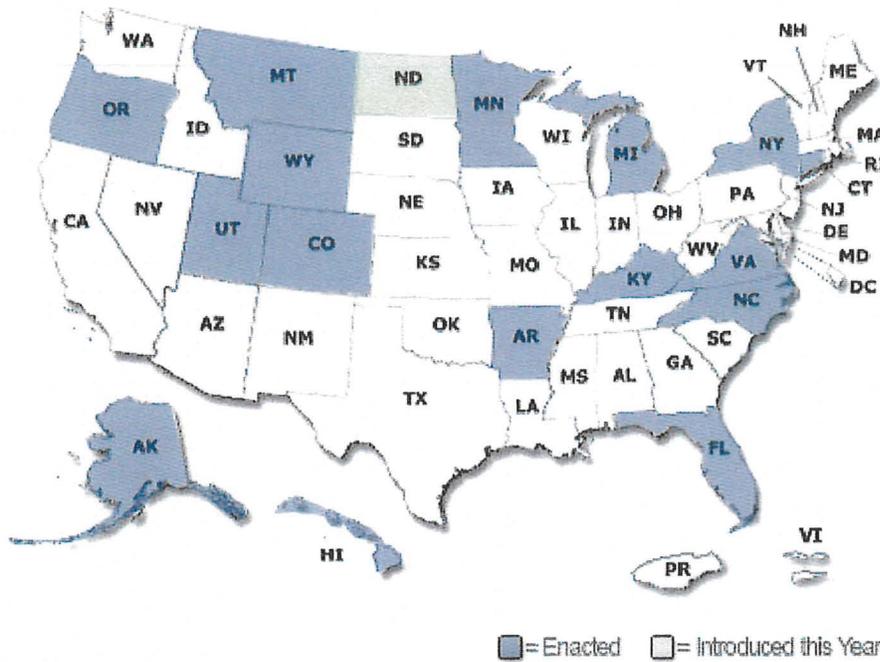
Section 14-21-09 provides that this chapter does not authorize a person to dispose of community property by will if the law of the community property state does not allow it.

Section 14-21-10 relates to uniformity of application and construction of this law.

Mr. Chairman and members of the committee, I have provided a complete copy of the uniform law with the official comments to the clerk for inclusion in the record of this hearing. I urge your support of House Bill 1213. Thank you.

#1  
1213  
1-24-17

**Enactment Status Map**



**Legislative Tracking**

**2017 Introductions & Enactments**

State	Bill	Sponsor	Status
North Dakota	HB 1213	Klemin	Introduced

3

#2  
1213  
1-24-17

**UNIFORM DISPOSITION OF COMMUNITY  
PROPERTY RIGHTS AT DEATH ACT**

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

And by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN  
ALL THE STATES

At its

ANNUAL CONFERENCE  
MEETING IN ITS EIGHTIETH YEAR  
AT VAIL, COLORADO  
AUGUST 21-28, 1971

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association  
At its Meeting at New Orleans, Louisiana, February 7, 1972

*Klein handout*

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Disposition of Community Property Rights at Death Act was as follows:

DWIGHT A. HAMILTON, 900 Equitable Building, Denver, CO 80202, *Chairman*

SALVADORE E. CASELLAS, G.P.O. Box 3507, San Juan, PR 00936

LINDSEY COWEN, University of Georgia School of Law, Athens, GA 30601

DOUGLAS KEDDIE, P.O. Box 551, Yuma, AZ 85364

STANLEY PLETTMAN, Beaumont Savings and Loan Building, Beaumont, TX 77701

ROBERT A. LUCAS, 115 W. 5<sup>th</sup> Ave., Gary, IN 46402, *Chairman, Division D, Ex Officio*

ALAN N. POLASKY, University of Michigan Law School, Ann Arbor, MI 48104, *Reporter*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS  
676 N. St. Clair St., Suite 1700  
Chicago, IL 60611  
(312) 915-0195

## UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT

### PREFATORY NOTE

Frequently spouses, who have been domiciled in a jurisdiction which has a type of community property regime, move to a jurisdiction which has no such system of marital rights. As a matter of policy, and probably as a matter of constitutional law, the move should not be deemed (in and of itself) to deprive the spouses of any preexisting property rights. A common law state may, of course, prescribe the *dispositive* rights of its domiciliaries both as to personal property and real property located in the state. California's development of its "quasi-community property" laws illustrates the distinction.

