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Transmutation of Community Property

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TRANSMUTATION OF COMMUNITY PROPERTY*

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More and more attorneys in common law jurisdictions are being called upon to counsel clients, who were at one time domiciled in a community property state, concerning their interests in property that were acquired while residing in the community state or that have subsequently been received. The necessity for a determination of the exact property interest of the client may occur as a result of a divorce, property settlement or the need for an estate plan. It is in the realm of estate planning, however, that the attorney may be of inestimable value to his clients, who chance to be husband and wife, due to the fact that both of them are desirous of having a workable plan that will insure compliance with their dispositive schemes, while at the same time, minimizing the potential tax liability. He will have greater flexibility here than in the aforementioned situations. The parties are amicable, and the attorney has an opportunity to view the total picture and to take any remedial measures prior to the time when a judicial body might be asked to intervene.

Realizing that community property is a stranger to the common law, the attorney may fear, as well he should, that the courts in the common law jurisdiction might not treat the property as community. On the contrary, they might tend to rationalize toward some analogous form of common law ownership such as a joint tenancy or a tenancy in common. Fully appreciating that the court's characterization could drastically affect the ability of the spouses to make the desired testamentary disposition in a particular fashion, as well as altering the tax liability, he may not be willing to leave this to chance. It may be preferable to have title to this property held in a form of ownership with which the courts in the common law states are familiar. In fact, he may find it necessary, or at least desirable, to alter in some manner the respective interests which each spouse possesses in the property transported from the community property state. Before attempting such an alteration, he should check

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to determine whether the state which characterized the property as community, and from which the parties moved, will permit the severance of the community aspects of the property, and if it does, under what circumstances, and with what formalities such severance will be allowed.

After ascertaining the possibility of a severance or partition if the property had remained in the community state, the attorney should then consider whether the change of domicile to a common law jurisdiction affected the parties' right to modify the community aspects. These problems are immediately posed: May the spouses sever their interests in the property although it was forbidden by the community state? If a partition was permitted by the community property state, should the method of effecting this change be governed by the law of the community state in which the property was acquired, or by the law of the common law state in which the parties now reside? Is there any advantage to be derived from complying with the laws of both jurisdictions if this is possible?

I. COMMUNITY PROPERTY JURISDICTIONS

A. Arizona

The question of whether the spouses may change the character of the property acquired by them after their marriage first arose in Arizona in connection with the conveyance of some real estate from a husband to his wife. The instrument of title recited that it was conveyed in consideration of love and affection.[1] The transfer was subsequently attacked on the theory that it was ineffectual to pass title, inasmuch as a conveyance of community realty was, by statute, invalid without the signatures of both spouses on the deed as grantors. The court found the purpose of this requirement to be for the protection of the wife should the husband attempt to convey the property to a third person. It was not designed to interpose obstacles in the path of a conveyance directly to the wife. To require the wife's signature on a conveyance to herself would be a senseless and useless act. Hence, the husband's signature was sufficient to vest the property in the wife as a part of her separate estate, thereby severing the community aspects of the reality.

The court continued to voice its approval of such transfers of community property from a husband to his wife on the basis that

1. Luhrs v. Hancock, 6 Ariz. 340, 57 Pac. 605 (1899).

they were completed gifts,[2] but when confronted with a conveyance of the wife's interest to her husband, it was first held ineffective due to the absence of the husband's name on the deed as one of the grantors.[3] On rehearing,[4] the logic of the decision was reconsidered, and it was held that if a deed from a husband to his wife satisfied the requirement that both spouses join in the conveyance, there was no sound reason why a deed from the wife to the husband, executed in a like manner, did not comply with the same requirement.

It was then argued that if the conveyance was valid, the most that could be transferred would be the wife's one-half interest so that the husband would continue to hold the other one-half as community property. The court felt that any such analysis was a legal impossibility because by definition both spouses are invested with an interest in the community property, and when the wife conveyed her interest to her husband she had nothing left. With the husband now the sole owner of the legal title, it could no longer be a part of the community, and he would own it as a portion of his separate estate.

Just as the community character of the property may be destroyed by a conveyance of the interest of one spouse to the other,[5] if property is purchased with community funds and title is originally taken in the name of only one spouse, with the full consent of the other and with the intention of making a gift, the newly acquired property becomes the separate property of the title holder, and the community funds will not be traced through the transmutation.[6] However, the interests of neither spouse in the community property will be severed or destroyed by such a gift or conveyance if the rights of creditors would be affected thereby.[7] This is not really a restriction upon their ability to sever. It merely prevents their doing so to the detriment of third parties. The rule would be the same if one of the

2. Germania Fire Ins. Co. v. Bally, 19 Ariz. 580, 173 Pac. 1052 (1918); Main v. Main, 7 Ariz. 149, 60 Pac. 888 (1900).

3. Schofield v. Gold, 25 Ariz 213, 215 Pac. 169 (1923).

4. Schofield v. Gold, 26 Ariz. 296, 225 Pac. 71 (1924).

5. In addition to those cases in notes 1-4, see Lincoln Fire Ins. Co. v. Barnes, 53 Ariz. 264, 88 P.2d 533 (1939); Schwartz v. Schwartz, 52 Ariz. 105, 79 P.2d 501 (1938); Colvin v. Fagg, 30 Ariz. 501, 249 Pac. 70 (1926).

6. Jones v. Rigdon, 32 Ariz. 286, 257 Pac. 639 (1927); Germania Fire Ins. Co. v. Bally, 19 Ariz. 580, 173 Pac. 1052 (1918).

7. Lincoln Fire Ins. Co. v. Barnes, 53 Ariz. 264, 88 P.2d 533 (1939).

spouses attempted to convey his or her separate property in fraud upon a creditor.

If the property involved is personalty instead of real estate, one spouse can give his or her share to the other, or they may divide it between themselves, without the formalities of any particular legal instrument. Therefore, where a husband and wife, in contemplation of a separation, divided their household goods and personal effects, the status of the property was changed from community to the separate property of the recipient.[8]

When a husband and wife can contract with each other concerning their respective interests in the community property, and are allowed to hold property as joint tenants or as tenants in common in addition to community, they may agree that property should be conveyed to them in one of these forms and not as community property.[9] Since a joint tenancy with the right of survivorship is in derogation of the general principle that all property acquired after the marriage is community property, it must be clearly established that both spouses realize the significance of the manner in which the title is being taken. With the community funds being frequently managed by the husband, it would be possible for them to be used in the purchase of joint tenancy property without the wife having any knowledge of this change of status. The mere insertion of such language as "joint tenants" in the conveyancing instrument may not be sufficient to overcome the presumption in favor of the community. If a provision were inserted in the document of title whereby the spouses acknowledge that they intend to take the property as "joint tenants with the right of survivorship," it will ordinarily be given effect, and the property will no longer belong to the community.[10]

Once the property has been changed from community, the participation of both spouses may be necessary to produce a reconversion to its former status. In *Russo v. Russo*,[11] the husband filed an action for a divorce and asked the court to partition some real estate owned by the parties as joint tenants. While the case was pending, the wife executed and delivered a quitclaim deed to this property to a third person who subsequently

8. Lightning Delivery Co. v. Matteson, 45 Ariz. 92, 39 P.2d 938 (1935).

9. *In re* Baldwin's Estate, 50 Ariz. 265, 71 P.2d 791 (1937). For the statutory provision relating to joint tenancies and tenancies in common between a husband and wife, see ARIZ. REV. STAT. ANN. § 33-431 (1956).

10. Collier v. Collier, 73 Ariz. 405, 242 P.2d 537 (1952).

11. 80 Ariz. 365, 298 P.2d 174 (1956).

reconveyed it to her. The trial court held that this transaction by the wife reconverted the property to community since it was acquired during the marital relationship. A distribution was ordered on this assumption. The Arizona Supreme Court disagreed, stating that when property is owned by the spouses as joint tenants the respective interests of each are owned as his or her separate property. Neither has the right to convey the other's separate property. All the wife could transfer was her one-half interest, and when the property was reconveyed to her she received only what she had transferred. It was as if the transaction had never occurred, and the property continued to be owned by them as joint tenants without any reconversion to community property.

Arizona has no statute specifically allowing or forbidding a husband and wife from altering the status of their community property; the only provision being that a married woman over the age of twenty-one has the same right as a man to contract, except that she cannot bind the common property of herself and her husband.[12] The net effect is to permit the spouses to contract with each other concerning their community interests in any property so owned. They may alter their respective interests in any fashion desired, provided they both realize the significance of the severance and are agreeable thereto. Another statute gives legally married minors the same right and privilege to deal with their community property.[13]

Parties who are intending to marry are statutorily prohibited from entering into an ante-nuptial contract, agreement or renunciation, the object of which is to alter or vary in any respect the law of descent and distribution, either with regard to themselves or the children that either may have by some other person, or with respect to their common children.[14] From this, it would appear that if prospective marital partners agree before their marriage that any property acquired subsequent to marriage would be held by either spouse in any form other than community property, and if it would have been community in the absence of such an agreement, it would definitely affect the law of descent as provided by statute, and would thus be void.[15] If the contract does not alter the law of descent and distribution and is not

12. ARIZ. REV. STAT. ANN. § 25-214 (1956).
13. ARIZ. REV. STAT. ANN. § 25-212 (1956).
14. ARIZ. REV. STAT. ANN. § 25-201 (A) (1956).
15. *In re* Mackevich's Estate, 93 Ariz. 129, 379 P.2d 119 (1963).

otherwise contrary to good morals and law, it is valid.[16] When valid, it may not be altered after the marriage has been solemnized.[17]

B. California

A husband and wife in California may enter into an agreement or transaction between themselves concerning the interests which either of them possess in any property, just as if they were not married. The only exceptions are the general rules which regulate and control the actions of persons occupying confidential relationships with each other.[18] With this statutory authority, they may convert their community property into separate property by contract,[19] or one spouse may make a gift of his or her share to the other, thereby converting it into the separate property of the donee spouse.[20] They may, likewise, convert their separate property into community property by the same methods.[21]

The contract between the spouses whereby the community character of the property is changed to the separate property of either, or both, of the spouses becomes executed immediately upon the agreement, with nothing remaining to be done by either party.[22] Since the contract is then fully executed, and is not merely executory, the statute of frauds is not applicable, and the spouses may alter the community character of real property, as well as personalty, without the necessity of any formal instrument.[23] A written document is not a prerequisite to its validity. The alteration may be effected by an oral agreement if it can be reasonably inferred from the conduct of the parties, together with

16. ARIZ. REV. STAT. ANN. § 25-201 (A) (1956).

17. ARIZ. REV. STAT. ANN. § 25-201 (D) (1956).

18. CAL. CIV. CODE § 158.

19. *In re* Sear's Estate, 182 Cal. App. 2d 526, 6 Cal. Rptr. 148 (1960); Dallman v. Dallman, 170 Cal. App. 2d 729, 339 P.2d 636 (1959); James v. Pawsey, 162 Cal. App. 2d 740, 328 P.2d 1023 (1958); *In re* Wieling's Estate, 37 Cal. 2d 106, 230 P.2d 808 (1951).

