THE UNIFORM MARITAL PROPERTY ACT:
SOME SUGGESTED REVISIONS
FOR A BASICALLY SOUND ACT

William A. Reppy, Jr.*

I. INTRODUCTION

The Uniform Marital Property Act (UMPA)1 is a community
property act with a good premise: spouses should share exten-
sively in property acquired during marriage.2 The Act does not,
however, mimic the typical American community property regime.
By directing that all of the rents and profits accrued during mar-
rriage from separate property, called “individual property” in the
Act,3 be co-owned by the spouses,4 the Act provides for greater
sharing by married persons than any other American community
property scheme.

The UMPA’s treatment of such rents and profits is modeled
after that of the community property states of Idaho, Louisiana,

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* A.B., J.D., Stanford University; Professor of Law, Duke University; member of the
bars of California and North Carolina. Other works by the author in the area of community
property law include: W. REPPY, COMMUNITY PROPERTY IN CALIFORNIA (1980 & 1983 Supp.);
J. McKnight & W. Reppy, Texas Matrimonial Property Law (1983); W. Reppy & C. Sam-
uel, Community Property in the United States (2d ed. 1982); W. Reppy & E. Mills,
Joint Ownership: Marital and Nonmarital Property—California Continuing Educa-
tion of the Bar Materials (1978); W. Reppy, Community Property in the United
States: A Comparative Study by Cases, Materials, and Problems (1975); Reppy, Com-
munity Property in the U.S. Supreme Court—Why Such a Hostile Reception?, 10 Com-
munity Prop. J. 93 (1983); Reppy, Quasi-Community Property Comes to Texas, 9 Com-
munity Prop. J. 171 (1982); Reppy & Wright, California Probate Code § 229: Making Sense of a
Badly Drafted Provision for Inheritance by a Community Property Decedent’s Former In-
laws, 8 Community Prop. J. 107 (1982); Reppy, Learning to Live With Hisquirdos, 6 Com-
munity Prop. J. 5 (1979); Reppy, Community and Separate Interests in Pensions and So-
cial Security Benefits After Marriage of Brown and ERISA, 25 UCLA L. Rev. 417 (1978);
Reppy, The Effect of the Adoption of Comparative Negligence on Community Property
Law: Has Imputed Negligence Been Revived?, 28 Hastings L.J. 1359 (1977); Reppy, Ret-
roactivity of the 1975 California Community Property Reforms, 48 S. Cal. L. Rev. 977
(1975).

UMPA appears infra at 601-67.
2. See UMPA prefatory note.
3. UMPA § 4(f).
4. UMPA §§ 4(d), 14(b).
and Texas. The Act rejects all but one of the exceptions to co-ownership of rents and profits recognized in those states, however. The one exception—that the spouses themselves may contract for separate ownership—is an essential element in all modern marital property regimes.

One fault of the Act, discussed in Part III of this article, is its refusal to extend co-ownership principles to some unmarried relationships, such as putative marriages. This limitation on the sharing of gain is relatively minor. Although the UMPA has been criticized as being out of step with the times, no reason exists for the


6. In Texas, if one spouse makes a gift of property to the other, a presumption arises that the rents and profits arising from the item given will be the separate property of the donee spouse. Tex. Const. art. XVI, § 15 (amended 1980). This recent change in Texas law resulted not from a distaste for community ownership of rents and profits but from a fear that a retained interest would cause the asset to be taxed as part of the donor’s estate for federal estate tax purposes. After the constitutional amendment qualified for the ballot, but before the vote, the Fifth Circuit dispelled such fears in Estate of Wyly v. Commissioner, 610 F.2d 1282, 1294 (5th Cir. 1980).

In Louisiana, a spouse may unilaterally elect to make future rents and profits from separate property his or her separate property rather than community by filing a formal, acknowledged document so stating. La. Civ. Code Ann. art. 2339 (West Supp. 1984). Idaho provides that rents and profits from a separately owned capital asset are separate property if the “conveyance by which it [i.e., the productive asset] is acquired” so provides. Idaho Code § 32-906 (1983). This section empowers one making a gift, bequest, or devise in favor of a married person to eliminate community ownership of the rents and profits. Apparently, in Idaho, as in Louisiana, a spouse can unilaterally employ this provision to opt out of the civil law rule by transferring separate property to a strawman who reconveys it to the spouse by an instrument reciting separate ownership of future rents and profits. See Cassity, The Living Separate and Apart Doctrine Revisited, 17 Idaho L. Rev. 111, 114-15 (1980) (conveyance need only be executed and acknowledged by one spouse); Henderson, Marital Agreements and the Rights of Creditors, 19 Idaho L. Rev. 177, 182-83 (1983) (unilateral transmutation of after-acquired income from separate property is permitted).

7. See UMPA § 10(c).

8. Refer to notes 46-60 infra and accompanying text. Furthermore, this article maintains that the UMPA has gone too far in providing for co-ownership by spouses of property acquired by the labor of only one of them after a final separation. Refer to notes 61-88 infra and accompanying text.

9. Uniform Marital Property Act, 12 Fairshare 18, 18-19 (Dec. 1983). The writer stated:

One may... question the wisdom of the community property concept at this particular time when more marriages are terminated by divorce than by death, and in most states a divorce may be had for the asking. It is one thing to have a system devised to protect homemakers and an entirely different thing to extend that system to short term and at will relationships. The image which justifies the community property concept is that of the breadwinner husband and homemaker wife, which went out of focus in the post-war years.
belief that the widespread desire of married persons to share equally in gains accumulated during marriage was more common among couples years ago, when wives rarely worked outside the home.\textsuperscript{10}

In the 1980's, there is more reason than there was a century ago to adopt a community property regime. By so doing legislatures would respond to the wishes of a majority of persons who marry. Now that "Marvinizing"\textsuperscript{11}—long-term cohabitation with a

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The writer missed the mark. No legislature in the 1980's would switch from a separate property regime to a community regime primarily because of concern for a "homemaker" spouse, but rather out of the belief that most married persons would want to share ownership of gains accumulated during the marriage.

10. See Sims, \textit{Consequences of Depositing Separate Property in Joint Bank Accounts}, 54 Cal. St. B.J. 452, 452-53 (1979) (this attitude is reflected in the common practice of families, where both husband and wife have income, of combining their wages into a common bank account upon which both can draw). In nonecommunity property states a tenancy in common or a joint tenancy may be created if the deposit contract recites a right of survivorship, especially if uncommingling is impossible because of multiple deposits and withdrawals. Bowling v. Bowling, 243 N.C. 515, 519-20, 91 S.E.2d 176, 180 (1956).

Such sharing in practice is also found among unmarried cohabitants. See Weitzman, \textit{Contracts for Intimate Relationships: A Study of Contracts Before, Within, and in Lieu of Legal Marriage}, 1 ALTERNATIVE LIFESTYLES 303 (1978).

Surely an empirical survey would support the UMPA's extension of co-ownership to rents and profits from separate property. Married persons receiving dividend checks from stock they own are normally just as likely to mix this into the "common pot" bank account as they would a paycheck for labor. Further evidence of this widespread popular acceptance of the sharing principle is indicated by the fact that, in every American jurisdiction, title to what is usually the most valuable and important asset for a married couple—their home—is usually taken in a form of co-equal ownership of present interests. This is true even though it may be paid for by the earnings of one spouse or disproportionately by the earnings of one of two working spouses. Avoiding probate surely cannot be the sole explanation for this common practice. See generally Frager, \textit{Sharing Principles and the Future of Marital Property Law}, 25 UCLA L. Rev. 1 (1977) (principles of marital sharing of wealth).

The Fair Share editorial, supra note 3, at 18-19, seems to assume that when both husband and wife work, she will earn as much as he. Often this is not so, and a community property regime appropriately equalizes the gain. For example, if the couple have children, their birth often removes the wife from the labor market for some period of time. Wives often move from job to job while following a husband who moves "up the ladder" in one company by being transferred from city to city. Moreover, discrimination against women in the labor market is still present with respect to wages, although Title VII, 42 U.S.C. § 2000e-2 (1982) offers relief. See \textit{Women's Bureau, U.S. Dep't of Labor, Equal Employment Opportunity for Women: U.S. Policies} (1982).

11. "Marvinizing," a term commonly used in the \textit{California Family Law Report} and other journals, is drawn from the decision in Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). In \textit{Marvin}, the California Supreme Court provided so many remedies with respect to property for one person against the other in a cohabitation relationship that quasi-marital status has been created. \textit{Id.} at 688-75, 557 P.2d at 112-19, 134 Cal. Rptr. at 825-32. Several jurisdictions have fully accepted the \textit{Marvin} rationale. See Carson v. Olson, 256 N.W.2d 249, 252-55 (Minn. 1977); Kinkenon v. Hue, 207 Neb. 693, 702-05, 301
person of the opposite sex in a sexual relationship—is widespread, and even socially acceptable in many areas of the country, a man and woman attracted to each other have an alternative to marriage. If their commitment is not total, they can “Marvinize.”