The common law states, as contrasted to California, have not developed a statutory pattern for disposition of estates consisting of *both separate* property of spouses and property which was community property (or derived from community property) in which both spouses have an interest. In these states there have been relatively few reported cases (although the number has been increasing in recent years); the decisions to date show no consistent pattern and the increasing importance of the questions posed suggests the desirability of uniform legislation to minimize potential litigation and to facilitate the planning of estates.

This Act has a very limited scope. If enacted by a common law state, it will only define the dispositive rights, at death, of a married person as to his interests at death in property "subject to the Act" and is limited to real property, located in the enacting state, and personal property of a person domiciled in the enacting state. The purpose of the Act is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their "community" rights. It thus follows the typical pattern of community property which permits the deceased spouse to dispose of "his half" of the community property, while confirming the title of the surviving spouse in "her half."

It is intended to have no effect on the rights of creditors who became such before the death of a spouse; neither does it affect the rights of spouses or other persons prior to the death of a spouse. While problems may arise prior to the death of a spouse they are believed to be of relatively less importance than the delineation of dispositive rights (and the correlative effect on planning of estates). The prescription of uniform treatment in other contexts poses somewhat greater difficulties; thus this act is designed solely to cover dispositive rights at death, as an initial step.

The key operative section of the Act is Section 3 which sets forth the dispositive rights in that property defined in Section 1, which is subject to the Act. Section 2 follows Section 1's definition of covered property and is designed to provide aid, through a limited number of rebuttable presumptions in determining whether property is subject to the Act.

No negative implications were intended to be raised by lack of inclusion of other presumptions in Section 2; areas not covered were simply left to the normal process of ascertainment of rights in property.

The first three sections form the heart of the Act; the succeeding sections might almost be described as precatory and have been added to clarify situations which would probably follow from the first three sections but which might raise questions. Thus, Section 8 makes it clear that nothing in the Act prevents the spouses from severing any interest in community property or creating any other form of ownership of property during their joint lives; and, such action on their part will effectively remove any property from classification as property subject to this Act. Similarly, Section 9 makes it clear that the Act confers no rights upon a spouse where, by virtue of the property interests existing during the joint lives of the spouses, that spouse had no right to dispose of such property at death. By way of illustration, in at least one community property jurisdiction, the wife has no right to dispose of any part of the community property if she predeceases her husband. If the law of that jurisdiction is construed so as to treat this as a rule of property, then the move to the common law state should not alter the "property interest" of the spouses by conferring a right on the wife which she did not previously possess. On the other hand, if the provision is treated as simply establishing a pattern of dispositive rights on death of a wife who predeceases her husband, rather than a property right, the common law state of new domicile could prescribe an alternative pattern of dispositive rights. The Act does not resolve this question; rather it simply makes clear that it does not affect existing "property rights," leaving to the courts the interpretation of the effect of the community property state's law.

**UNIFORM DISPOSITION OF COMMUNITY PROPERTY  
RIGHTS AT DEATH ACT**

**Section 1. [Application.]** This Act applies to the disposition at death of the following property acquired by a married person:

(1) all personal property, wherever situated:

(i) which was acquired as or became, and remained, community property under the laws of another jurisdiction; or,

(ii) all or the proportionate part of that property acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, that community property; or

(iii) traceable to that community property;

(2) all or the proportionate part of any real property situated in this state which was acquired with the rents, issues or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property.

**COMMENT**

This section defines property subject to the Act.

**Subsection (1): Personal Property**

Subsection (1) is designed to cover all personal property which was acquired while the spouses were domiciled in a community property state, to the extent that it would have been treated as community property by that state at the time of acquisition and that no further action terminated the community character of the property. It also includes any property which was not originally community property but became such by agreement and, further, brings within the Act any personal property which can be traced back to a community source. Again, the Act only applies if there was no severance of the community interests [Section 8]. [While Section 3 applies to the dispositive rights of persons domiciled in the enacting state, the Act, as a practical matter, may be effective as to property located outside the state only to the extent that the state of the situs of the property is willing to recognize the policy of the domiciliary state.]