20. Johnson v. Johnson, 214 A.C.A. 29, 29 Cal. Rptr. 179 (1963); Odone v. Marzocchi, 34 Cal. 2d 431, 211 P.2d 297 (1949); Hutchinson v. California Trust Co., 43 Cal. App. 2d 571, 111 P.2d 401 (1941).

21. Metcalf v. Metcalf, 209 Cal. App. 2d 742, 26 Cal. Rptr. 271 (1962); *In re* Hartnett's Estate, 155 Cal. App. 2d 280, 318 P.2d 81 (1957); Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956).

22. *In re* Raphael's Estate, 91 Cal. App. 2d 931, 206 P.2d 391 (1949).

23. James v. Pawsey, 162 Cal. App. 2d 740, 328 P.2d 1023 (1958); Faust v. Faust, 91 Cal. App. 2d 304, 204 P.2d 906 (1949); Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398 (1934).

all of the surrounding circumstances, that they intended a transmutation.[24] The only consideration that is required for such a contract, whether in oral or written form, is the mutual consent of the spouses.[25]

Spouses in California may not only own property as separate or community property but may hold it as joint tenants or as tenants in common.[26] Therefore, an agreement between the parties that any further acquisitions during their marriage will be deemed to be held by them as joint tenants will effectively alter the community aspects of such property.[27] In fact, the agreement prevents the property from ever being labeled as community. From the date of the contract, each spouse owns a distinct and separate interest in the new accumulations and may convey that interest as he or she would any other separate property.[28] The community or joint tenancy property may also be converted into property which they agree to hold as tenants in common.[29]

Unlike a conversion of the community to separate property, if the property to be taken in joint tenancy form is real estate, the contract must be in writing, for an oral agreement is not sufficient, under these circumstances, to destroy the community character.[30] With respect to personal property, the court first permitted a joint tenancy to be created orally,[31] but after the adoption of a statute providing that "a joint tenancy in personal property may be created by a written transfer or agreement,"[32] the court held the language to be mandatory.[33] Thus, a written instrument or contract is essential to the creation of a joint tenancy in either realty or personalty.

24. James v. Pawsey, 162 Cal. App. 2d 740, 328 P.2d 1023 (1958); Sandrini v. Ambrossetti, 111 Cal. App. 2d 439, 244 P.2d 742 (1952); *In re* Raphael's Estate, 91 Cal. App. 2d 931, 206 P.2d 391 (1949); Long v. Long, 88 Cal. App. 2d 544, 199 P.2d 47 (1948).

25. Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956).

26. CAL. CIV. CODE § 161.

27. See also Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P.2d 905 (1944) where there was evidence that it was intended to remain as community though title was taken as joint tenants; *In re* Gurnsey's Estate, 177 Cal. 211, 170 Pac. 402 (1918); Estate of Harris, 169 Cal. 725, 147 Pac. 967 (1915).

28. *In re* Kessler, 217 Cal. 32, 17 P.2d 116 (1932).

29. McDonald v. Morley, 15 Cal. 2d 409, 101 P.2d 690 (1940); Wheeland v. Rodgers, 20 Cal. 2d 218, 124 P.2d 816 (1942).

30. CAL. CIV. CODE § 683. See *In re* Harris' Estate, 9 Cal. 2d 649, 72 P.2d 873 (1937).

31. *In re* Harris' Estate, 169 Cal. 725, 147 Pac. 967 (1915).

32. CAL. CIV. CODE § 683.

33. California Trust Co. v. Bennett, 33 Cal. 2d 694, 204 P.2d 324 (1949).

A third method of altering the community interests is for the parties to deposit funds in a bank account in both of their names, and in such a form that the money is payable to either of them during their joint lives and to the survivor upon the death of either. The community character of any funds so deposited will be lost, and the spouses will hold the account as joint tenants.[34] However, the bank account,[35] together with any other property held in joint tenancy, may be reconverted to community property if the spouses should so desire.[36] Also, if they had intended it to be community from the beginning, and it had been placed in some other form through mistake, no written agreement would be necessary for its reconversion.[37] It had never actually been anything other than community.

While a husband and wife may orally contract with respect to a conversion of their community into separate property, any such contract entered into prior to the marriage must be in writing.[38] The only necessary consideration is the mutual promise to marry.[39] In *Hussey v. Castle*,[40] the prospective spouses entered into an oral contract whereby certain property was to belong to the wife after the marriage, and in compliance therewith the property was subsequently conveyed to her. After the transfer, a creditor of the husband obtained a judgment against him and sought to sell this property in satisfaction of the debt. The creditor alleged that the agreement between the spouses was invalid as an ante-nuptial contract because it had not been reduced to writing in conformity with the statutory requirement. The court held that since the contract had been completely performed, it was assailable by neither the husband nor wife, nor by a third party. If both spouses, or if either of them, fulfills their part of the contract it will be given effect although it was not originally reduced to writing.[41] Otherwise, it will be invalid. The ante-nuptial contract may encompass all property owned by either

34. CAL. FINANCIAL CODE § 852.

35. Hotle v. Miller, 51 Cal. 2d 541, 334 P.2d 849 (1959).

36. Sears v. Rule, 27 Cal. 2d 131, 163 P.2d 443 (1945).

37. *Ibid.*

38. CAL. CIV. CODE § 178.

39. Ayoob v. Ayoob, 74 Cal. App. 2d 236, 168 P.2d 462 (1946); *In re* Wamack's Estate, 137 Cal. App. 2d 112, 289 P.2d 871 (1955).

40. 41 Cal. 239 (1871).

41. Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956); *In re* Wahlefeld's Estate, 105 Cal. App. 770, 288 Pac. 870 (1930); Martin v. Pritchard, 52 Cal. App. 720, 199 Pac. 846 (1921).

spouse at the time of the marriage and any, including wages, that may be subsequently acquired.[42]

With this ability to freely contract between themselves, there would seem to be very little difficulty for a husband and wife in California to alter the community aspects of their property at anytime suitable to them, the important element being that they intended the alteration or transmutation to occur. Without this intention there would be no way of rebutting the presumption that the property belongs to the community. Therefore, while the parties may convert their community property into another form of ownership by an oral agreement, it is certainly advisable to use a written instrument in order to meet this burden of proof.[43]

C. Idaho

By statutory enactment, either spouse in Idaho may execute a conveyance to real property naming the other spouse as the grantee, and the deed or other document of title need only be acknowledged by the grantor spouse.[44] Such a conveyance raises a presumption that the property is to be held thereafter by the grantee spouse as a part of his or her separate estate, and if the property previously belonged to the community, its former status is lost by the transmutation.[45]

The rule with respect to gifts of community property between the spouses is that since they are able to contract with each other, when either spouse is free from debt he or she may make a gift of his or her interest in the community to the other. It thereupon becomes the separate property of the donee.[46] When a gift or conveyance of community property has thus been made while there are outstanding debts owed by the donor or grantor, only the creditors in existence at the time of the transaction may complain. A person giving credit afterwards may not attack the gift's validity.[47] Even if there are outstanding debts, it will not be set aside as a fraudulent conveyance if the donor spouse has other property out of which the creditors may satisfy their legal claims.[48]

42. Barker v. Barker, 139 Cal. App. 2d 206, 293 P.2d 85 (1956).
43. For a discussion of the inherent dangers in the use of an oral agreement and the necessity of being able to establish the true ownership interests, see Erhman, *Instant Community Property,* 40 CAL. S.B.J. 259 (1965).
44. IDAHO CODE ANN. § 32-906 (1963).
45. IDAHO CODE ANN. § 32-906 (1963).
46. Hobbs v. Hobbs, 69 Idaho 201, 304 P.2d 1034 (1949).
47. Glover v. Brown, 32 Idaho 426, 184 Pac. 649 (1919).
48. McMillan v. McMillan, 42 Idaho 270, 245 Pac. 98 (1926).

Idaho permits any two persons to open a joint bank account whereby the deposits may be made payable to either person or to the survivor.[49] In construing this statute, the court held that it was designed primarily for the protection of the bank and was not intended as a guide to determining the rights of the depositors or the interests of any persons claiming under them.[50] It does not create a conclusive and irrebutable presumption that all of the money in the account at the death of one depositor automatically inures to the benefit of the survivor. On the contrary, the intention of the depositor to make a gift is determinative of any survivorship interests.[51] If a gift of a joint interest coupled with the right of survivorship was intended at the time of the creation of the account, the survivor will be entitled to the balance upon the death of the other depositor, but if no gift was intended there will be no survivorship right by virtue of the death.[52]

While all of the cases concerning joint bank accounts have dealt with two persons other than husband and wife,[53] there is no reason to suppose that a contrary result would have been reached if spouses had been involved and the money deposited had been community property. The statute does not forbid the creation of a joint account by a husband and wife, and if the funds deposited belonged to the community the same rule should govern as in the case of any other gift from one spouse to the other. Hence, if either intends for the other to have a right of survivorship in this joint account at his or her death, the community funds will be converted into the separate property of the survivor. Otherwise, they will retain their original community character.

A husband and wife in Idaho may thus convert their community property into the separate property of either by making a gift of their own interest to the other, or by a written instrument of conveyance if real estate is being transferred.[54]

49. IDAHO CODE ANN. § 26-1014 (1963).

50. *In re* Chase's Estate, 82 Idaho 1, 348 P.2d 473 (1960).

51. Idaho First Nat'l Bank v. First Nat'l Bank of Caldwell, 81 Idaho 285, 340 P.2d 1094 (1959).

52. Gray v. Gray, 78 Idaho 439, 304 P.2d 650 (1956).

53. *In re* Chase's Estate, 82 Idaho 1, 348 P.2d 473 (1960); Idaho First Nat'l Bank v. First Nat'l Bank of Caldwell, 81 Idaho 238, 340 P.2d 1094 (1959); Gray v. Gray, 78 Idaho 439, 304 P.2d 650 (1956).