Although the Act’s overall plan is desirable, as it stands it suffers from a number of practical problems that should be resolved before it will be ready for general acceptance. This article suggests a number of possible solutions to these problems.

II. THE CREATION OF NEW TERMS TO DESCRIBE COMMUNITY AND SEPARATE PROPERTY

The UMPA has rightfully been criticized for abandoning the well-settled terms “community” and “separate” property for the term “marital” and the newly-coined term “individual” property. As Leo Kornfeld points out, use of the term “marital” to mean “community” will cause confusion because in many states the word “marital” has acquired a settled meaning. “Marital” property refers to property that is separately owned by one spouse during marriage yet is divisible at divorce by an award of part, or sometimes all, of it to the other spouse. The new UMPA terminology


can mislead attorneys in other ways as well. Practitioners might incorrectly assume that the Act's rejection of the term "community" means that precedent from community property states is not to be used in interpreting provisions of the UMPA.

The official comments to the Act do not solve this problem. The prefatory note concedes that "some of the root concepts" of the Act are derived from community property laws currently in force, and that the equal sharing of proprietary interests acquired during marriage is "the heart of the community property system . . . [and] also the heart of" the UMPA; yet nowhere does the Act expressly adopt or endorse community property states' jurisprudence for the interpretation of the Act's many broadly-drafted provisions.

The official comments to the twenty-six sections of the Act cite seven statutes from community property states but none from noncommunity property states; the comments cite ten community property appellate court decisions compared with only four from noncommunity property states; and the comments cite eighteen treatises and law review articles on community property compared with ten of other types. The Commissioners on Uniform State Laws have apparently attempted to defend rejection of the terms "community" and "separate" property on the ground that, rather than providing for a community regime, the UMPA "is more accurately characterized as a sui generis approach, and as one which utilizes equally useful ideas developed in common law jurisdictions such as title based management and control."

This "sui generis" argument is very misleading. The Act is far more accurately characterized as codifying a community property regime that adopts the best solutions to various problems found among the eight community property states. For example, the concept that management power should follow title, while foreign to

15. UMPA prefatory note.
16. See, e.g., UMPA §§ 8, 18 comments. Reference here is to statutes enacted by a particular state and not to other model or uniform acts such as the Uniform Commercial Code and the Uniform Probate Code.
17. See, e.g., UMPA §§ 8, 13 comments.
19. UMPA prefatory note.
the earliest American community property regimes,\(^{20}\) appeared in the Texas community property reform of 1967,\(^{21}\) the New Mexico reform of 1973,\(^{22}\) and the Louisiana reform of 1980,\(^{23}\) as well as in California statutes first enacted in 1925.\(^{24}\)

Indeed, the basic management scheme for personal property in section 5 of the Act is almost identical to the personal property provisions enacted by New Mexico.\(^ {25}\) Under both statutes, each spouse manages his or her own separate ("individual" under the UMPA's terminology) property.\(^ {26}\) Furthermore, both schemes provide for equal management of untitled community ("marital" under the UMPA) property by allowing either spouse to act unilaterally.\(^ {27}\) If the title, however, is in both names, connected by "and," both the Act and New Mexico statute have a dual management rule under which both spouses must act for most transac-

\(^{20}\) In early community property regimes, management power was based on gender. A husband, as the spouse of the preferred gender, could sell community property to which his wife had "title." See, e.g., Tustin v. Faught, 23 Cal. 2d, 241 (1943); R. Ballinger, A Treatise on the Property Rights of Husband and Wife Under the Community or Ganancial System § 93, at 133 (1895).

\(^{21}\) Tex. Fam. Code Ann. § 5.22 (Vernon 1975). Although § 5.22 of the Texas Family Code assigns management power over community property to the spouse who earned it (or whose separate property generated it as a rent or profit), § 5.24 qualifies this proposition by providing that a third party may rely on a spouse having power to manage and convey community property to which the spouse has record title. See id. at §§ 5.22, 5.24. See generally McKnights, Texas Family Code Symposium Title 1: Commentary, 5 Tex. Tech. L. Rev. 269, 361, 364-67 (1974).

\(^{22}\) N.M. Stat. Ann. § 40-3-14 (1983). This provision allows either spouse to control community personal property except where only one spouse is named in the ownership document (the named spouse has exclusive control of the property); or where both spouses are named in the ownership document with their names connected by "and" (in which case disposition or encumbrance of the property would require both spouses). Refer to notes 25-29 infra and accompanying text for additional discussion of this statute.

\(^{23}\) La. Civ. Code Ann. art. 251 (West Supp. 1983). Article 251 of the Louisiana Civil Code provides that a spouse has exclusive management powers over personally "issued or registered in his name as provided by law."


\(^{26}\) Compare N.M. Stat. Ann. §§ 40-3-8(A), 40-3-14(b) (1983) with UMPA §§ 6(a)(1), 11(e). (Section 40-3-8 of the New Mexico statute and section 11 of the UMPA illustrate the nomenclature differences).

Further, if title is in the names of both spouses connected by the word "or," either spouse may manage the property. Accordingly, it is inaccurate to assert that the Act’s management

28. Compare N.M. Stat. Ann. § 40-3-14(C)(2) (1983) ("both spouses must join to dispose of or encumber such community personality where the names of the spouses are joined by the word ‘and’") with UMPA § 5(a)(6) (spouses must act together to manage and control property if title is in both names and not in the alternative by use of the word "or"). The UMPA provision is broader than the New Mexico provision in that the UMPA provision applies to management actions in addition to sales and pledges. Under the New Mexico provision, if an automobile is held under a title naming husband “and” wife as owners, one spouse apparently can loan the car to a friend, but under the UMPA this would be in violation of the management provisions.

29. Compare N.M. Stat. Ann. § 40-3-14(C)(2) (1983) (applicable if connector word is “or” or “and/or” — a clarification the UMPA should make—and applicable only to acts of disposition or encumbrance not management in general) with UMPA § 5(a)(6). In New Mexico, real property acquired under an “or” title could be joint tenancy property and probably would be if the words “as joint tenants” also appeared in the title. See In re Estate of Fletcher v. Jackson, 94 N.M. 572, 576, 613 P.2d 714, 718 (Ct. App. 1980) (construing N.M. Stat. Ann. § 47-1-16 (1978)). If the spouses were joint tenants, each spouse could convey or mortgage a half interest by himself/herself and otherwise manage the entire parcel (as by conferring licensee status on persons entering).

One of the ambiguities of the Act is whether it abolishes ownership by joint tenancy. Spouses desiring a right of survivorship are invited to use a deed employing the term “survivorship marital property.” UMPA § 11(c). Section 11’s title is: “Optional Forms of Holding Property, Including Use of ‘And’ or ‘Or’; Survivorship Ownership.” Section 19 of the UMPA states that the Act does not affect tenancies by the entirety, but no section specifically addresses joint tenancies. Given that UMPA § 10 invites spouses to make a marital property agreement varying the provisions of the Act, a deed of indenture to the spouses could qualify as such agreement because both spouses would have signed it. Therefore, if the deed conveyed the property to them “as joint tenants with right of survivorship,” the UMPA could mean that the courts should apply to such conveyance the common law rules concerning management and control of joint tenancy property. Apparently, the UMPA’s only qualification of this interpretation is the absence of joint tenancy provisions would be that a joint tenancy deed would not be binding on most creditors. See UMPA § 8(a). Hence, if community funds were used to acquire property under a joint tenancy deed of indenture, a creditor would not be restricted to his debtor spouse’s half interest as he would be at common law (unless he had had actual knowledge of the deed before the debt was incurred). See id. Cf. Cantwell, Drafting the Uniform Marital Property Act: The Issues and Debate, 21 Hous. L. Rev. 669, 674 (1984) (infra) (conventional joint tenancy remains available under the UMPA).

All community property states except Louisiana permit joint tenancy to exist as an alternative to community property ownership. See, e.g., Cal. Civ. Code § 5104 (West 1983). In most community property states, a deed poll will create the joint tenancy if the spouses intend that effect. See, e.g., Lovetro v. Steers, 234 Cal. App. 2d 461, 471-72, 44 Cal. Rptr. 604, 610 (1965) (no joint tenancy was created because the spouses did not understand the effect of the deed).

To avoid these ambiguities, the Act should specifically state that joint tenancy is not abolished and make clear whether § 19 is intended to prospectively abolish tenancy by the entirety. If either or both such forms of co-ownership are abolished, care should be taken in completing the drafting of UMPA § 25 (entitled “Repeal”) to make sure that it acts upon all relevant legislation dealing with these forms of concurrent estates.
rules are foreign to community property jurisprudence in an attempt to depict the UMPA system as a hybrid in need of new terminology.