*Example 1.* H and W, while domiciled in California, purchased 100 shares each of A Co., B Co., and C Co. stock with community property (earnings of H). H and W were transferred to a common law state which had not enacted this Act; while domiciled there H sold the 100 shares of A stock and with the proceeds purchased 100 shares of D stock. Subsequently H and W became domiciled in Michigan which had enacted this Act; H sold the B stock and 50 shares of D Co. stock and purchased 150 shares of E stock. H died domiciled in Michigan with 100 shares of C Co., 50 shares of D Co. and 150 shares of E Co. stock; all of the stock had always been registered in H's name. All of the shares, traceable to community property or the proceeds therefrom, constitute property subject to this Act.

### **Subsection (2): Real Property**

Subsection (2) deals with real property and is confined to real property located within the enacting state (since presumably the law of the situs of the property will govern dispositive rights). The policy and operation of this subsection are intended to be the same as those set forth in subsection (1).

*Example 2.* H and W, while domiciled in California, purchased a residence in California. They retained the residence in California when they were transferred to Wisconsin. After becoming domiciled in Wisconsin they used community funds, drawn from a bank account in California, to purchase a Wisconsin cottage. H and W subsequently became domiciled in Michigan; they then purchased a condominium in Michigan for \$20,000 using \$15,000 of community property funds drawn from their bank account in California and \$5,000 earned by H after the move to Michigan. H died domiciled in Michigan; title to all of the real property was in H's name. Assuming Michigan had enacted this Act, three-fourths of the Michigan condominium would be property subject to this Act; the Michigan statute would not, however, apply to either the Wisconsin or California real estate. If Wisconsin had enacted this Act, the Wisconsin statute would apply to the Wisconsin cottage.

### **Subsections (1) and (2): Apportionment**

In both subsections (1) and (2) an apportionment is required by the phrase "all or the proportionate part" where personal property, or real property situated in the enacting state, has been acquired partly with property described as subject to the Act and partly with other (separate) property. To put it succinctly, the phrase represents a condensation of an area covered by many pages in a prior draft and is simply a statement of policy; it leaves to the courts the difficult task of working out the precise interest which will be treated as the "proportionate part" of the property subject to the dispositive formula of Section 3. Simply by way of illustration, assume that a single man (domiciled in a community property state) purchased a life insurance policy with a face amount of \$100,000 and an annual premium of \$1,000. Assume further that he paid three premiums and then entered into marriage. Further assume that the next seven premiums were paid with his earnings while domiciled in the community property state and that he and wife then moved to a common law state where the next ten premiums were paid from his earnings in that common law state; he then died after the payment of the twenty premiums. Under one interpretation of the law of Texas the contract would remain the separate property of the insured; the community would have a claim for community funds advanced to pay premiums

and, ignoring interest, it would appear that \$7,000 of the proceeds would be treated as community property and the remaining \$93,000 would be treated as the separate property of the deceased spouse. On the other hand, a state like California would probably treat the proceeds as being 65% separate and 35% community (basing the allocation of proceeds upon the percentage of separate and community funds contributed). Further variations could be mentioned. The illustration is one of the simpler problems. Much more difficult problems are encountered where benefits under a qualified pension and profit-sharing plan are involved and the employee has been domiciled in both community property and common law jurisdictions during the period in which benefits have accrued. Attempts at defining the various types of situations which could arise and the varying approaches which could be taken, depending upon the state, suggest that the matter simply be left to court decision as to what portion would, under applicable choice of law rules, be treated as community property. The principle suggested is that at least a portion should be treated as community, if the appropriate law so treated it. Ordinarily, such questions should not arise if the problem is foreseen and effective planning takes place prior to death of a spouse.

**Section 2. [Rebuttable Presumptions.]** In determining whether this Act applies to specific property the following rebuttable presumptions apply:

(1) property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as or to have become, and remained, property to which this Act applies; and

(2) real property situated in this State and personal property wherever situated acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship, is presumed not to be property to which this Act applies.

#### COMMENT

The purposes of the rebuttable presumptions are simply to assist a court in applying the definitions in Section 1, through a process of tracing the property to a community property origin.

#### **Subsection (1)**

Subsection (1) of Section 2 deals with property acquired by the spouses while domiciled in a community property state. It thus provides that if one of the spouses acquired property while so domiciled, such property is “presumed” (a rebuttable presumption) to have been and remained community. It may be shown, of course, that such property was the separate property of the spouse and the law of the state of domicile may furnish the rule. For example the law of community domicile may provide the rule that property acquired in the name of the wife shall be deemed to be her separate property or that a particular subsequent act effectively severed the community property interest.