54. Even when a gift has been made, the spouses have made use of a written instrument and there is no indication in any of the cases as to whether a gift of community personal property could be made by an oral agreement. If the property had a high value, it would certainly be advisable to reduce the terms of the gift to writing in order to prove that there was a completed gift if this should later become necessary.

D. Louisiana

Persons contemplating marriage in Louisiana may, by a contract executed before a notary and two witnesses,[55] modify or limit the applicability of the community property system of that state with respect to any property that they may bring into the marriage, or subsequently acquire. They may even agree that the community of acquests and gains shall never exist between them.[56] By this ante-nuptial contract the parties are, in effect, voluntarily severing their community interests in any future acquisitions since the agreement will determine what property belongs to the community and what belongs to the separate estate of each spouse as it is accumulated.[57] By their joint action, the prospective spouses may alter the terms of the contract at any time prior to the celebration of the marriage, but after the exchange of vows it may not be changed in any respect.[58] Although the parties have this freedom to vary the community system, one writer has suggested that as a practical matter the ante-nuptial contract has long been obsolete, and "the devise may be presumed to be used today only by a few mature persons of means who are contemplating marriage and wish to contract away the community regime."[59]

Once the parties have married without the benefit of an ante-nuptial agreement, they may not thereafter cause a voluntary severance or dissolution of the community property,[60] with the one exception that spouses who have been married elsewhere may make a valid marriage contract within one year after their change of domicile to Louisiana.[61]

This inability is vividly illustrated in *Driscoll v. Pierce*[62] where the wife brought an action against her husband asking that her separate property be returned to her. After receiving judgment, she executed a written document wherein she renounced her interest in any community property owned by her husband. Fol-

55. LA. CIV. CODE ANN. § 2328.

56. LA. CIV. CODE ANN. § 2332.

57. LA. CIV. CODE ANN. §§ 2332, 2392, 2399, 2424.

58. LA. CIV. CODE ANN. § 2329.

59. Morrow, *Matrimonial Property Law in Louisiana,* 34 TUL. L. REV. 3, 11 (1959).

60. LA. CIV. CODE ANN. § 2329: Nides v. Hoyle, 236 La. 1032, 109 So. 2d 908 (1959); Messersmith v. Messersmith, 229 La. 495, 86 So. 2d 169 (1956); Sheard v. Green, 219 La. 199, 52 So. 2d 714 (1951); Driscoll v. Pierce, 115 La. 156, 38 So. 949 (1905).

61. LA. CIV. CODE ANN. § 2329.

62. 115 La. 156, 38 So. 949 (1905).

lowing the death of her husband, she brought another action seeking to set aside the previous decree and renunciation on the theory that the first judicial proceedings were in reality nothing more than a voluntary separation of property and, as such, incapable of producing any legal effect upon her right to a portion of the community property. Even though the interim between the two actions exceeded six years, the court held that the spouses were absolutely prohibited from severing the community aspects of their property. Any consensual dissolution of the community even when accompanied by a judgment and a written renunciation is invalid.

In a case where the spouses were living apart, the wife executed an affidavit wherein she renounced all interests in the community property, but when the husband obtained a divorce, the decree made no mention of a distribution of the community property nor of their previous agreement.[63] Some time after the divorce had been granted, the wife sought to have the community partitioned. The court so ordered holding that "a contract of this nature between husband and wife is absolutely void when entered into prior to a judicial separation or divorce."[64] Again, a partition was ordered although a court decree had previously been rendered.

Notwithstanding this total inability of the spouses to voluntarily sever their community property, either one is statutorily permitted to make a gift to the other[65] with the limitation that they can not make "any mutual or reciprocal donation by one and the same act."[66] In applying this statute to a gift of community property from the husband to the wife, the court held that the community character was destroyed, and the property became a part of the separate estate of the donee wife.[67] The court felt that there was no reason why such a gift would not be valid because the wife is the only one entitled to prevent the husband from making a gift of community property,[68] and when she gives her consent the donation is valid.[69] The court later held that either spouse may give his or her interest in the community

63. Nides v. Hoyle, 236 La. 1032, 109 So. 2d 908 (1959).
64. *Id.* at 1037, 109 So. 2d at 910.
65. LA. CIV. CODE ANN. § 1746.
66. LA. CIV. CODE ANN. § 1751.
67. Succession of Bendel, 116 So. 2d 84 (La. App. 1959).
68. LA. CIV. CODE ANN. § 2404.
69. Succession of Williams, 171 La. 151, 129 So. 801 (1930); Succession of Byrnes, 206 La. 1026, 20 So. 2d 301 (1944).

property to the other[70] whether that interest be in personality[71] or reality.[72]

Therefore, the only methods by which a husband and wife in Louisiana may alter or sever their interests and rights in their community property is a voluntary partition or severance through the medium of an ante-nuptial contract, or by gift if they marry without such a contract.

E. Nevada

By reason of a statutory enactment, a husband and wife in Nevada may enter into any contract or transaction with each other which either might have entered into if unmarried.[73] This includes the right to alter legal relations in any property possessed by them.[74] With this contractual ability, the spouses may sever the community aspects of their property thereby converting it into the separate property of either spouse, but such a dissolution must be supported by evidence of a clear and convincing character that a transmutation was intended.[75] While the statutes do not specify any particular style of contract necessary to effect a conversion, a conveyance of real property between the spouses would presumptively have to be in writing because of the statute of frauds.[76] Even then, the deed creates only a presumption that a transmutation was desired. This may be rebutted by evidence to the contrary.[77]

Since the spouses may hold property as joint tenants or as tenants in common, they should be able to contractually convert the property held by them as community into one or the other of these forms.[78] Furthermore, if they own property as joint tenants, it may be converted to community in the same manner.[79]

The parties may likewise sever the community character of their property by making a gift, and the donee spouse receives it

70. Succession of Johnson, 8 So. 2d 139 (La. App. 1942).
71. Coney v. Coney, 220 La. 473, 56 So. 2d 841 (1951).
72. Ponthier v. Bordelon, 66 So. 2d 32 (La. App. 1953).
73. NEV. REV. STAT. § 123.070 (1957).
74. NEV. REV. STAT. § 123.080 (1) (1957).
75. Petition of Fuller, 63 Nev. 26, 159 P.2d 579 (1945).
76. NEV. REV. STAT. § 111.05 (1957).
77. Petition of Fuller, 63 Nev. 26, 159 P.2d 579 (1945).
78. NEV. REV. STAT. § 123.030 (1957).
79. Mullikin v. Jones, 71 Nev. 15, 278 P.2d 876 (1955).

as a part of his or her separate estate.[80] Inasmuch as the presumption prevails that all property accummulated after marriage belongs to the community, the party claiming the property as separate must present facts from which it may be deduced that a severance or transmutation was intended.[81] Mere naked statements by the spouses that a gift was desired will not suffice.[82] However, a written declaration is not necessary because a gift may be inferred from the conduct of the parties together with the donee's transactions concerning the property after its receipt.[83]

F. New Mexico

Like California and Nevada, New Mexico adopted statutes permitting spouses to contract with each other[84] and to alter their legal relations concerning property owned by them.[85] When the court was first presented with an opportunity to interpret these additional grants of power, it held that the ability to contract did not enable the spouses to agree to a transmutation of their community property.[86] The court admitted that the statutes were patterned after those enacted in California where the parties could freely contract with respect to their property interests, but it did not think that it was bound by the construction placed upon the statutes by the courts of California when to do so would render them inconsistent with other laws intended to be retained.

Then in *Chavez v. Chavez*,[87] the spouses purchased some real estate, paying most of the purchase price with money accumulated after their marriage. Title was taken as joint tenants, as was permitted by statute.[88] The court expressly overruled their

80. Petition of Fuller, 63 Nev. 26, 159 P.2d 579 (1945); Stockgrowers & Ranchers Bank v. Milisich, 52 Nev. 178, 283 Pac. 913 (1930); Bailey v. Littell, 24 Nev. 294, 53 Pac. 308 (1898).

81. Laws v. Ross, 44 Nev. 405, 194 Pac. 465 (1921).

82. Milisich v. Hillhouse, 48 Nev. 166, 228 Pac. 307 (1924).

83. Stockgrowers & Ranchers Bank v. Milisich, 52 Nev. 178, 283 Pac. 913 (1930).

84. N. M. STAT. ANN. § 57-2-6 (1953).

85. N. M. STAT. ANN. § 57-2-12 (1953).

86. McDonald v. Lambert, 43 N.M. 27, 85 P.2d 78 (1938). For an article on this case and its effect, see Clark, *Transmutations in New Mexico Community Property Law*, 24 ROCKY MT. L. REV. 273 (1952).

87. 56 N.M. 393, 244 P.2d 781 (1952).

88. N.M. STAT. ANN. § 57-3-2 (1953) permits a husband and wife to hold property as joint tenants or as tenants in common as well as in community.

previous opinion and held that there had been an effective transmutation of community funds into property held by the parties in joint tenancy. Since this decision, the spouses may contract with each other to voluntarily sever their community property and may agree to convert it into another form of joint ownership or into the separate property of either.

Although the spouses may agree to a severance, "any other form of ownership through transmutation must be established by clear, strong and convincing proof—more than a mere preponderance of evidence."[89] Apparently, this burden of proof will be satisfied if either spouse can show that both parties wanted a severance and that they contracted, or took title in another fashion, to effectuate this dissolution. The mere recitation of one type of ownership in an instrument of conveyance will not be sufficient to overcome the presumption in favor of the community.[90]

Either spouse may also execute a conveyance of community realty directly to the other,[91] or may make a gift of his or her share of the community to the other marriage partner.[92] It then becomes the separate property of the grantee or donee spouse if this is the intention of the spouse making the transfer or gift.

G. Texas

Texas originally took the position that a husband and wife could not voluntarily sever their community property by a mutual agreement that it should thereafter be the separate property of either.[93] This continued to be the court's view until 1948 when the Texas Constitution was amended so that a:

> . . . husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any

89. *In re* Trimble's Estate, 57 N.M. 51, 57, 253 P.2d 805, 808 (1953).