Leo Kornfeld assumes that the refusal of the Act’s authors to call community property by that name was political. The theory was that legislators would be opposed to a community property proposal, but not to a “marital property” proposal. Even if this were true, legislators will surely read the UMPA’s comments citing community property authorities. Furthermore, its prefatory note concedes that the heart of the Act is premised on the fundamental principle of community property law: economic rewards resulting from the personal effort of either spouse are equally shared by both spouses. Hence, opponents of a proposal to enact the UMPA will certainly stress that it is a community property act in order to garner support from lawyers who, for some reason, fear community property laws.

Wisconsin became the first state to adopt the UMPA regime. Prior to enacting the UMPA, however, the Wisconsin legislature on three occasions considered a bill that would have created the equivalent of a community property regime in Wisconsin. Each of

30. Kornfeld, supra note 13, at 70: “We can understand the politics that made ‘community property’ a no-no.” Id.
31. Refer to notes 16, 18 supra.
32. See, e.g., UMPA § 8 comment; § 10 comment.
33. UMPA prefatory note.
34. Some members of the bench and bar apparently react negatively to community property’s equal treatment of women; others to the fact that the regime’s roots are Spanish-Mexican rather than English. See, e.g., Wilcox v. Penn Mut. Life Ins. Co., 357 Pa. 591, 586-88, 55 A.2d 521, 524 (1947). In Wilcox, the Pennsylvania Supreme Court, in declaring a community property act unconstitutional, stressed the Spanish origins of community property law and concluded that community property was “exotic” and “alien” and that its concepts were “antagonistic” to the common law. Id. at 597, 55 A.2d at 524. The court held the act unconstitutional because the court interpreted the act to apply retroactively in some respects, which would result in a taking of vested property rights.

The UMPA classifies the rents and profits accrued from individual (separate) property after enactment as marital (community) property even if the owner-spouse acquired the property before enactment. See UMPA §§ 4(d), 1(6). Wilcox held this aspect of the Pennsylvania act unconstitutional, but some courts might disagree. At any rate, the UMPA has a severability clause directing the courts to preserve as much of the UMPA as possible. See UMPA § 23. In states that agrees with Wilcox, this means that only rents and profits from separate property acquired after enactment would be community property; but the entire act would not fail, as happened in Wilcox, where the community property legislation conspicuously lacked a severability clause.
36. For a discussion of the Wisconsin antecedents of the adopted UMPA proposal, see Irish, A Common Law State Considers Shift to Community Property, 5 COMMUNITY PROP.
these proposals called what was obviously community property "marital partnership property." Opponents attacked each version of the proposal as an attempt to make Wisconsin a community property state. Indeed, the main proponent of the bill said that it was patterned after community property laws in other states. One of the bill's original authors asserted that the general public in Wisconsin also realized that the bill was a community property proposal. As the Wisconsin adoption of the UMPA shows, there is no "political" advantage in changing the name of community property to marital property, because the UMPA will be readily


38. One opponent of Assembly B. 200, 1983-85 Leg., 1983 Wis. Laws 1153 (codified at Wis. Stat. Ann. §§ 766.001-97 (West Supp. 1984-85)) (effective Jan. 1, 1983)) called the switch "a 1950's solution to 1980's problems . . . ." Statement of Rep. Betty Jo Nelson in United Press International report for Wisconsin media of April 18, 1983, entitled "Republicans introduce marital property bill." The State Bar of Wisconsin published a booklet that attacked Assembly B. 200, the third version of the proposal, as a "community property" bill. The Bar did not misconstrue the second sentence of the pamphlet that "proponents of reform based their proposal on community property law . . . ." M. Wilcox, Wisconsin Considers Marital Property Reform, at i (1984). The same publication saw right through the UMPA terminology, stating, "UMPA uses the term 'marital property.' However, the system which would be created by UMPA 200 has been traditionally called 'community property' in the United States. The terms 'marital property' and 'community property' will be used interchangeably in this booklet." Id. at n.3. Senator Gary George, who led opposition to the bill, urged fellow senators not to "jump into the abyss of hybrid community property." Milwaukee Sentinel, Mar. 9, 1984, at 1, col. 6.


40. This assertion is supported by numerous newspaper articles that repeatedly referred to the bill as being a "community property" measure. See, e.g., Pommer, Marital property bill author urges Senate passage, Capital Times, Mar. 8, 1984, at 1, col. 3; Pommer, Senate passes marriage reform bill 27-5, Capital Times, Mar. 9, 1984, at 1, col. 34; Fanlund, Marital property 'reform' advances. Wisconsin State Journal, Mar. 14, 1984, at 1, col. 3; Shively, Marital property reform wins support of Assembly, Milwaukee Sentinel, Mar. 14, 1984, at 1, col. 1; Trebach, Assembly defeats move to reconsider property bill, Milwaukee Sentinel, Mar. 16, 1984, at 13, col. 6. The "community property" label was not always buried in text, either. E.g., Rix, Senate OK's community property bill, Wisconsin State Journal, Mar. 9, 1984, at 1, col. 3. Clearly the newspaper-reading public associated the bill with community property.
perceived by opponents and the public as a community property measure. On the other hand, refusing to call the jointly owned property "community" may have some definite disadvantages. One such disadvantage is the possibility that bench and bar might believe that cases from community property states should not be cited as precedents. A second potential problem is that attorneys may overlook special rules in the Internal Revenue Code and regulations that apply to community property because of the UMPA's different nomenclature. For example, section 1014(b)(6) of the Internal Revenue Code gives appreciated community property a stepped up basis for both halves when one of the spouses dies, representing a substantial tax savings. That benefit is not available, though, if title is in another form—such as joint tenancy—at death, even if the couple used community funds to make the acquisition.42

Section 1014(b)(6) applies to spousal interests created by the "community property laws of any state."43 The IRS would probably view the UMPA as a "community property" law even though the co-owned property is called "marital property."44 The risk of a

41. See, e.g., I.R.C. §§ 43, 66, 121, 219, 1014, 1402 (1982); Treas. Reg. §§ 1.31-1, 1.34-1, 1.37-3, 1.43-1, 1.121-5, 1.270-1 (1983). A "Lexis" search for the term "community property" (and "community" within five words of "property" to pick up such expressions as "property of the community") disclosed the term to appear in 52 sections of the Code, 58 regulations, 7 proposed regulations, and 61 entries in IRS supplements, manuals, handbooks and policy statements. Provisions in chapters of the United States Code relating to pensions and social security also have special provisions for community property. See, e.g., 42 U.S.C. §§ 622, 2391 (1982).

42. See Bordenave v. United States, 150 F. Supp. 820, 823 (N.D. Cal. 1957) (applying I.R.C. § 115(a)(6) (1939) (prior version of I.R.C. § 1014(b)(6) (1982)); Murphy v. Commissioner, 41 T.C. 608, 612-13 (1964). In California, however, under the doctrine of oral transmutation, the benefits of I.R.C. § 1014(b)(6) can be had if the surviving spouse convinces the IRS that the spouses treated the property as community property and intended it to be community property despite the joint tenancy title. See United States v. Pierotti, 154 F.2d 756, 762-63 (9th Cir. 1946).


44. Professor Irish, writing at a time when no formal bill had yet been introduced in Wisconsin, used the term "marital partnership property" in lieu of community property and posited the test for § 1014(b)(6) benefits to be whether the equal sharing of interest by the spouses was legislatively mandated. Irish, A Common Law State Considers a Shift to Community Property, 5 COMMUNITY PROP. J. 227, 230 (1978). Of course, under the UMPA and all contemporary community regimes, the legislative mandate attaches only if the spouses make no different agreement. Spouses under the UMPA do not have to opt for community sharing but can opt out. Cf. Commissioner v. Harmon, 323 U.S. 44, 47-48 (1944). Harmon dealt with whether property was community in order to permit income splitting. The case arose before the provision for joint returns by spouses. The court held that the property was not community because the Oklahoma spouses had to take an affirmative step in addition to
contrary IRS response would be removed entirely if a state enacting the UMPA produced a legislative history rejecting the notion advocated in the UMPA prefatory remarks that the regime it creates is a hybrid between community property and common law systems. More importantly, attorneys who are not in the day to day practice of calling the property at issue “community” may commit malpractice by failing to obtain the benefits of section 1014(b)(6) for the UMPA’s “marital property” and by failing to adhere to other provisions in the Internal Revenue Code with special rules for community property.\textsuperscript{45}

There simply is no reason to reject the historic terms “community” and “separate” property when enacting what is clearly a community property regime.