*Example 1.* H, married to W and domiciled in California, acquired stock; later H and W became domiciled in Michigan. Such property, if retained, is presumed to be property subject to this Act. By operation of Section 1 the proceeds of sale or exchange of such stock, and property acquired with the proceeds or income of such stock, would be deemed subject to the Act. If, however, upon the death of H, H’s personal representative rebutted the presumption by evidence that the stock was acquired by H with his separate property (or by inheritance) neither the stock nor property acquired with that property or the income therefrom (unless the income itself would be subject to the Act because, under the applicable law, income from separate property is deemed to be community property), would be subject to this Act. Similarly, the presumption may be rebutted by showing that such property, though originally community property, was effectively severed by an act of the spouses. It should be emphasized that the presumption is simply one of procedural convenience and neither changes the nature of the property interests nor prevents an interested person from showing the separate nature of the property.

### **Subsection (2)**

Subsection (2) sets up a rebuttable presumption that where a domiciliary of a *common law* state acquired property in such form as to indicate that title was in joint tenancy, tenancy by the entireties, or some other form of joint ownership with right of survivorship, it will be presumed that the property is not subject to the Act. This presumption was deemed appropriate as expressing the normal expectations of the spouses and to facilitate ascertainment of title to real property located in the enacting state, as well as personal property wherever located.

*Example 2.* John and Mary Jones, formerly domiciled in California, became domiciled in Illinois and purchased a residence, taking title in the names of “John and Mary Jones as joint tenants, and not as tenants in common, with right of survivorship.” Regardless of the source of the funds, the Illinois residence would be presumed to be held in joint tenancy and not subject to this Act.

**Section 3. [Disposition upon Death.]** Upon death of a married person, one-half of the property to which this Act applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this

State. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this State. With respect to property to which this Act applies, the one-half of the property which is the property of the decedent is not subject to the surviving spouse's right to elect against the will [and no estate of dower or curtesy exists in the property of the decedent].

#### COMMENT

This section deals with the dispositive rights, at death, of (1) a married person domiciled in the enacting state as to personal property and (2) of any married person, including a nondomiciliary of the enacting state, as to real property located in the enacting state; it also sets forth rules for intestate succession to property subject to this Act.

#### **Testate Disposition**

The dispositive pattern is the usual one encountered in the community property states; the deceased spouse may dispose of his one-half of the community property, subject to the provisions of Section 9.

*Example.* H and W were formerly domiciled in California and are now domiciled in Michigan. All of their property was community property prior to the move from California to Michigan. At H's death he held title to a home in Michigan which had been purchased with the proceeds of the sale of a home in California which had been community property. Stock acquired as community property in California was held in his name in safety deposit boxes located in Illinois and Michigan. H and W had acquired a cottage in California as community property, held in H's name, and it was so held at the time of his death. H and W acquired a Michigan resort condominium, taking title as tenants by the entireties. H acquired bonds issued by his employer with earnings in Michigan and held title in his own name.

The Michigan residence and the stock would be deemed property subject to this Act and H would have the right under Section 3 to dispose of half of that property by his will. The remaining property would not be deemed subject to this Act.

#### **Intestate Succession**

If the property subject to this Act passes by intestate succession, the law of the enacting state applies to the decedent's one-half, again subject to Section 9. If under the law of the enacting state, a surviving spouse is entitled to one-third of the decedent's property by intestate succession, the result of the Act is to give to her two-thirds of the property subject to the Act. For example, if the spouses had recently moved to a common law state and owned \$300,000 of property (all being personal property held in the husband's name and acquired as community property), the wife would be entitled to one-half of the property (\$150,000) and would receive a

1/3 share of the husband's half (\$50,000) for a total of \$200,000. It is clearly within the power of the enacting state to prescribe any pattern of intestate succession deemed appropriate, and views may differ. In some community property states, the surviving spouse receives all of the decedent's community property upon intestate succession; in another, she would receive none. Similarly, the common law state may alter the pattern to fit its own policy determination.

### **Dower, Curtesy, Elective Share**

Dower and curtesy do not exist in community property and have been abolished in many common law states; policy considerations suggest that no such interest should exist in property subject to this Act, since the surviving spouse already has a one-half interest in such property. Similar reasons suggest a denial of any right in the surviving spouse to elect a statutory share in the one-half of the property over which the decedent had a power of disposition.