90. *Ibid.*

91. N.M. STAT. ANN. § 57-4-3 (1953).

92. N.M. STAT. ANN. §§ 57-3-4, 57-3-5 wherein any property received after marriage as a gift is the separate property of the recipient.

93. King v. Bruce, 145 Tex. 647, 201 S.W.2d 803 (1947); King v. Matney, 259 S.W.2d 606 (Tex. Civ. App. 1953); Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925).

> property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.[94]

While this amendment was declared to be self operative, the legislature was given the power to enact any laws relating to the form and method by which these partitioning instruments could be executed.[95]

Pursuant to this constitutional grant of authority, the Texas Legislature enacted a statute providing that:

> Such a partition or exchange shall be effectuated by a written instrument subscribed and acknowledged by both spouses in the manner now required by law for the conveyance of realty; whereupon the property or interest in property set aside to each spouse by such instrument shall be and constitute a part of the separate estate of such spouses.
>
> If such instrument purports to exchange property or to partition property between husband and wife, otherwise than as equal undivided interests in the same property, or as equal shares or units of identical personal property, such instrument shall not be valid unless approved by the Court upon written application of the husband and wife, addressed to the District Court of the county in which they or either of them reside. Such petition must set out facts showing that the transaction is not to the disadvantage of the wife, and shall be filed and docketed as in other cases, and at any time thereafter the District Court may, in term time, take up and hear said petition and evidence in regard thereto, and enter an order accordingly either approving or disapproving the transaction.[96]

In order for the partition to be effective against a bona fide purchaser for value without notice or against any creditor, it must be recorded with the county clerk of the county or counties where the property is located.[97]

Following this enactment, the parties were free to partition their community property by complying with the statutory mandate, but any attempted deviation therefrom would render the

94. TEX. CONST. art. 16, § 15 (as amended 1948).
95. TEX. CONST. art. 16, § 15 (as amended 1948).
96. TEX. CIV. STAT. ANN. art. 4624a (1948).
97. TEX. CIV. STAT. ANN. art. 4624a (1948).

severance invalid.[98] However, in *Smith v. Ricks*[99] where the husband had purchased United States Savings Bonds with community funds and had them made payable to himself or his wife, the Texas Civil Court of Appeals held that the wife became entitled to the bonds upon the death of her husband. The opinion was based upon the regulations of the United States Treasury which provided that if either owner of a co-owner bond dies without surrendering it, the surviving co-owner will be recognized as the sole and absolute owner. In affirming the appellate court, the Texas Supreme Court ruled that "the solution as to the property rights of the surviving co-owner of 'or' bonds rests in contract, and that contract becomes a part of the bonds."[100] By so holding, the parties were allowed to alter the characteristics of their community property without following the statutory requirements for a partition, because if the Treasury regulations had not been given effect, the bonds would have belonged to the community and not to the surviving spouse.

The survivorship problem arose again in *Hilley v. Hilley*[101] where the husband, using community funds, bought some corporate stock and directed the broker to have it issued in the name of the husband and wife as joint tenants with the right of survivorship. Upon the death of the husband, the wife claimed the stock by virtue of the survivorship clause, but the husband's son by a former marriage objected, alleging that it was a part of the community. In awarding judgment to the son, the court held that the survivorship agreement was not effective as a partition of the community property used in the purchase because it had not been subscribed and acknowledged by both spouses in accordance with the statute relating to severances. Since both spouses are prohibited from making a contract which would affect the legal order of descent,[102] the stock could not be deemed to have remained an asset of the community during their joint lives, and it only became the separate property of the wife at the death of her husband because this interpretation would definitely affect the order of its descent and distribution. Neither could the stock be treated as a gift from the husband to the

98. Stockwell v. Parr, 319 S.W.2d 779 (Tex. Civ. App. 1958); Reed v. Reed, 283 S.W.2d 311 (Tex. Civ. App. 1955).

99. 308 S.W.2d 941 (Tex. Civ. App. 1958).

100. Ricks v. Smith, 159 Tex. 280, 283, 318 S.W.2d 439, 440 (1958).

101. 161 Tex. 569, 342 S.W.2d 565 (1961).

102. Weidner v. Crowther, 157 Tex. 240, 301 S.W.2d 621 (1957); TEX. CIV. STAT. ANN. art. 4610 (Vernon 1948).

wife for if she had predeceased him, the survivorship agreement would have placed sole ownership in the husband. This would be inconsistent with any idea of a completed and irrevocable gift.

This case did not destroy the ability of the spouses to partition their community property, but reaffirmed the earlier position that any severance must be accomplished in the manner prescribed by statute. In the opinion, however, the court specifically overruled the *Ricks* case, relating to the survivorship rights in United States Savings Bonds acquired in "or" form, on the ground that "federal regulations do not overrule our local laws in matters of purely private ownership where the interests of the United States are not involved."[103]

Prior to the *Hilley* case, the spouses in *Free v. Bland*[104] purchased United States Savings Bonds with community funds, making them payable to either the husband or wife. When the wife died, the court of civil appeals held that ownership of and title to the bonds was free from any claim of the wife's devisee. The court stated that the *Ricks* case was controlling and that the Treasury regulations were determinative. The Supreme Court of Texas reviewed the case after it had handed down the *Hilley* decision, and in a per curiam opinion, it reversed the lower court because its pronouncement was now in conflict with the rule announced in *Hilley*.[105] Thus the survivorship provision was nullified, and the wife's devisee was allowed to recover one-half of the value of the bonds.

The Supreme Court of the United States granted certiorari,[106] and when the case was heard it reversed the decision of the Texas Supreme Court.[107] In rebuttal to the argument that the Treasury regulations were merely to provide a convenient method of payment, the Court held that their purpose was to confer the right of ownership upon the survivor irrespective of local law. If a state could frustrate any attempt of its citizens to take advantage of the Treasury regulations by requiring the survivor to reimburse the estate of the deceased co-owner, it would be interfering directly with the power of the federal government to borrow money under these conditions. Since a federal law must prevail over a state law with which it is in conflict, any "state law

103. Hilley v. Hilley, 161 Tex. 569, 577, 342 S.W.2d 565, 570 (1961).
104. 337 S.W.2d 805 (Tex. Civ. App. 1960).
105. Free v. Bland, 162 Tex. 72, 344 S.W.2d 435 (1961).
106. Free v. Bland, 368 U.S. 811 (1961).
107. Free v. Bland, 369 U.S. 663 (1962).

which prohibits a married couple from taking advantage of the survivorship provisions of United States Savings Bonds merely because the purchase price is paid out of community property must fall under the Supremacy Clause."[108]

The Court agreed that the regulations could not be used as a shield for fraud and that relief would be granted if the husband exceeded his authority in investing in the bonds while acting in capacity as the manager of the community property. Just what the relief provisions would be under these circumstances the Court refused to say, since no issue of fraud was presented in the case that was before it.

In addition to the limitation placed upon the *Hilley* case by the Supreme Court's decision, the Texas Legislature subsequently amended the Probate Code and "specifically provided that any husband and wife may, by written agreement, create a joint estate out of their community property, with rights of survivorship."[109] Prior to the court's determination of the exact nature of the changes wrought by the amendment, or the extent to which it increased the ability of the spouses to partition their community property, writers suggested various possibilities. One approach was that it might be violative of the Texas Constitution[110] inasmuch as it permitted the spouses to create a new type of property, and this was beyond the scope of legislative authority.[111] On the other hand, it was suggested that the legislature was doing nothing more than prescribing a method for severance of the community interests in accordance with the 1948 constitutional amendment.[112]

The issue was resolved in 1965 in favor of the constitutionality of the legislation.[113] The court held that the 1948 constitutional amendment permitted a severance of community property under certain circumstances by a written agreement, and it specifically endowed the legislature with the authority to promulgate laws

108. *Id.* at 670.

109. TEX. REV. STAT. ANN. PROBATE CODE § 46 (1955) as amended by Texas Laws ch. 120, § 1, p. 233 (1961).

110. For some of the questions presented by the amendment together with a discussion of its possible effect, see Wren, *Recent Texas Statutes Affecting Estate Planning,* 15 Sw. L. J. 479, 484 (1961); Maxwell and Weathers, *Hailey, Hilley and House Bill 670—A Study in Partition and Survivorship In Texas Community Property,* 15 Sw. L.J. 613 (1961).

111. Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925).

112. TEX. CONST. art. 16, § 15 (as amended 1948).

113. Williams v. McKnight, 391 S.W.2d 813 (Tex. Civ. App. 1965). This case is noted at 19 Sw. L.J. 835 (1965).

prescribing requirements as to the form and manner thereof. The statute was the product of the exercise of this constitutional grant of authority. The fact that it was not as complicated as the previously adopted one[114] was immaterial. It was designed to alter and to simplify the procedure necessary for a transmutation.

A third encroachment upon *Hilley* came via the promulgation of another statute. In 1963, the Texas Legislature adopted a statutory provision permitting the spouses to enter into a savings contract involving a community property savings account.[115] By so doing, they can create a joint tenancy in such property with the right of survivorship. This applies with equal force to subsequent deposits and accrued dividends as well as to the funds originally deposited. Because of the constitutional mandate requiring any severance to be by written instrument,[116] the savings contract must be in writing and subscribed to by each spouse. It does not have to be acknowledged by either of them. When these formalities are complied with, the statute states that "such contract shall constitute a partition of such community property or reciprocal gifts from the respective spouses."[117]

As soon as the statute was adopted, arguments began to ring either in favor of or against its constitutionality. The main contention advanced against its validity centered around the use of the words "contract" and "gift." This is similar to that mentioned with regard to the earlier legislation, *i.e.*, the new statute would permit the wife to acquire separate property in a manner not condoned by, or included in, the constitutional definition of the wife's separate property.[118] However, the statute specifically provides that such a contract creates a partition of the community property. Again, it appears to be a valid exercise of legislative authority since the 1948 constitutional amendment allows the legislature to specify the methods by which the partition may be effected.[119]

Fourthly, the legislature recently enacted a statute which permits the spouses to own their automobile under a joint tenancy

114. TEX. CIV. STAT. ANN. art. 4624a (1948).
115. TEX. REV. CIV. STAT. art. 852(a), § 6.09 (Supp. 1964).
116. TEX. CONST. art. 16, § 15 (as amended 1948).
117. TEX. REV. CIV. STAT. art. 852(a) § 6.09 (Supp. 1954).
118. TEX. CONST. art. 16, § 15 (as amended 1948).
119. TEX. CONST. art. 16, § 15 (as amended 1948). For a discussion of the relative merits of the statute together with the prime reason for its enactment, see *Recent Statutes*, 43 TEX. L. REV. 596 (1965). See also Comment, 18 BAYLOR L. REV. 517 (1966).