III. APPLICABILITY TO ALTERNATIVE LIVING ARRANGEMENTS

A. The Community Regime Should Apply to Putative Spouses

Consistent with the civil law that created the community property concept,\textsuperscript{46} early drafts of the UMPA applied its marital property regime to property acquired by putative spouses before annulment of a voidable marriage.\textsuperscript{47} The final version of the

\textsuperscript{45} For example, if an UMPA state does not abolish joint tenancy, an attorney, thinking to avoid probate, may recommend a joint tenancy title for a married couple’s residence. This advice overlooks the fact that far more substantial savings may be had at death due to § 1014(b)(6) by holding the house as “marital” property, because the IRS will treat “marital” property as community.


\textsuperscript{47} See UMPA § 27 (Discussion Draft Dec. 17, 1982) (on reserve, University of Houston Law Library). This draft of the UMPA would have terminated putative spouse status the moment a cohabitating party who believed in good faith that there had been a marriage
UMP A, however, merely provides that, upon annulment, the court may apply the Act to the parties' property to the extent "necessary to avoid an inequitable result." Thus, no property rights arise during a putative marriage in favor of a homemaker putative spouse, nor do such property rights exist at the dissolution of

learned there was no valid marriage. For example, if after Mary lives with John for twenty years and bears and raises three children he tells her, "I lied. I never got a final divorce from my first wife," Mary is immediately converted into a "Marvinizer." Refer to note 11 supra. Apparently the UMP A's drafting committee felt that good morals require Mary to leave the father of her children as soon as she learns the truth. Some caselaw supports this aspect of the UMP A draft, but the far better rule would leave Mary with the benefit of the putative marriage doctrine based on her original good faith until a decree of annulment was entered. See Repp, supra note 14, at 214 n.267 (citing Jackson v. Swilt & Co., 161 So. 816 (La. App. 1934)). The position taken in the UMP A draft would be especially harsh in states that reject California's Marvin decision, or confine the remedy to the case of an express contract (something Mary is unlikely to elicit from John because of her ignorance of the necessity to do so).

Section 26 of the discussion draft, however, would have given a bigamist's spouse, such as Mary, some relief through application of the UMP A's property provisions in certain circumstances. This UMP A draft creates new terms which may result in confusion. "Annulment" is replaced by "declaration of invalidity." "Void marriage" refers to the type of marriage declared invalid by a "retroactive decree declaring the invalidity of the marriage." "Voidable" marriages are those annulled by a "nontetroactive decree declaring the invalidity of the marriage."

48. UMP A § 16. The UMP A provides that if a divorce decree does not award marital (community) property to a spouse, the former spouses become tenants in common. Id. § 17(3). Apparently the intention of § 16, in declining to state what happens to property that is not divided at annulment, is that such property will be owned solely by the "spouse" who earned it.

In dealing with persons who are validly married, the UMP A is silent as to whether an equal or equitable division should be made. See id. § 17 comment. Why, then, has it chosen the equitable division route for putative spouses? Simply because the Uniform Marriage and Divorce Act (UMDA) has done so? See UMP. MARRIAGE AND DIVORCE A CT § 209 comment, 9A U.L.A. 91, 115-16 (1973). Consistency requires that § 16 of the UMP A, dealing with putative spouses, also leave to the legislatures the same discretion to opt for equal or equitable distribution.

49. A note to § 16 of the UMP A says it is to be "read with" § 209 of the UMDA, which provides that a putative spouse "acquires the rights conferred on a legal spouse" including the right to alimony whether or not the marriage was void or voidable. UMDA § 209. The statute is unclear as to whether the putative marriage doctrine is to be fully recognized, so that community property rights exist during the marriage, or only partly recognized, so that the rights created can be asserted only at annulment. The comment to § 209 cites five cases from common law states that, unfortunately, shed no light on the question. Id. § 209 comment. The comment also says that the putative marriage doctrine has worked well in California. Id. It is true that Cal. CIV. CODE § 4452 (West 1983) treats acquisitions during a putative marriage as community property if they would have been community property had the marriage been valid. At the time the UMDA (and the UMP A) were drafted, however, many California cases rejected the putative marriage doctrine unless a statute could be found that seemed consistent with it. See, e.g., In re Estate of Levis, 50 Cal. App. 3d 872, 877, 123 Cal. Rptr. 445, 447 (1976) (denying putative wife inheritance rights of lawful wife);
such a relationship by the death of the laboring “spouse” who has
acquired property in his or her own name. A note to the section of
the UMPA dealing with invalid marriages indicates that its provi-
sions do not apply to “Marvinizers.” The latter will apparently
have more remedies than putative spouses.

The UMPA’s rejection of the putative marriage doctrine is not
only unfair to innocent persons who thought they were married,
but is also unfair to creditors. If a couple is validly married, all of
the community property of the marriage is available to satisfy the
wife’s community debts, even when the husband (who may have
earned the assets at issue) has sole management of it because “ti-
tle” is in his name.

Under the putative marriage doctrine, the “wife’s” creditor
would have the right to reach the community property acquired by
the “husband” because putative spouses assume obligations as well
as benefits of a community regime. If the UMPA were enacted,
however, the creditor may be unable to collect. The “wife” may
have no separate property and acquisitions of the “husband”
owned solely by him) would be available only if the creditor could
establish that the “wife” was acting as the “husband’s” agent when
she incurred the debt. The UMPA’s position makes it irrelevant
that all parties—the man and woman involved as well as the credi-

(1976) (dictum) (putative wife not covered as “spouse” in “husband’s” insurance policy).
death of “husband”); Souza v. Freitas, 10 Cal. App. 3d 680, 685, 89 Cal. Rptr. 485, 488
(1970) (dictum) (during the relationship, property earned by one “spouse” becomes tenancy
in common property of the pair); Brennfleck v. W.C.A.B., 3 Cal. App. 3d 668, 671, 84 Cal.
Rptr. 56, 53 (1970) (putative spouse received workers’ compensation benefits); Kurnoloff v.
were drafted, the California Supreme Court squarely adopted the Louisiana view recognizing
putative marriage as a general principal of jurisprudence. See Estate of Leslie, 37 Cal.
3d 186, 207 Cal. Rptr. 561, 689 P.2d 133 (1984) (specifically overruled In re Estate of Levie,
50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975)).
50. UMPA § 16 comment.

51. The UMPA declines to use the well known phrase “community debt” and instead
creates a new one: “an obligation incurred by a spouse in the interest of the marriage
. . . .” UMPA § 8(b)(ii). The notes make clear, however, that this wording is an adoption of
Arizona law (among the cases cited is Cosper v. Valley Bank, 28 Ariz. 373, 237 P. 175 (1923))
and Washington law (with respect to torts as it existed before De Elche v. Jacobsen, 95
52. See UMPA § 8(b)(ii).
53. See Barber v. Dumke, 59 Tex. 150, 153, 87 S.W. 1147, 1148 (1905) (one of very
few Texas cases recognizing the putative marriage doctrine).
tor—believed there was a valid marriage. 55

The UMPA’s rejection of the putative marriage doctrine is indefensible. Section 16 of the UMPA should be revised as follows:

All of the civil effects of marriage shall apply to a putative spouse and to the relatives of such putative spouse. 56 The burdens, but not the benefits, of a community property regime apply to a nonputative party to an invalid marriage if the other party is a putative spouse. 57 Putative status is not terminated when a party who believed in good faith that he or she was married learns of the invalidity of the marriage, but continues until the parties separate 58 or until their union is terminated by death or by annulment. 59 When both parties lack putative spouse status because they know they are not validly married, yet they hold themselves out to the public as being married, each is estopped to deny marital status to the detriment of creditors, whether or not the creditor knew or relied on the representations by the spouse. 60

B. A Restricted Living-Apart Doctrine Should be Added

With one very limited exception, 61 the UMPA classifies all in-

55. This is so unless an estoppel could arise in favor of a creditor who relied on the representation of the “husband” that he was married to the debtor “wife.”

56. If, for example, the husband and wife are involved in an accident causing their simultaneous deaths, the wife’s relatives can inherit her share of the community property. This clause also legitimates the issue of their union.

57. This clause means that the creditor of the nonputative husband cannot get any share of the putative wife’s earnings that became her property alone prior to annulment. Because the “wife” who receives the benefits of the putative marriage doctrine also incurs the detriments of a community property regime, she cannot assert that her half interest in the “husband’s” earnings is other than community in a situation where the creditor can reach community property but not her separate property.

58. The same rule regarding living apart should apply to putative spouses as to lawfully married spouses. Refer to text accompanying notes 61-89 infra.

59. This language rejects the untenable position taken by UMDA § 209 that putative status terminates the instant the putative spouse learns of the invalidity of the marriage. Refer to note 47 supra.