**Section 4. [Perfection of Title of Surviving Spouse.]** If the title to any property to which this Act applies was held by the decedent at the time of death, title of the surviving spouse may be perfected by an order of the [court] or by execution of an instrument by the personal representative or the heirs or devisees of the decedent with the approval of the [court]. Neither the personal representative nor the court in which the decedent's estate is being administered has a duty to discover or attempt to discover whether property held by the decedent is property to which this Act applies, unless a written demand is made by the surviving spouse or the spouse's successor in interest.

### **COMMENT**

This section simply provides for perfection of title interests of the surviving spouse (e.g. where title was in the name of the deceased spouse) by orders of the court of appropriate jurisdiction (e.g. the probate court) in the enacting state. This section is designed to eliminate any liability of the personal representative for a breach of his fiduciary duty by failing to search for or to discover whether property held by the decedent is property defined in Section 1, unless a written demand is made by the surviving spouse or the spouse's successor in interest. In several states the Court administering a decedent's estate has a duty or undertakes to advise parties in interest of their legal and equitable rights, and this section is similarly designed to eliminate such Court's liability for failing to discover the community rights and to advise the interested party of his rights. Nothing contained in this section is to be construed to interfere with the Court's jurisdiction in a proper proceeding to perfect the title of the surviving spouse in and to property to which this Act applies.

**Section 5. [Perfection of Title of Personal Representative, Heir or Devisee.]** If the title to any property to which this Act applies is held by the surviving spouse at the time of the decedent's death, the personal representative or an heir or devisee of the decedent may institute an action to perfect title to the property. The personal representative has no fiduciary duty to discover or attempt to discover whether any property held by the surviving spouse is property to which this Act applies, unless a written demand is made by an heir, devisee, or creditor of the decedent.

#### COMMENT

This section is a corollary to Section 4. Since title is apparently in the surviving spouse, the section simply provides for an action by the personal representative, heirs, or devisees and is again designed to eliminate any liability of the personal representative for a breach of his fiduciary duty by failing to discover or to attempt to discover whether property held by the surviving spouse is property subject to this Act, absent a written demand by an heir, devisee or creditor of the decedent.

#### **Section 6. [Purchaser for Value or Lender.]**

(a) If a surviving spouse has apparent title to property to which this Act applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the personal representative or an heir or devisee of the decedent.

(b) If a personal representative or an heir or devisee of the decedent has apparent title to property to which this Act applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the surviving spouse.

(c) A purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.

(d) The proceeds of a sale or creation of a security interest shall be treated in the same manner as the property transferred to the purchaser for value or a lender.

#### COMMENT

This section is designed to protect purchasers and lenders taking a security interest, who acquire such interest for value, after the death of the decedent, from a person who appears to have title to property to which this Act applies. The only requirement is that the purchaser or lender have acquired his interest for value; there is no requirement of good faith absence of notice. The purpose of the section is to permit reliance upon apparent title and facilitate both ascertainment of title and disposition of assets where adequate consideration is paid. Since, during the joint lives of the spouses, the spouse with apparent title would have been able to convey title (at least as to community property) though being held accountable to the other spouse for an appropriate allocation of the proceeds or any breach of fiduciary obligation, the Act simply extends this treatment to disposition of the assets after the death of the spouse.

**Section 7. [Creditor's Rights.]** This Act does not affect rights of creditors with respect to property to which this Act applies.

**Section 8. [Acts of Married Persons.]** This Act does not prevent married persons from severing or altering their interests in property to which this Act applies.

#### COMMENT

The rights, and procedures, with respect to severance of community property vary markedly among the community property states. The Act simply makes clear that nothing in the Act itself in any way limits the rights of the spouses to sever community property or to create a form of ownership not subject to this Act.

**Section 9. [Limitations on Testamentary Disposition.]** This Act does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.

**Section 10. [Uniformity of Application and Construction.]** This Act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

**Section 11. [Short Title.]** This Act may be cited as the Uniform Disposition of Community Property Rights at Death Act.

**Section 12. [Repeal and Effective Date.]** The following acts and laws are repealed as of the effective date of this Act:

- (1)
- (2)

**Section 13. [Time of Taking Effect.]** This Act shall take effect. . . .