arrangement if the agreement is signed by both the husband and wife.[120] Whatever the final outcome might be as regards the scope of these last two statutes, the *Hilley* case, on its precise facts, will not be affected since it dealt with the acquisition of corporate stock. These two statutes were not designed to cover this attempted method of severance. Nevertheless, its potential scope has been severely restricted by the amendment to the Probate Code and the decision in *Free v. Bland.*

Finally, the husband and wife may alter the community character of their property by making a gift of their interest therein to the other, thereby converting it into the separate property of the donee.[121]

H. Washington

Washington has enacted two statutes whereby a married couple may cause a severance of their community property and thus convert it into separate property. One permits a husband or wife to give, grant, sell or convey, to the other, his or her interest in all or any portion of their community real property.[122] Every such conveyance operates to divest the property from any claim or demand as community property and vests the same in the grantee as his or her separate property.[123] When the statutory requirements are complied with, a severance has been perfected unless there is clear and convincing evidence that the parties were unaware of the significance of their acts and never intended a transmutation to occur.[124]

The second statute allows the spouses to jointly enter into an agreement to take effect at death, concerning the status or disposition of the community property owned by them at that time or to be acquired thereafter.[125] This contract must be in writing, witnessed and acknowledged in the manner required for conveyances of real estate, and may be altered or amended in the same way. These contracts become executed upon the death of either spouse, and the title to any community property contained

120. TEX. SESS. LAW SERV. ch. 658, § 24, at 1514 (1965).

121. Shroff v. Deaton, 220 S.W.2d 489 (Tex. Civ. App. 1949); Cauble v. Beaver-Electra Refining Co., 115 Tex. 1, 274 S.W. 120 (1925); Amend v. Johns, 184 S.W. 729 (Tex. Civ. App. 1916).

122. WASH. REV. CODE § 26.16.050 (1951).

123. WASH. REV. CODE § 26.16.050 (1951).

124. Bryant v. Stablein, 28 Wash. 2d 739, 184 P.2d 45 (1947); *In re* Monighan's Estate, 198 Wash. 253, 88 P.2d 403 (1939).

125. WASH. REV. CODE § 26.16.120 (1951).

therein vests in the survivor as a part of his or her separate estate.[126] Since the parties have contracted that the property shall belong to the survivor, neither of them may dispose of it in contravention of the agreement.[127]

As noted, one of the statutes relates to an immediate severance of community realty and the other pertains to a severance of any community property to take effect at the death of either spouse; but no statute exists whereby a present recharacterization of community personalty into separate property can be accomplished by an agreement between the spouses. However, the courts have upheld such agreements[128] and, unlike contracts relating to real property, they may be oral as well as written.[129]

This rule was altered to some extent in *Kolmorgan v. Schaller*[130] where a creditor obtained a community judgment against the spouses and sought to garnish the wife's wages in satisfaction of the debt. The wife objected because she and her husband had entered into a written agreement providing that the personal earnings of the wife were to be her separate property and thus not liable for any debts of the community. The court permitted the garnishment stating that the validity of a severance contract depended not only upon its existence, but a mutual observance of the agreement by the parties was also essential. In this case, there was an agreement but the community had always received the benefit of the wife's earnings. Since this decision, both the contract and the observance thereof are requisite to a transmutation of community personalty.

Another Washington statute provides that when United States Savings Bonds are purchased in the name of two persons and are not presented for payment before the death of either, the surviving co-owner will become the sole and absolute owner of them.[131] This is the same as the Treasury regulation in *Free v. Bland*,[132] and since the Supreme Court's decision in that case,

126. *In re* Brown's Estate, 29 Wash. 2d 20, 185 P.2d 125 (1947).

127. *In re* Wittman's Estate, 58 Wash. 2d 841, 365 P.2d 17 (1961).

128. *Cf.* Hill v. Cole, 132 Wash. 432, 231 Pac. 950 (1925); Churchill v. Stephenson, 14 Wash. 620, 45 Pac. 28 (1896).

129. Gage v. Gage, 78 Wash. 262, 138 Pac. 886 (1914); Union Sec. Co. v. Smith, 93 Wash. 115, 160 Pac. 304 (1916); *In re* Janssen's Estate, 56 Wash. 2d 150, 351 P.2d 510 (1960). See 33 WASH. L. REV. 112 (1958), citing Dobbins v. Dexter Horton & Co., 62 Wash. 423, 113 Pac. 1088 (1911).

130. 51 Wash. 2d 94, 316 P.2d 111 (1957). See 33 WASH. L. REV. 112 (1958).

131. WASH. REV. CODE § 11.04.230 (1951).

132. See text accompanying notes 104-08 *supra*.

the statute adds nothing to the ability of the spouses to effect a severance of their community property which they could not do in the absence thereof. Nevertheless, this statute was the focal point of a case where the husband bought such savings bonds with community funds and made them payable to himself and his brother.[133] When the husband died, the brother claimed the bonds and based his allegation upon this statute. The court held that the husband's actions amounted to an unilateral attempt to convert community property into separate property, and because this could be done only by an agreement of both spouses, the bonds remained as a part of the community. *Free v. Bland* was distinguished on the ground that the wife had there been named as the co-owner while in the present case the husband's brother was so named. The *Free* decision had also held that relief would be available if the husband committed a breach of trust while acting as manager of the community property. The Washington court felt that the husband had breached his fiduciary duty by trying to place the bonds out of the reach of his wife in violation of her rights in the community, and opined that it was following the *Free* case. By the final decision, the wife received the value of one-half the bonds, and the other one-half passed under the husband's will. The brother received nothing.

The case was subsequently heard by the United States Supreme Court[134] which agreed that the federal regulations governing savings bonds could not be used as a device to deprive the wife of her property rights which she enjoyed under the law of Washington. On the other hand, if the husband's action did not amount to fraud or a breach of trust tantamount to fraud, the bonds would belong to the brother. The Court then reviewed the Washington law whereby the status of community personalty could be changed by one spouse making a gift of his or her interest to the other, or by an agreement to become effective upon the death of either spouse.[135] Hence, if the wife had consented to the purchase of these bonds as a gift to her husband's brother, or if she agreed to their inclusion in that portion of the community estate over which the husband could testamentarily dis-

133. *In re* Yiatchos's Estate, 60 Wash. 2d 179, 373 P.2d 125 (1962).

134. Yiatchos v. Yiatchos, 376 U.S. 306 (1964).

135. WASH. REV. CODE §§ 26.16.050, -120 (1951). See also Scott v. Currie, 7 Wash. 2d 301, 109 P.2d 526 (1941); *In re* Hubbard's Estate, 115 Wash. 489, 197 Pac. 610 (1921); *In re* Slocum's Estate, 83 Wash. 158, 145 Pac. 204 (1915).

pose of, or if she later ratified such purchase and registration, her husband's conduct would not be sufficiently fraudulent to vitiate the regulations. The brother would then be entitled to the bonds. There was no evidence in the record as to the wife's conduct, and the case was remanded for a determination of her knowledge of and participation in the purchase of the bonds.

Even if she did not consent to nor later ratify the purchase, the brother would still receive all of the bonds if, under Washington law, (a) the wife is entitled to one-half of the total value of the community property and not one-half of each community asset, and (b) there are other community assets out of which her share may be satisfied. The reason for this is that she will not really lose her property interests if she can be reimbursed for her one-half interest used by her husband to purchase the bonds in derogation of her rights in the community. This is a very sound approach because it is giving effect to the federal regulations only to the extent that they do not enable the husband to perpetrate a fraud upon the wife. To do otherwise would produce a definite injustice and would amount to a condonation of fraudulent conduct. In fact, it might even encourage it.

If there are not enough other community assets out of which she may be reimbursed, the bonds will be used for this purpose. Presumably, this means that if there are no other community assets, she will receive one-half of the bonds. If there is other property from which she may be partially satisfied, it will be used, and any deficit will be made up through the use of one-half the value of the bonds. If on remand it is found that the wife is entitled to a share of each community asset, she would receive one-half of the bonds and the brother would receive the remainder. In any event, the brother will receive one-half. The opinion of the Washington Supreme Court was reversed insofar as it held that this one-half passed by the husband's will because this would amount to a state prohibition against its citizens utilizing the savings bonds survivorship clause to transmit property at death. Whatever the findings on remand,[136] the wife's rights in the community will not be destroyed involuntarily for if she consented to the purchase her interests will be affected by her own conduct and not by that of her husband. If she has not consented, she will receive one-half of the bonds or the value of one-half of them, this being dependent upon the character

136. At the date of writing, there is no further reported case concerning the specific outcome of the litigation.

of her one-half interest in the community property under state law. This decision does not enlarge the husband's right to dispose of the community, nor does it increase his ability to unilateraly sever it since the Court looked to Washington law to determine the circumstances under which either of these may be done. The only way the wife could have lost all of her interest in the bonds is through her own conduct and consent.

Lastly, in Washington, as in all the other community states, the spouses may destroy the community aspects of their property by making a gift of their interests to the other thereby converting it into the separate property of the recipient.[137]

II. CONVERSION OUTSIDE OF COMMUNITY STATE

Once the attorney in the common law state has ascertained whether the spouses have a right to sever their community property in the state where it was acquired, he should then consider the possibility that the interstate move may have had some effect upon their ability to do so. He should also ponder the distinction between those situations where the spouses retain their domicile in the community state but the transmutation occurs in a common law jurisdiction, and those where the domicile has actually been changed to a common law state. Will a court be more prone to set aside an attempted severance where the parties never give up their community domicile?

A. Where the Community Domicile is Retained

An excellent example of an attempted severance by a husband and wife who retained their domicile in the community property state is *King v. Bruce*[138] where the spouses entered into an agreement to sever their community property while domiciled in Texas. They wanted to divide it equally into the separate property of each spouse, but under the Texas law then in effect such a partition would be held invalid.[139] The parties then went to New York with the avowed purpose of partitioning this property. The husband drew a check on a Texas bank account containing $5,800 in community funds and opened an account in a New York bank with the same money for the identical amount. He

137. *In re* Slocum's Estate, 83 Wash. 158, 145 Pac. 204 (1915); *In re* Hubbard's Estate, 115 Wash. 489, 197 Pac. 610 (1921); Scott v. Currie, 7 Wash. 2d 301, 109 P.2d 526 (1941).