60. Because the creditor need not prove reliance, the estoppel provided for is not in pais but a quasi-estoppel arising to prevent unjust enrichment. See 31 C.J.S. Estoppel § 107 (1964) (unconscionable to allow a person to take a position inconsistent with one in which he accepted a benefit). The proposed revision of § 10 would not extend the quasi-estoppel to a situation where only one “Marvinizer” holds out to the public that the couple is married. In such a case, the creditor should have to establish an estoppel in pais (i.e., prove he acted in reliance on the representation).

61. UMPA § 17(4)—placed in brackets by the Commissioners on Uniform Laws and thus merely proposed as an option rather than recommended—allows a court granting a legal separation to “deem the extent to which property acquired by the spouses after the legal separation is marital [community] property . . . .” Id. Refer to notes 65-66 infra and accompanying text.
come during marriage as marital (community) property, and thus rejects the living-apart doctrine employed in three of the community property states: Arizona, California, and Washington. Accordingly, even if Bob and Sue amicably separate after five years of marriage, divide up their property, go their separate ways and never see each other for twenty-five years, the earnings of Bob and Sue continue to be their community property. An oral agreement between the spouses, or a written agreement signed by only

62. UMPA § 4(d). See also id. § 1(8) (defining “during marriage” as a period continuing until divorce).

For simplicity, this article henceforth abandons the use of the term “marital” in describing the operation of the UMPA and instead uses the term “community.” Likewise, this article will call the UMPA’s “individual” property “separate.” This terminology eliminates the need to qualify, when applying community property precedents to UMPA property, that the UMPA employs a different name for what is historically called “community” property.

63. According to the California Civil Code, “[t]he earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.” CAL. CIV. CODE § 5118 (West 1983). The Washington Code provision is similar. WASH. REV. CODE § 26.16.140 (Supp. 1984-85). Arizona apparently uses a nonstatutory version of the living-apart doctrine, though concededly a few cases flatly reject any form of it. See, e.g., Flowers v. Flowers, 118 Ariz. 577, 580, 578 P.2d 1006, 1009 (Cl. App. 1978) (earnings after divorce action filed were community); Messer v. Miner, 118 Ariz. 291, 293, 576 P.2d 150, 182 (Cl. App. 1978) (earnings 11 years after court ordered decree of separation were community); Guerrero v. Guerrero, 18 Ariz. App. 403, 402, 502 P.2d 1077, 1079 (1972) (earnings of husband while living apart from wife were community). But in Pendleton v. Brown, 25 Ariz. 604, 221 P. 213 (1923), separation did terminate the community regime as to subsequent earnings—either on an implied contract theory or under the alleged civil law rule that a party at “fault” in causing the separation could not claim co-ownership in the community of the other spouse’s subsequent earnings. The court in In re Marriage of Fong, 121 Ariz. 298, 589 P.2d 1330 (Cl. App. 1978) found that community ownership did not attach to future acquisitions when the “will to union” of the separated spouses ended. Id. at 305, 589 P.2d at 1337.

64. A surprising number of cases exist in which property claims to postseparation acquisitions are made years after what appears to have been a final separation. This frequently occurs after the acquiring spouse dies and his or her personal representative is compelled by law to notify the legal widow or widower of his or her right to a windfall. See, e.g., Pendleton v. Brown, 25 Ariz. 604, 607, 221 P. 213, 215 (1923) (wife asserted claim when husband died 42 years after formal separation); Togliatti v. Robertson, 29 Wash. 2d 844, 846-46, 190 P.2d 575, 576 (1948) (wife asserted claim when husband died 40 years after separation).

65. He or she may even cohabit with a new lover or go through an invalid marriage ceremony with such a person. If an invalid marriage creates putative spouse status in the new “spouse,” he or she should have an equitable claim; but the rights of the lawful spouse in earnings during the invalid remarriage are not cut off. The UMPA achieves this by its reference to § 209 of the UMDA, which contains a note approving cases where the “pie” is divided between the lawful spouse, a putative spouse, and the nonputative bigamist who earned the assets. See UMPA § 16 comment; UMDA § 209 note.
one of them, to the effect that after separation each spouse’s earnings would constitute separate property, is ineffective under the UMPA.\(^{66}\) Such a result is both illogical and unnecessary.

Ten years after their separation, Sue in Seattle does not provide Bob in Boston with any support, emotional or otherwise, that helps him earn money. She has no moral claim to any share of his property.\(^{67}\) The UMPA allows the earnings of each to be separate property only if Bob and Sue obtain a judgment of legal separation, a remedy not universally available. Even then, the UMPA purports to give the court rendering the decree discretion to refuse to terminate the community characterization of future earnings of the legally separated spouses.\(^{68}\) Couples commonly separate without obtaining a court decree of legal separation.\(^{69}\) Thus, the UMPA provision is directed at too few situations. That the UMPA should envision a court granting a separation decree that orders continuation of the community is indefensible.\(^{70}\)

The drafters of the UMPA were probably influenced to reject the living-apart doctrine by the abuses of the doctrine in California chronicled by Carol Bruch in her excellent 1977 survey.\(^{71}\) Although California courts purported to apply the doctrine only to a separation that was “final” and constituted an “actual rupture” of the marital relation,\(^{72}\) the courts were also quick to find that the rup-

\(^{66}\) UMPA § 10(a) states: “A marital property agreement must be a document signed by both spouses. It is enforceable without consideration.” While the requirement of a writing is proper, it seems absurd that both spouses must sign. If the agreement is one without consideration because only one spouse makes a promise varying the rules of the UMPA—e.g., husband agrees that if he bequeaths Blackacre from his father it will be community rather than separate property—why should the agreement be invalid if the wife does not sign it? The common law assumes consent to gift transactions. See Klingman v. Burch, 216 Ind. 695, 700, 25 N.E.2d 996, 998 (1940); 38 C.J.S. Gifts § 65d-f (1943). England’s prototype Statute of Frauds requires the signature of only “the party charged.” 2 A. Corbin, \textit{Corbin on Contracts} § 524, at 774 (1950). The UMPA should require no more.

\(^{67}\) If she is in need, Bob must support her, but that obligation could presumably be satisfied with less than half his earnings.

\(^{68}\) See UMPA § 17(4).


\(^{70}\) What reason other than “fault” concepts would make it appropriate not to terminate the community when the marriage has so broken down that a court order to confirm that must issue?


ture did occur the moment the spouses physically separated. It is more likely that spouses begin living apart hoping their differences can be resolved. Only later do they conclude that their marriage is “over.” This is the pattern even if the parting is violent, as in *Patillo v. Norris*, where a putative wife was forced out of her home at gun point by her “husband,” who threatened to kill her if she took their daughter. In such circumstances, many women have come back to violent spouses. In cases like *Patillo*, however, where subsequent events, or simply the passage of time, cause one spouse to conclude the marriage is dead, the courts seem to date the demise of the marriage to the time of separation. Courts appear unwilling to fix a precise time based on the spouses’ subsequent states of mind.

Bad decisions like *Patillo* are unjustifiable and unnecessary. In an Arizona case, the evidence showed that the spouses married in China in 1923, and were separated when the husband came to the United States in 1936. He was unable to contact his wife during World War II. In 1946, he was told she had died and in 1947 relatives in China sent the couple’s son to live with him. In 1957, he visited her family, and his wife posed as her own sister. The court found that the “will to union,” and hence the community as to subsequent acquisitions, ended in 1947 when the wife sent their

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73. See, e.g., Union Oil Co. v. Stewart, 158 Cal. 149, 157, 110 P. 313, 316 (1910) (physical separation enough to allow wife to begin adverse possession of husband’s property even though no divorce was contemplated).

74. See the husband’s testimony in Loring v. Stuart, 79 Cal. 200, 201-02, 21 P. 651, 652 (1889). *Loring* suggests (correctly) that a marriage is “over” if one spouse is firmly convinced that the marriage cannot be saved even though the other may still be hoping for reconciliation. *Id.* at 202, 21 P. at 652. There is no basis for such hope in view of the other spouse’s final decision.

75. *Id.* at 213, 135 Cal. Rptr. at 213.


77. *Patillo*, 65 Cal. App. 3d at 218, 135 Cal. Rptr. at 216.


79. *Id.* at 300, 589 P.2d at 1332.

80. *Id.* at 301.

81. *Id.*

82. *Id.*

83. *Id.*

84. Incredibly, this succeeded in fooling the husband. *Id.*
child to the United States. Note that this was nine years after the physical separation.