138. 145 Tex. 647, 201 S.W.2d 803 (1947). *cert. denied,* 332 U.S. 769 (1947).

139. Bruce v. Permian Royalty Co., 186 S.W.2d 686 (Tex. Civ. App. 1945).

then drew a check on this account for $4,000, requesting that it be paid in silver dollars to be equally divided into two containers. He obtained two cashier's checks for $500 each, and drew two other checks for $400 each. All of them were made payable jointly to himself and his wife. Each spouse endorsed one of the cashier's checks along with one of the other joint checks, thus making them payable to the other spouse. Following this elaborate maneuver, they entered into a contract in New York stipulating that each party was entitled to the two checks endorsed by the other together with one of the containers of silver dollars, and further stipulating that they intended for the severance to be accomplished by the transfer between themselves and not on the theory of mutual gifts. The contract recited that its purpose was to secure one-half of the community property to the separate estate of the wife, and expressed their desire to have the contract governed by the law of New York, where it was executed and performed.

After the contract was executed, each deposited his $2,900 in a separate account in a New York bank under his own name and received in return a cashier's check for this amount. They immediately returned to Texas where the wife opened an account in a Texas bank by depositing her New York check. A community creditor garnished this account and the wife objected, claiming it as her separate property.

The Texas Court of Civil Appeals held that the New York law governed because the validity of a transfer of personal property is dependent upon the law of its actual situs at the time of the conveyance.[140] Furthermore, the validity of the contract itself should be determined by the law of the *lex loci contractus*. By applying the law of New York, the contract was held to be valid, and the parties were allowed to sever their community property although it could not have been partitioned in Texas by the same method. The Texas Supreme Court reversed, placing special emphasis upon the obvious fact that the spouses had not changed their domicile to New York but were citizens and domiciliaries of Texas when the New York transactions occurred. Their only purposes in going to New York had been to enable the wife to enjoy in Texas the property segregated to her, and to obtain in Texas the benefits incident to its ownership. Bearing in mind that the parties retained their Texas domicile, the court then held that the law of Texas remained applicable to the

140. 197 S.W.2d 830 (Tex. Civ. App. 1946).

transactions. It was pointed out that this was not a renunciation of the rule that the validity of contracts is ordinarily determined by the place of execution and performance. Rather that rule would "not be observed and applied when to enforce a foreign contract, according to the provisions of the foreign laws, will contravene some established rule of public policy of the state of the forum."[141] As between the spouses, the law of their domicile prevailed.

There are several factors which may have directly influenced the court's decision. First, the spouses never changed their domicile. At all times they remained Texas domiciliaries. As such, it could be reasonably said, as the court did, that the law of that jurisdiction was still applicable to their personal relationship and governed their contractual arrangements even though the instrument was executed and performed elsewhere. This is particularly true where the real benefit to be derived from the performance of the contract was to be received by the spouses after their return to Texas.

While this is sufficient justification for the application of Texas law, fuel is added to the judicial fire by the second factor, *i.e.*, they went to New York solely for the purpose of circumventing the law of their domicile. If the court winked at this uncamouflaged tactic, any Texas residents who were dissatisfied with legal inabilities imposed upon them by Texas law would have a simple and uncomplicated solution. They could merely remove themselves from the state long enough to accomplish the desired result, and then return to enjoy the fruits of their labor. If this were the law of Texas relating to conjugal relationships, marital property rights would be reduced to a meaningless set of unenforceable rules. They would be no more than rules of convenience to be used to advantage by those who so desired and evaded by those who disliked their application. This aspect undoubtedly prompted the court to advance the public policy argument in applying the law of the forum. As illusive as the term "public policy" may be, it seems fitting here.

A third factor which may have influenced the court was that the parties had previously attempted to sever this property in Texas and it was only upon this unsuccessful endeavor that they went elsewhere. This shows more strongly their avid desire to evade the restrictions of Texas law. Their conduct could not be

141. 145 Tex. 647, 657, 201 S.W.2d 803, 809 (1947).

considered to have been a product of their good faith nor of their mere lack of knowledge of Texas law. From first hand experience, they knew that similar efforts in Texas were futile, and they wanted to escape that handicap.

Fourthly, a community creditor was involved. To permit the spouses to defeat his claim by this subterfuge again raises the public policy issue. This is magnified by the fact that there were outstanding community debts at the time of the New York junket.

One cannot be certain whether the court would have reached a different result if the parties had changed their domicile to New York rather than simply having gone there with the expressed intention of partitioning the community property. However, the court mentioned this salient fact several times and repeated that they were bearing it in mind while arriving at their opinion. To have held otherwise in this particular factual situation would have been a condonation of an overt attempt by Texas citizens to subvert the laws of that state. Likewise, the court may have upheld the validity of the contract if no third party had been involved, or if the spouses had not been so patent in their intentions. It is impossible to segregate any one of these factors as the sole contributor to the court's decision, but together they all add up to a resounding application of the law of the domicile.

The usual case of the migrant client will involve an actual change of domicile to the common law state. However, the above decision could still be very important if the client came to the common law jurisdiction for a specified period of time with the intention of returning to the community state or did, in fact, subsequently return. It could then be legitimately argued that there had never been a change of domicile. While the intention to live permanently at the new residence is not necessary to effect a change of domicile, if a return to the community state is imminent, a new domicile might not be established.[142] The shorter the length of time spent in the common law state, the more plausible this possibility.[143] The likelihood of such a decision is increased by the determination of the domicile according to the law of the forum, which would probably be the community state if the spouses do return.[144]

142. For a discussion of the rules with respect to a change of domicile, see GOODRICH, CONFLICTS OF LAWS §§ 26-29 (3rd ed. 1949); LEFLAR, CONFLICTS OF LAWS § 10 (1959).

143. See GOODRICH, and LEFLAR, *op. cit. supra* note 142.

144. GOODRICH, CONFLICTS OF LAWS § 21 (3rd ed. 1949).

In the recent New York case of *Wyatt v. Fulrath*,[145] however, an opposite result was reached. The spouses were both nationals of Spain where they were married and where they were domiciled during their entire lifetimes. Because of political unrest, large sums of money and securities were sent to New York for safekeeping. In establishing accounts in various banks, the parties either expressly agreed in writing that the New York law of survivorship would apply or they agreed to a form of survivorship account that conformed to the law of New York. The contracts were apparently executed in Spain. According to the law of New York, the wife, upon the death of her husband, would have been entitled to the entire amount contained in these accounts by virtue of the survivorship agreement. Under the law of Spain, this was community property and the spouses were prohibited, except by an ante-nuptial contract, from entering into any form of consensual arrangement which would enable the survivor to receive all of this property.

Conceding that such a contract of survivorship would have been invalid under the law of Spain, the court asserted that New York does have the right to decide as a matter of public policy whether it will apply its own rules to property located there, and which is owned by non-domiciliaries who chose to place it there for safekeeping. The state likewise has the power to honor the formal agreements of the owners that New York law should apply to the disposition of this property upon the death of one of the parties. With regard to the property actually placed within the state while both spouses were alive, the court recognized that the parties had in essence solicited the application of the law of New York and honored their request, even though a different result would have been reached if the law of their domicile had been relied upon.

There seems to be little question as to the ability of New York to reach such a decision inasmuch as it had jurisdiction over the personalty together with the written agreements of the spouses wherein they specifically consented to the survivorship arrangement. It is interesting, however, that the court failed to make any special effort to characterize the particular problem as one of contracts, marital property rights or succession. While the issuer may not have been limited to any one of these characterizations and while it may have encompassed all of them, nevertheless, such an approach may have been exceedingly helpful in trying

145. 16 N.Y.2d 169, 211 N.E.2d 637 (1965).

to reach a desirable end. The court did not attempt to discover or discuss any of the relevant criteria ordinarily associated with the application of the law of either jurisdiction. No mention was made of the justification which the domicile has in governing the personal property interests of its residents and the corresponding desire to treat all such individuals as equally as possible irrespective of where this property is located. Furthermore, the court did not intimate what might be the effect of its decision upon such desire for control and uniformity. In fact, the court gave no detailed explanation of why the law of New York should govern in this particular instance. It merely said that as a matter of public policy the state had the right to apply its own law and it was preferrable to do so where the parties had asked for its application.

As a precedent, the court cited *Hutchison v. Ross*[146] wherein the law of New York was held to be determinative of the validity of a trust created under the laws of that state even though it would have been invalid under the law of Quebec where the parties were domiciled. It would seem that two very important aspects of the previous case were absent here. In the earlier case the trustee had legal title to the property whereas the banks in *Wyatt* were bailees who possessed no indicia of ownership. There is greater impetus for applying New York law where the holder of the legal title is a trust company organized under and subject to the law of New York. Secondly, the *Hutchison* trust arrangements contained an expressed intention of having the trust governed by New York law, where as in *Wyatt* the spouses agreed to the application of the law of New York only through the medium of survivorship bank accounts. It might have been argued that these survivorship agreements were intended more for the protection of the banks than to indicate the desire of the depositors to have their interests determined by the law of New York. While admitting that the two cases were not identical, the court thought the prior one suggested a direction to the present public policy of the state.

Chief Judge Desmond, dissenting in *Wyatt*, felt that the majority was upsetting the uniform conflicts rules without any good reason. The resolution of the dispute by any law other than that of Spain was utterly incompatible with historic and settled conflict of laws principles. In his view, the law of the matrimonial domicile should have been determinative.

146. Hutchison v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933).

Another part of the case should be mentioned. The spouses had also deposited certain assets in England, but they were transferred to New York by the wife after the husband's death. The court refused to apply its own law to these assets, but held that the question should be determined by the law of the jurisdiction where the money was deposited while both parties were alive. If the law of that country would treat the property as having passed to the wife at the time of her husband's death, New York would do likewise. On the other hand, if England would have applied the Spanish law of community property, or if it was uncertain how England would rule, New York would apply the law of Spain. While New York law would not determine the method of disposition of this property, the court handled it by the same method used with regard to the property originally deposited in that state.

A comparison of the New York and the Texas cases reveals some factual differences that could have contributed to the different results. First is the location of the property. If the assets had been returned to Spain there seems to be relatively little doubt as to the manner of resolution. Undoubtedly, the law of Spain would have been applied and the same reasons assigned by Texas would also be applicable here, *i.e.*, to permit the parties to engage in such activities would enable them to avail themselves of the law of their domicile when desirable and to go elsewhere when their interests would be furthered by this tactic. A second difference is that the evidence of a willful intention to evade the law of the domicile was more substantial in the Texas case. There the spouses went to New York with the avowed purpose of contractually severing the community aspects of their property while realizing that such a transmutation was prohibited by the law of Texas. In the *Wyatt* case the spouses originally sent the property to New York for safekeeping, not to evade the law of Spain. This was apparently their primary goal at the time of its introduction into that state. Thirdly, a creditor was involved in the Texas case. True, there were third parties in *Wyatt* who would be deprived of various interests because of the decision, but they were prospective heirs and had not extended credit in reliance upon a particular form of property ownership. These differences may be significant or may be no more than mere rationalizations. Perhaps the real distinction lies in who was asked to decide the question since both courts gave lip service to public policy in applying the law of the forum.

While *Wyatt* may be subject to criticism,[147] it is very important from the standpoint of permitting the spouses to voluntarily alter their interests in community property even though such a transmutation is prohibited by the law of the jurisdiction where the property was acquired. This is particularly true when a new domicile is also established in the common law state.

In other cases where the place of contracting and the domicile of the spouses have been different, the courts have generally resolved the question of the ability of a married woman to contract, or the ability of the spouses to contract between themselves, by looking to the law of their domicile. The United States Supreme Court has sanctioned this determination,[148] and which is in harmony with the Texas decision.

B. Where Domicile is Changed to Common Law State

Undoubtedly, the spouses may sever their community interests after the change of domicile through the use of mutual gifts since this is permitted by all the community states.[149] Neither will this contravene any public policy of the common law jurisdictions. Of course, the mere fact that the severance can thus be effected does not insure that this is at all desirable. On the contrary, it may result in the levying of taxes which might otherwise be avoided,[150] and alternate methods of transmutation may be preferrable.

One such alternative is a partition through the medium of a joint agreement, *i.e.*, a severance by contract and not by gift or exchange. The attorney in the common law state will, therefore, have to resort to the law of his state, including its conflict of laws rules, to determine if such a severance can be consummated there, and if so, with what formalities. This raises two questions

147. In addition to the dissenting opinion of Chief Judge Desmond, see note 66 COLUM. L. REV. 790 (1966).

148. Union Trust Co. v. Grosman, 245 U.S. 412 (1918) and the cases cited therein.

149. Lightning Delivery Co. v. Matteson, 45 Ariz. 92, 39 P.2d 938 (1935); Odone v. Marzocchi, 34 Cal. 2d 431, 211 P.2d 297 (1949); Hobbs v. Hobbs, 69 Idaho 201, 204 P.2d 1034 (1949); Petition of Fuller, 63 Nev. 26, 159 P.2d 579 (1945); Shroff v. Deaton, 220 S.W.2d 489 (Tex. Civ. App. 1949); Scott v. Currie, 7 Wash. 2d 301, 109 P.2d 526 (1941); LA. CIV. CODE ANN. art. 1746; N.M. STAT. ANN. §§ 57-3-4, 57-3-5 (1953).

150. These unwanted taxes could be either federal or state gift taxes. INT. REV. CODE of 1954, § 2501. Also, if the spouses make mutual gifts by which each then receives in return the share of the other, it might be possible to construe this as an actual "sale or exchange" and, as such, subject to income taxation. INT. REV. CODE of 1954, § 1002.

which must be resolved before he can proceed. May the parties sever their community property by joint agreement although such action is forbidden by the community state where the property was acquired? If both states permit a severance, which law governs the method and the formalities required?

1. Real Property

If the migrant clients own real estate in the community property state, there can be no doubt but that the law of that jurisdiction should determine their ability to partition their community interests therein. The method by which this may be accomplished will likewise be governed by the law of the situs. The universal rule is that the validity of a transfer of real estate is determined by the law of the state within whose boundaries the property is situated.[151] The Restatement of Conflicts also takes the position that the validity of a conveyance of an interest in land, the capacity to make such a conveyance, the requisite formalities of the conveyance and the effect thereof, are all determined by the law of the situs.[152]

In the instance of realty located in a community state where the spouses may freely contract with each other, or may make conveyances of real property between themselves, no formidable problems are presented.[153] The attorney may engage the services of a corresponding attorney in the community state to prepare the requisite conveyancing instruments. They may be executed by the spouses at their domicile and returned to the community property state for proper recordation.

151. United States v. Fox, 94 U.S. 315 (1876); Sunderland v. United States, 266 U.S. 226 (1924); Irving Trust Co. v. Maryland Cas. Co., 83 F.2d 168 (2nd Cir. 1936). See also, LEFLAR, CONFLICTS OF LAWS §§ 140, 143, 144 (1959). The only possible exception to this well established rule is where the parties are all before the court and it is necessary to decide some question relating to realty located elsewhere to insure a final disposition of the case. In this situation courts have, on occasion, required the parties to execute a conveyance to foreign realty. This is done upon the assumption that the court order operates upon the persons and is not a direct action affecting title to real estate. See *e.g.*, Tischhauser v. Tischhouser, 142 Cal. App. 2d 252, 298 P.2d 551 (1956). However, as pointed out above, this is given validity where the parties are involved in a court action. It has no application to the ordinary estate planning scheme where the spouses are trying to make a voluntary conveyance or severance. The law of the situs would govern.

152. RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 219, 221 (Tent. Draft No. 5, 1959).

153. Included in this group are: Arizona, ARIZ. REV. STAT. ANN. § 25-214 (1956); California, CAL. CIV. CODE § 158; Idaho, IDAHO CODE ANN. § 32-906 (1963); Nevada, NEV. REV. STAT. §§ 123.070, 123.080(1) (1957); New Mexico, N.M. STAT. ANN. §§ 57-2-6, 57-2-12 (1953); Washington, WASH. REV. CODE § 26.16.050 (1951).

Additional problems are created, however, in Louisiana and Texas where there are certain limitations upon the ability to partition the community property. In Louisiana, spouses who have entered into the marital relationship without the benefit of an ante-nuptial contract covering the method of acquiring property are, by statute, barred from subsequently dissolving or severing their community by a consensual arrangement.[154] This definitely goes to the capacity of the parties to make a valid conveyance of title to realty and, as such, is governed by the law of the situs, that is, the law of Louisiana.[155] Hence, the migrant spouses may not partition their community realty by a joint agreement even though they no longer reside in Louisiana. Such a contract would have to be recognized in Louisiana to be effective.

The only voluntary method of dissolution permitted in Louisiana is by gift,[156] and even then the spouses cannot make reciprocal gifts involving the same property.[157] Thus, two gifts would be required. The first would involve the interest of one spouse in the community property being given to the other at which time the donee spouse would own all of it as separate property. The second gift would then be consummated when one-half of this property was returned to the former donor. Each spouse then would own one-half of the property as a part of his separate estate. By the use of this approach, two completed gifts have been effected, thus resulting in a possible taxation on both of them. This should not be interpreted to mean that the gift route should never be utilized since it may be the only available one, but the consequences should be recognized.

A voluntary severance in Texas is limited in two instances. The partition must be contained in a written instrument subscribed and acknowledged by both spouses in the same manner required for the conveyance of realty.[158] When the property is Texas realty, there are no insoluable problems. The corresponding attorney is again the answer. Secondly, if the instrument purports to partition the property other than as equal interests in the same assets, it must be approved by the district

154. LA. CIV. CODE ANN. art. 2329.
155. RESTATEMENT (SECOND), CONFLICT OF LAWS § 216 (Tent. Draft No. 5, 1959).
156. LA. CIV. CODE ANN. art. 1746.
157. LA. CIV. CODE ANN. art. 1751.
158. TEX. CIV. STAT. ANN. art. 4624a (Vernon 1948).

court of the county wherein the realty is situated.[159] Any attempted severance or conveyance without a compliance with this procedure would be invalid inasmuch as it relates to the formalities of a conveyance.[160] While the court's approval is indispensable for a transmutation into separate property or into a tenancy in common, it is apparently unnecessary for the creation of a joint tenancy with the right of survivorship where the agreement is reduced to writing.[161] The parties may avail themselves of this recent enactment if the joint tenancy is compatible with the overall result sought to be achieved by their estate plans.

Hence, there seems to be little difficulty in the spouses effectively partitioning their community interests in foreign realty although they must comply with the law of the situs. The only exception to this rule is real estate situated in Louisiana.

By the same rule, if the parties purchase real property in the common law state after their change of domicile, the interests acquired therein should be determined by the law of that state.[162] If they agree that it is to be held by them in some common law form of ownership, or if they agree to partition it in any fashion, the law of the situs will be determinative of this ability irrespective of where the purchase funds were accumulated. This should not in any way be interpreted to mean that the community characteristics of the purchase funds have been altered or destroyed by the change of domicile. The transmutation would be effective as a result of the consensual arrangement between the spouses and not because of the interstate move.

2. Personal Property

In addition to their realty the spouses will undoubtedly have some personal property. This may be the actual property acquired in, and brought from, the community state, or it may have been subsequently received in exchange for such community property. Furthermore, the personalty may be either tangible or intangible, the latter of which may or may not be represented by or embodied in an instrument or document of title.

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159. TEX. CIV. STAT. ANN. art. 4624a (Vernon 1948).

160. RESTATEMENT (SECOND), CONFLICT OF LAWS § 217 (Tent. Draft No. 5, 1959).

161. *Supra* notes 109, 113.

162. RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 217, 221 (Tent. Draft No. 5, 1959).

a. Tangible Personalty. The question of whether the spouses may voluntarily sever their community interests in tangible personalty may be categorized as one of property or as one of contracts. If classified as one of property, the general rule is that an inter vivos conveyance of an interest in tangibles is governed by the law of the situs of the property.[163] A few older cases rely on the law of the owner's domicile, because it is directly related to the time worn adage that personalty has no situs other than the owner's domicile.[164] This has presently fallen into disuse where the transfer is an inter vivos one.[165] Under either rule, the law of the common law jurisdiction would be applicable since both the situs of the property and the domicile of the spouses are in that state.