The civil law rule governing living-apart situations forces the courts to determine which spouse was at fault in causing the disintegration of the marriage. According to De Funiak the party at fault in the separation cannot share as half-owner in the innocent spouse’s subsequent earnings but must share his or her own subsequent earnings as community property. The modern trend is to eliminate domestic relations judgments based on fault, partly because such judgments are often impossible to make and partly because the judge applying such an approach may be imposing his or her own moral values on a couple whose values are quite different. Because the civil law version of the living-apart doctrine turns on findings of “fault” for the breakdown of the marriage, it is both too subjective and unfair. A better approach for legislatures considering adoption of the UMPA is the following compromise between California’s approach and total rejection of the doctrine:

With respect to subsequent acquisitions and subsequent debts, the community is terminated one year after spouses have separated unless the court finds both spouses still had hopes for rec-

85. The court erroneously said that it had to find that the “will to union” had ended for both spouses. Id. But there was no evidence that the husband would not, in 1947, have returned to China to join his wife if their 11-year-old child had told Dad that his mother was still alive. The decision is correct because the wife had showed she lacked the will to union by causing the husband to believe she was dead.

86. 1 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 57, at 132 (1943).
87. Id. (citing the Spanish juriscounsel Juan de Matienzo).
89. At least one influential community property expert finds the “fault” approach acceptable. See Cross, The Community Property Law in Washington, 49 WASH. L. REV. 729, 753 (1974). If rejecting the civil law rule, and thereby allowing a husband to abandon his wife and convince the trier of fact that this was the final breakdown of the marriage, disturbs the legislature, one possible solution would be to require a finding that both spouses consider the marriage ended before invoking the living-apart doctrine. Until the “innocent” wife realizes that the marriage is over, the husband’s “self help” effort to make his earnings all his own would be futile.

90. Comments to this section should indicate that most, but not all, debts incurred after separation will not be “in the interest of the marriage.” UMPA § 8 comment. The cost of recreational activity for a separated spouse should be, for example, a separate debt. See Cross, supra note 89, at 827-29. Obligations for the care of the couple’s children, maintenance of community property, and counseling obtained in hopes of patching up marital difficulties appear to be postseparation debts that are “in the interest of the marriage” (i.e., are community debts). Note that if the proposal for a limited living-apart doctrine is rejected, the problem of classifying postseparation debts as community or separate still exists. It could be addressed usefully in comments to UMPA § 8 concerning creditors’ rights.
conciliation. If so, the community terminates for purposes of subsequent acquisitions and debts when either spouse concludes after such one year period that the marriage has irretrievably broken down.

Comments to the section should explain that this version of the statute creates a presumption that a marriage is dead if the spouses do not reconcile within a year after separating. The comments should also observe that a written agreement can effectuate an earlier (or later) termination of the community. Another provision might allow an injunction after the year period has expired to prevent a separated spouse from spending community assets on consumables such as food and rent while saving earnings that are separate property under the one year presumption.

C. Freedom of Contract

Section 8(e) of the UMPA provides that no contract between the spouses can adversely affect the rights of creditors who lack actual knowledge of the contract at the time the obligation is incurred. This provision needlessly interferes with the freedom of persons to marry but live separate in property. A better provision would make a contract to live separate in property binding on all persons except those who acted in detrimental reliance on the assumption that all of what would ordinarily be community property would be liable for the debt that the married person incurred.

Section 10 of the UMPA provides that an agreement between the spouses cannot affect the right of a child to support. This provision, too, needlessly interferes with a legitimate decision to live separate in property. If the man and woman are simply cohabiting, his earnings are not liable to support her children of a prior marriage, who may be living with their father. These children should not enjoy a windfall simply because the couple marries. So long as

91. What should be done about brief, abortive attempts at reconciliation during the year period? For example, the husband asks the wife to stay all night at his house; she does and they have sexual relations but within 24 hours they are yelling at each other again and she vacates. The proposed statute could include a rule to the effect that only those reconciliations surviving more than a nominal period (five days, for example) would start another year running, but it is no doubt better to let the courts deal with this problem on a case by case basis.

92. The assumption here is that the legislature will not authorize division of separate property at divorce but only community property. If all property is divisible, no need for such a remedy exists.

93. UMPA § 8(e).
the mother continues to work, only her earnings should be liable for such support, if that is what her marriage contract provides. If, because of the marriage and her spouse's legal obligation to support her, she quits work, then there is good reason to invalidate, for the children's benefit, the agreement to live separate in property. But section 10(b) of the UMPA tries to protect children in situations where they do not merit the protection.

IV. CLASSIFYING PROPERTY

A. Determining What Is Appreciation, What Is Profit

The UMPA properly adopts the civil law rule that rents and profits of separate property are community property if they accrue during marriage. Community property includes dividends, interest income from trusts and net rents, and other net returns at-

94. That is to be distinguished from the "American Rule" (a term coined in W. Reppy & W. De Punnak, Community Property in the United States 249 (1st ed. 1975)). Under this Rule such rents and profits have the same separate character as the productive property except to the extent there is an apportionment for labor of either spouse that helped generate the profit. See In re Marriage of Cockrill, 124 Ariz. 50, 54, 601 P.2d 1334, 1338 (1979); Beam v. Bank of America, 6 Cal. 3d 12, 24-25, 98 Cal. Rptr. 137, 140, 490 P.2d 257, 266 (1971); Johnson v. Johnson, 89 Nev. 244, 245-47, 510 P.2d 625, 626 (1973). The best analysis of the apportionment process in the American Rule states is found in Adler, Arizona's All-or-Nothing Approach to the Classification of Gain From Separate Property: High Time for a Change, 20 Ariz. L. Rev. 597 (1978) (a critique which spawned the Cochrill apportionment case).

95. UMPA § 8(d).

96. UMPA should be revised so that the reference is to "interest income from trusts, whether or not the payee has any ownership in corpus." This is necessary to qualify the impact of UMPA § 4(6)(b), which provides that a gift is separate property. A great debate rages among the states adhering to the civil-law rule regarding whether all trust income is community or whether a donee or legatee of an income interest alone takes it as separate property because the income is the sole item that has been given. See Reynolds v. Reynolds, 388 So. 2d 1185 (La. 1980); Commissioner v. Porter, 148 F.2d 566 (5th Cir. 1945) (Texas law); Wilmington Trust Co. v. United States, 4 Cl. Ct. 6 (1983) (Texas law); O. Speer & L. Simpsons, Texas Family Law § 15.42 (5th ed. 1976); W. Reppy & C. Samuel, supra note 1, at 158-64; Counts, Trust Income—Separate or Community Property, 30 Tex. B.J. 861, 914-17 (1967); Davis, Income Arising From Trusts During Marriage Is Community Property, 29 Tex. B.J. 901, 901 (1966).

A statute or official comment should also note that it matters not whether the instrument of gift or bequest declares an intention that the income gift be separate property. Cf. Commissioner v. Porter, 148 F.2d 566, 567-69 (5th Cir. 1945) (stating that such intention is determinative). A community property characterization is equally compelled if the trust is spendthrift or if the trustee has discretion over how much income is paid to the donee spouse. Id. Contra Buckler v. Buckler, 424 S.W.2d 514, 515-16 (Tex. Civ. App.—Fort Worth 1967, writ dism'd). Because the policy of the UMPA is that of the broadest possible marital property sharing, short of a general community, each of the various splits of authority
tributable to investment, rental, licensing, or other use of property, unless attributable to a return of capital or appreciation.\textsuperscript{97} Section 4 of the UMPA specifically makes all such income marital (community) property if "earned or accrued" during marriage.

Apparently, gain must be realized through a profit-making event before a there is a community-owned profit as a return attributable to investment.\textsuperscript{98} Thus, if Bob buys ten hogs with separate funds and fattens them so that they double in value before sale, a creditor, who can only levy upon community property, will reach nothing. All the gain is appreciation of separate property and is thus also separate.\textsuperscript{99} Later, Bob sells the pigs. If he paid $50 each for them, fed each $50 worth of feed, and sold each for $200, what is the community profit? One hundred dollars per animal? Perhaps. Note that the profit-making event converts at least some of the separate appreciation into community-owned profit. The reason that there is some community profit is that the pigs were held for investment and gain on sale, but nothing in the UMPA and its comments makes this clear.

Suppose instead that Sue bought land with $10,000 of separate funds, improved it with fences costing $5,000 using separate funds, and several years later sold the property for $30,000. Is there community profit here? There should be if Sue's motive in buying the land was to resell it at a profit. But what if her motive was to rent it out as pasture and obtain a community profit in that manner? Or to build a house on it where she and Bob would live until they died? The UMPA has no answer.

Evidently, the property owner's reason for holding the item, whether to resell for gain or for some other reason, determines whether there is a community "profit" component in the realized gain upon sale. The UMPA should make this clear. If a legislature finds it intolerable, however, to make motive the touchstone of the classification process—perhaps because it would lead to a great amount of litigation about state of mind—the statutory scheme would have to classify the gain on sale as separate property because it is clearly appreciation.

\textsuperscript{97} UMPA § 1(10).
\textsuperscript{98} UMPA § 4.
\textsuperscript{99} The Act is specific in stating that appreciation can be realized or unrealized. \textit{Id.} § 1(2).
Fortunately, motive is usually quite clear. If Martha owns a retail shop, her inventory is obviously held for resale for profit, and at least some of the gain on resale should be community-owned profit. If Howard buys houses and holds them for many years before selling, his business is rental, and a sale of the capital asset does not necessarily create any community-owned "profit." All gain may be appreciation.\(^\text{100}\)

The UMPA should at least acknowledge the problem of distinguishing a business from a nonbusiness sale and provide some guidance. Internal Revenue Service provisions may supply a solution. Where the IRS treats a gain as ordinary income (rather than a capital gain) the spouse could be treated under the UMPA as "in the business" of selling the relevant item, resulting in some community gain. The UMPA comments, or the Act itself, should make clear that the test is not the amount of labor expended by the spouse. For example, Charlie may spend many hours (using only separate funds) building up a stamp collection; when he tires of the hobby he may spend many hours finding a buyer for the collection. But the sale of hobby materials surely is not a profit-making event. Labor spent working at a hobby seems to be separate labor.\(^\text{101}\) The labor necessary to realize "pure" appreciation should also be separate labor.

The UMPA never directly refers to the secondary question—once it is concluded that separate property was held to resell for a profit—of apportioning gain between community profit and separate appreciation. This issue has generated an enormous amount of litigation and commentary. One cannot ascertain from the UMPA and its comments if an UMPA jurisdiction is to apportion, as does Idaho, or eschew apportionment in favor of an all-or-nothing approach, as does Texas.\(^\text{102}\) Recall, however, that the

\(^{\text{100}}\) The problem of distinguishing community-owned profit from separately-owned appreciation is analogous to the difficulty in defining obscenity. Justice Potter Stewart was unable to formulate a verbal test for obscenity but could assure the bar that "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Similarly, when there are numerous sales of similar items by a spouse, one just "knows" that the spouse is in the business of selling. Each such sale is a profit-making event for the community and not just a realization of appreciation. Cf. Byrd v. Babin, 181 La. 466, 467-70, 169 So. 718, 719 (1935) (wife had not sold enough lots after subdividing her separately owned land to be in the business of selling realty).

\(^{\text{101}}\) See UMPA § 14(b). Presumably motive determines whether the hobby labor substantially contributed to the community.

\(^{\text{102}}\) See W. REFFY & C. SAMUEL, supra note 1, at 143-57. "All-or-nothing" usually means all gain is either community or separate, but in some Texas cases it has meant all
UMPAS definition of income provides that income includes returns attributable to investment “unless attributable to a return of capital or to appreciation.” If the definition had used, instead of “unless,” the words “except to the extent that the gain includes a portion attributable to . . . ,” the direction to apportion would have been clear. Unfortunately, use of “unless” may result in an all-or-nothing interpretation.

Surely apportionment, at least of return of capital, is intended when an asset bought with separate funds for the specific purpose of profitable resale is sold for a gain. But fairness to the separate estate requires more: apportionment, not only of a separately owned share of sale proceeds that are a return of capital, but also a share for natural appreciation occurring after acquisition and before sale. The community would then be entitled to an apportionment of profit and a return for community labor.

proceeds of sale are separate or community. Id. at 155.

Classic examples of “all-or-nothingism” in Texas are: Norris v. Vaughn, 152 Tex. 491, 498, 260 S.W.2d 676, 680 (1953) (sale of oil and gas not a profit-making event regardless of motive, thus no community gain); Stringfellow v. Sorrels, 82 Tex. 277, 279, 18 S.W. 689, 691 (1891) (fattening livestock not a profit-making event regardless of motive, thus no community gain); Craxton v. Ryan, 3 Tex. Civ. Cas. 439, 439 (Civ. App. 1888) (sale of bricks made from separately-owned clay; held, entire proceeds are community without a return of capital to the separate estate); White v. Hugh Lynch & Co., 26 Tex. 195, 196 (1882) (sale of separately-owned timber cut from separately-owned land; held, entire proceeds community without any return on capital). On the other hand, in Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982), a decision that found no community profit because of a refusal to pierce a corporate veil, the Texas Supreme Court cited apportionment decisions from the American Rule states of California and Nevada with approval, and more importantly, the Idaho apportionment case of Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1973), applicable in civil law jurisdictions. Vallone, 644 S.W.2d at 459 n.1. The Vallone footnote fails to mention that Speer apportioned undistributed corporate gain not only into a community share for return on labor but also into a community-owned rent-profit component. Speer, 96 Idaho at 127, 525 P.2d at 322. On the importance to the Texas bar of these out-of-state citations in Vallone, see Comment, Closely Held Corporations in the Wake of Vallone: Enhancement of Stock Value by Community Time, Talent and Labor, 35 Baylor L. Rev. 47 (1983).

Until 1980, Louisiana was an all-or-nothing state by virtue of an article of its civil code (former art. 2368) that was construed to allow the separate estate no share of the gain if any portion of the gain would be community as a profit or a return on labor. See Abraham v. Abraham, 230 La. 78, 85-86, 87 So. 2d 735, 737-38 (1956). The code currently calls for “an apportionment of increase in value of separate property resulting from community labor.” La. Civ. Code Ann., art. 2368 (West 1984). This provision seems directed at unrealized gain existing at dissolution. Other code articles (e.g., art. 2339) entitle the community to claim a portion of gain as profit at a sale where the appreciation was realized. Louisiana's remedy for the community with respect to unrealized gain caused by labor is addressed by UMPA § 14.

103. The contrary Texas cases, refer to note 102 supra, are extremely unfair to the separate estate.
There are two approaches to apportionment. The first approach involves calculating a return for the community estate: the “profit” plus a return for otherwise uncompensated labor. The rest of the proceeds will be a return of capital together with “natural” appreciation. This is analogous to Van Camp apportionments\(^{104}\) in California; the community return is fixed by specific calculations and the separate share of gain “floats.” This formula best benefits the separate estate if the gain is unusually large.\(^{105}\)

The second approach involves applying the rate of inflation to the cost of the item sold, allocating to the community the remainder.\(^{106}\) This scheme is analogous to California’s Pereira apportionments.\(^{107}\) The community share “floats,” and thus this approach best benefits the community estate if the gain is unusually large; the separate estate benefits by this method if the gain is modest. Two California cases have used a compromise formula that combines both the Van Camp and Pereira approaches.\(^{108}\)

In California, the courts choose which apportionment formula to apply by determining whether separate capital or community labor was the factor primarily responsible for the gain.\(^{109}\) The applicable “capital” factor is gain occurring without any labor. This factor raises no apportionment problem even if the asset was bought with the intention of reselling for profit. Under the UMPA’s civil law approach, however, what California treats as

\(^{104}\) Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 855 (1921). This was also the approach taken in the only reported decision where a civil law rule jurisdiction attempted to apportion community profit and community return on labor from the separate estate’s “natural” appreciation. See Speer v. Quinlan, 96 Idaho 119, 128, 525 P.2d 314, 323 (1973).

\(^{105}\) The “floating” concept is described in Adler, supra note 94, at 610.

\(^{106}\) When reality is bought to resell for a profit, held in an unproductive state for several years, and then sold, it is arguable that all of the gain is “natural” appreciation; that is, only inflation and market forces could have caused the gain. To accept the argument, however, is to deny that there is any “profit” (as that term is used in civil law jurisdictions to define sums taking on community ownership). In such a case, the second approach may be unworkable because it is unrealistic to assume that the only market force at work was inflation. But both approaches to apportionment are workable when the item sold at retail was purchased at wholesale. Only a small amount of the difference between purchase and resale price will be attributable to inflationary pressures and market forces. As such, the second approach will produce an apportionment that recognizes a community profit component in this situation.

\(^{107}\) Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909).

\(^{108}\) Todd v. Commissioner, 153 F.2d 555, 555 (9th Cir. 1945); Todd v. McColgan, 89 Cal. App. 2d 509, 512, 201 P.2d 414, 417 (1949).

“capital” must be broken down into natural appreciation and profit components. Thus, the “chief contributing factor” test cannot be borrowed automatically from California.

B. Piercing the Corporate Veil: Incorporating to Preserve Separate Property

In Texas, a spouse can effectively opt out of the civil law rule that makes profits from separate capital community property by incorporating a business into which he or she places separately owned capital. Texas courts respect the corporate veil unless the incorporation is fraudulent, for example, where the husband actually intended to defeat his wife’s potential claim to a community share of gain. The fact that the husband is the controlling or sole shareholder is irrelevant. If the corporation reinvests all its profits, every bit of gain is treated as separate appreciation. Thus, the only profit-making event is the declaration of dividends.