The Restatement of Conflicts has taken a similar position. The capacity of the parties to make such a conveyance, together with the requisite formalities thereof and the interests obtained thereby, are all governed by the law of the state where the property is located at the time of the conveyance.[166]

Even if the problem is characterized as one of contract and not property, the same result should follow. There are three primary conflicts rules regarding the validity of a contract. The choice will be the law of the state where it is executed, the law of the place where it is to be performed, or the law of the state which the contracting parties intend to be controlling. The latter choice presumes that their intention is to have the validity governed by the law of a jurisdiction that has a substantial connection with the contract.[167] Under any of these choices, the partitioning contract would be governed by the law of the new domicile inasmuch as the contract will be executed there; it will be performed in that state and the parties will obviously desire the application of that law if it aids them in the accomplishment of their severance.

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163. GOODRICH, CONFLICT OF LAWS § 153 (3rd ed. 1949); LEFLAR, CONFLICT OF LAWS §§ 150, 154 (1959).

164. For some of the older cases adhering to this view, see Loftus v. Farmers & Mech. Nat'l Bank, 133 Pa. 97, 19 Atl. 347 (1890); Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636 (1894).

165. For a case criticizing the use of this rule, see Lees v. Harding, Whitman & Co., 68 N.J. Eq. 622, 60 Atl. 352 (1905).

166. RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 254b-58 (Tent. Draft No. 5, 1959).

167. See generally, GOODRICH, CONFLICT OF LAWS §§ 108-10 (3rd ed. 1949); LEFLAR, CONFLICT OF LAWS §§ 122, 123 (1959).

A fourth and more recent approach to the ascertainment of the validity of a contract is the so-called "center of gravity" or "grouping of contacts" theory. Under this approach the law of the state which has the most significant contacts with the contract will govern its validity and effect.[168] Again, the law of the common law state would govern since every aspect of the contract occurs there. The only event that took place elsewhere was the original acquisition of the community property. A position very similar to the grouping of contacts has been expostulated by the Restatement of Conflicts. It specifies that the validity of a contract is to be determined by the law of the state with which it has its most significant relationship.[169] This state is defined as the one chosen by the parties to govern unless (1) such state was selected by one party by unfair means or was the result of a mistake, (2) the contract has no substantial contacts with the chosen state, or (3) the application of such law would be contrary to the public policy of the state whose law would have governed in the absence of the parties' specification of a particular state.[170] If the parties do not select a state and if both the place of contracting and the place of performance are in the same jurisdiction, its law will determine the validity of the contract under the Restatement approach.[171]

Therefore, whether the problem is characterized as one of contract or one of property, or some combination thereof, the law of the common law state would or could be used to govern the partitioning of the community interests in tangible personalty under either the Restatement viewpoint or the general conflicts rules as expressed by the cases.

b. Intangible Personalty. The type of property with which the spouses will probably be the most concerned is their intangible personalty including their stocks and bonds. This will ordinarily encompass a major share of their assets and the rules relating thereto should be considered. The determination of the applicable law presents a different problem from that involved in the case

168. LEFLAR, CONFLICT OF LAWS § 125 (1959). The first case to adopt this theory was W. H. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945). See also Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954), which is perhaps the leading case in this area.

169. RESTATEMENT (SECOND), CONFLICT OF LAWS § 332 (Tent. Draft No. 6, 1960).

170. RESTATEMENT (SECOND), CONFLICT OF LAWS § 332a (Tent. Draft No. 6, 1960).

171. RESTATEMENT (SECOND), CONFLICT OF LAWS § 332b (Tent. Draft No. 6, 1960).

of real property or tangible personalty. In each of these latter cases, the property has an actual physical situs. On the other hand, intangibles do not usually have such a situs, making more difficult a determination of what law controls the transfer of an interest in such property.

One of the more common forms of intangible personalty is shares of corporate stock. This is property which is said to be represented by or embodied in an instrument, *i.e.*, the share is represented by the certificate. The courts have taken the position that the state in which the corporation was organized or incorporated has complete jurisdiction over the shares even though the stock certificates are located elsewhere.[172] Thus, the law of the state of incorporation alone is determinative of how a transfer of the share of stock may be effectuated.[173]

This has been resolved by the promulgation of the Uniform Stock Transfer Act, one of the primary purposes of which is to make the stock certificate, as far as possible, the sole representative for the share or shares for which it stands.[174] Under this act, which has now been adopted in some form by all fifty states,[175] title to the stock certificates, and to the shares represented thereby, may be transferred "by delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner."[176] By complying with this requirement, the parties, as between themselves, would be able to change the method of holding the stock from community to one that is compatible with their estate plan. As between the spouses and the corporation, the original stock certificates should be returned to the corporation for the purpose of having it reissue them in the manner now desired.

The validity of the transfer of any other intangible property interest embodied in an instrument is dependent upon the law of the place where the document is located at the time of the con-

172. Mills v. Jacobs, 333 Pa. 231, 4 A.2d 152 (1939); Petri v. Rhein, 162 F. Supp. 834 (N.D. Ill. 1957). See also RESTATEMENT (SECOND), CONFLICT OF LAWS § 182 (Tent. Draft No. 7, 1962).

173. Petri v. Rhein, *supra* note 172; Mills v. Jacobs, *supra* note 172. See also RESTATEMENT (SECOND), CONFLICT OF LAWS § 182 (Tent. Draft No. 7, 1962).

174. Mills v. Jacobs, 333 Pa. 231, 4 A.2d 152 (1939).

175. See, 6 U.L.A. at 7-10 (Supp. 1963) for the state citations and the manner in which their adoption has varied from the Uniform Act, if it has in any respect.

176. 6 U.L.A. § 1 (Supp. 1965).

veyance.[177] Hence, if the parties are domiciled in the common law state and the instrument is situated there, the law of that jurisdiction should govern when the spouses, by mutual agreement, attempt to sever or partition their community interests.

If the spouses should have an intangible interest, such as an account receivable that is not embodied in, nor represented by, an instrument, the law of the place where the transfer occurs will be controlling.[178] This is based upon the theory that the transfer is in reality an assignment, and the same rules regarding the validity of an assignment are usually applicable.[179] Again, the law of the spouses' domicile, where the transfer takes place, is determinative. While these rules may have importance in occasional situations, the estate of most mobile clients will ordinarily contain very little of these intangibles, or at least not enough to significantly affect their estate plans.

III. SUMMARY

The above conflicts rules are the ones most generally accepted and most frequently applied by the courts, but it cannot be said that any one of them is "the" rule insofar as concerns a severance of community property where the spouses have changed their domicile to a common law jurisdiction. The precise issue has never been resolved by the courts. Nevertheless, they are the ones that have been used in deciding questions which involved similar interstate transactions.

There seems to be no valid reason why the court in the common law state could not use its own law in ascertaining the ability of the spouses to partition their community interests in any personal property when the parties are domiciled there; when it has jurisdiction over the particular property involved; when all of the events concerning the severance transpired within its boundaries; and, when the parties expressly request that the law of their domicile be determinative. This is particularly true in light of the New York decision in *Wyatt v. Fulrath*,[180] which applied forum law even though the parties had never changed their domicile. In fact, it may be argued that no conflicts prob-

177. See generally, GOODRICH, CONFLICT OF LAWS §§ 160-63 (3d ed. 1949). See also RESTATEMENT (SECOND), CONFLICT OF LAWS § 262 (Tent. Draft No. 5, 1959).

178. Callwood v. Virgin Islands Nat'l Bank, 221 F.2d 770 (3d Cir. 1955); Witt v. Realist, Inc., 18 Wis. 2d 282, 118 N.W.2d 85 (1962).

179. GOODRICH, CONFLICT OF LAWS §§ 160-63 (3d ed. 1949).

180. 16 N.Y.2d 169, 264 N.Y.S.2d 233, 211 N.E.2d 637 (1965).

lem is even existent under these peculiar facts. After all, the only contact with any other state was the acquisition of the original community property while the spouses were domiciled there, and they now are perfectly willing to have their interests determined by the common law state. However, the fact that the property was acquired while domiciled elsewhere may be enough to induce the court to look to the law of the community jurisdiction in order to determine whether their marital property rights may be altered. While the wisdom of this approach may be questioned where the parties are contracting with respect to their property rights, this possibility does exist and should be recognized. The attorney should consider it to thwart a blatant error on his part.

The best approach for the attorney is to have the partitioning contract meet the requirements of both states if at all possible. If the spouses are from a community state such as California where they may freely sever their community interests,[181] this may be accomplished with little difficulty. On the other hand, if they are from Louisiana where all post-marital severances are prohibited in the absence of an ante-nuptial contract,[182] this will be impossible. Total reliance and dependence upon the domiciliary law will then be necessitated. The statutes or case law of the common law jurisdiction will naturally contain no specific information concerning the requisite formalities for a severance of community property, but the rules governing either a sale or a contract for the sale of personal property will be determinative.[183]

A second advantage to be gained from a compliance with the law of the community state, in addition to compliance with that of the common law state, whenever possible is from the standpoint of proof of intention of the parties. Someone might subsequently challenge the validity of the severance, not on the theory that the law of the domicile is not controlling, but upon the basis that one spouse has perpetrated a fraud upon the other inasmuch as he or she was ignorant of the fact that the contract executed in the common law state produced a transmutation of his or her community interest. If the community state's rules of severance are adherred to, this will lend credence to the idea that a partition was actually intended and desired.

181. See text, § I(B) *supra.*
182. See text, § I(D) *supra.*
183. See text, § II(B) (2) (b) *supra.*

A very important aspect of any partitioning agreement is its reduction to writing even though this may not always be essential to its validity.[184] While a writing might not forestall any litigation over the ability of the parties to partition, their intention will be well documented. Later guesswork about latent intention and fraudulent designs will be held to a minimum.

Again, it should be reiterated that since the decision in *Free v. Bland*,[185] the spouses may destroy the community aspects of their property, irrespective of the laws of either state, by investing it in United States Savings Bonds and taking title as co-owners. The feasibility of such a move poses another question from the estate planning viewpoint.

In short, many problems abound in this area which have never been decided by a court nor remedied by a legislature in the various common law states. The attorney will have to exhibit considerable ingenuity in formulating an estate plan for his mobile clients, always keeping in mind the possibility that a court sitting in a common law state may or may not recognize the community character of the property. Partitioning agreements should be considered so that the estate will contain no community property to plague the court.

184. See Erhman, *Instant Community Property,* 40 CAL. S.B.J. 259 (1965).
185. 369 U.S. 663 (1962).