The UMPA simply ignores the corporate veil problem. A comment to section 4, however, which declares rents and profits of separate property to be community property, states that the Texas regime is “kindred” to that of the UMPA. The UMPA should be redrafted to make it clear that it does not sanction the Texas approach concerning the effect of incorporation. If a spouse has actual majority voting control, or even de facto control as a minority shareholder, the corporate veil should be pierced, at least at ter-

110. An inconsistency in older Texas cases, e.g., Dillingham v. Dillingham, 434 S.W.2d 459, 462 (Tex. Civ. App.—Fort Worth 1968, no writ) (piercing the corporate veil despite no actual fraud), was resolved against community sharing and in favor of the separate estate in Jensen v. Jensen, 665 S.W.2d 107, 110 (Tex. 1984).

111. UMPA § 4 comment. Fortunately, this comment also declares Idaho law to be “kindred.” Id. Idaho often ignores the corporate form. Refer to note 112 infra.


113. A minority shareholder can take control by obtaining proxies from family members or if some shareholders do not vote together. Under the suggested approach in the text, an apportionment might have been appropriate in Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974), where the husband separately owned 610 shares out of 2,262 shares of a holding company that in turn owned 22,622 of 72,622 shares of a corporation with extensive undistributed profits. Id. at 241, 526 P.2d at 846. Rather than exploring whether the husband effectively had control over dividends, the court approached the apportionment matter as if the only community claim was for a return on labor (as done in California). Id. at 242-
mination of the community, and an appropriate amount of corporate profits treated as community property.

By its court holdings concerning the effect of incorporation, Texas has created a rule equivalent to the specific code provision in Louisiana that invites a spouse to opt out of the civil law treatment of rents and profits in favor of the American Rule. Because the UMPA has declined to follow this approach, an additional provision is necessary to prevent judges from indirectly achieving the same end. One such provision could read:

When appreciation of separate property is realized, an appropriate amount of gain shall be apportioned to the community as its return on any labor by either spouse contributing to the gain and as the community profit (if any) in the transaction. The right to an apportionment can be asserted on behalf of the community during the marriage or at dissolution by divorce, annulment, or death. Such right can be exercised if gain is made by a corporation or partnership or other business entity provided a spouse had, at the time of the gain or subsequent thereto, legal or de facto power to cause the payment of a dividend or other distribution of gain by the business entity. Where an apportionment is made of undistributed profits of a corporation or other business entity, the remedy is a community lien on the separately owned stock or partnership interest. This lien may be foreclosed by a spouse or the estate of a deceased spouse at dissolution of the

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43, 525 P.2d at 847-48. Note that the type of control that is pertinent is the power not to elect a majority of directors, but rather, to compel a dividend. In some states, the minority in a close corporation can do just that. See N.C. Gen. Stat. § 55-50(L) (1982). A spouse with power to withdraw profits from the corporate treasury is in no position to contend there has not been a profit-making event.

In addition, a minority stockholder, on the ground of mismanagement, may be entitled to monetary relief if the failure to pay dividends results in federal accumulated earnings tax liability. I.R.C. § 532 (1982). See Smith v. Atlantic Properties, Inc., 81 Mass. App. 1320, 422 N.E.2d 798 (1981). The spouse of such a minority owner of separate stock should be able to ask for an apportionment of undistributed corporate gain as a community profit.

115. The proposal does not authorize an apportionment of dividends actually paid out. Dividends can be classified as community property under a per se approach. But see Paxton v. Bramlette, 228 So. 2d 161 (La. App. 1969). In Paxton, the wife had opted to make rents and profits of her separate stock also separate. Id. at 162-63. She owned 82% of the stock of a corporation that paid her a generous salary. Id. at 164. She contended that a portion of the salary was really a dividend distribution and thus not community. Id. at 162. Rather than rejecting this claim as legally unsound, the court examined the facts and concluded that the salary was an appropriate compensation for her labor. Id. at 164. The approach in Paxton would require the courts in civil law states to entertain the contention that distributions earmarked by the corporation as earnings-based dividends actually consisted partly of capital distributions of realized appreciation upon sale of capital assets.
community. The lien may also be foreclosed during the marriage by a creditor who can reach community property but not the separate interest in the corporation, partnership or other joint venture.\textsuperscript{116}

This remedial provision is contrary to the approach taken by the UMPA in "improvement" cases.\textsuperscript{117} In such cases the UMPA provides for a buy-in by the improving estate. The estate thereby acquires a percentage of ownership, apparently equal to the value of the contributed labor or property compared to the prior unadjusted basis in the property of the improved estate. As explained below, this UMPA remedy is inappropriate in improvement cases and for the same reasons is unsuitable for apportionment cases. Management of the stock should remain solely in the separate owner, which would not be the case if the community were viewed as "buying in" to ownership of the corporation.\textsuperscript{118}

C. The UMPA's Approach to Improvements Cases Should Be Revised

Although the text of the Act is unclear, the comment to section 14 suggests that the Act rejects the inception of title doctrine\textsuperscript{119} in favor of pro rata sharing of ownership in those cases in which a down payment is made from one estate and at least some subsequent principal payments are made from a different estate. Pro rata sharing is the majority approach in community property jurisdictions,\textsuperscript{120} and the UMPA's adoption of that approach is justified, although it complicates the process of allocating manage-

\textsuperscript{116} The right of a community creditor to foreclose on a lien during marriage makes clear that apportionments are to be made, as in Nevada, on an annual basis rather than by a total recapitulation of corporate activity made at termination of the marriage by divorce or death. See, e.g., Cord v. Neuhoff, 94 Nev. 21, 25-26, 573 P.2d 1170, 1173 (1978). See also In re Marriage of Winn, 98 Cal. App. 3d 363, 365, 159 Cal. Rptr. 554, 555 (1979) (separate property component disappeared when business went through bankruptcy). But see Denney v. Denney, 115 Cal. App. 3d 543, 550, 171 Cal. Rptr. 440, 443 (1981) (separate interest did not vanish when business became insolvent).

\textsuperscript{117} Refer to notes 120-140 infra and accompanying text.

\textsuperscript{118} A legislature might conclude that allowing the community creditor to levy before dissolution also would effectuate an undesirable community "buy-in." If so, the portion of the proposed statute giving the community creditor power to foreclose the lien during marriage should be stricken.

\textsuperscript{119} For a discussion of the inception title doctrine, see generally W. McClanehan, Community Property Law in the United States § 6.6 (1982); W. Reppy & C. Samuel, supra note 1, at 77-88.

\textsuperscript{120} See W. Reppy & C. Samuel, supra note 1, at 80 n.1.
ment power. What the UMPA needs is clarity on this point: a specific rejection of the inception of title doctrine and a specific rule as to how much of a mortgage payment "buys in" to title. The present case law in pro rata sharing jurisdictions provides that only insofar as the principal indebtedness is reduced does the periodic payment buy in to title. 121

The UMPA does not address improvements of separate property by the expenditure of community money. Because the section dealing with improvements by labor provides for a buy in rather than a right of reimbursement, a judge attempting to figure out how the UMPA deals with monetary improvements could apply that provision by analogy.

An astonishing aspect of section 14(b) is that it deals solely with labor of the nonowning spouse and does not address the more likely possibility that the owning spouse supplied the labor. 122 Basic community property theory provides that substantial labor by the owning spouse is as much a community asset as labor by the nonowning spouse. 123 The UMPA implicitly defines labor expended by the owning spouse to improve his or her separate estate as separate labor. Section 14 should be revised so that substantial labor performed by either spouse would be treated as community labor. At the very least, the Act should set forth explicitly the proper treatment of labor performed by the owning spouse during marriage. The Wisconsin Act rejected the distinction between labor supplied by owning or nonowning spouse. Substantial physical labor by either may cause separate property to become, in part, community. 124

The comment to section 14 125 does make clear that, when a nonowning spouse's labor improves the owning spouse's separate property, the remedy is not reimbursement but a buy-in to title.

121. See, e.g., In re Marriage of Moore, 28 Cal. 3d 366, 371-74, 618 P.2d 208, 210-12, 168 Cal. Rptr. 662, 664-66 (1980). The refusal to view the interest payment as part of the acquisition of title has been subject to intense criticism. See Comment, Community Entitled to Interest in Separate Property Residence of One Spouse But Limited to Community Reduction of Principal Only, 4 Cal. Fam. L. Rep. 1458, 1458-83 (1980).

122. Section 14(b) of the UMPA states in pertinent part: "Application by one spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity on individual [i.e., separate] property of the other spouse creates marital [i.e., community] property attributable to that application . . . ." if the labor was not compensated and contributed to "substantial appreciation" of the property. Id. (emphasis added).

123. See Kenfield, supra note 13, at 70-71 (criticism of UMPA § 14(b)).


125. UMPA § 14 comment ("What is the Laborer's right?").
The community interest thus increases along with the rising value of the property. But the comment is unclear as to the percentage of ownership obtained by such labor on separate property. This is an important issue that should be settled.

Overall, the buy-in remedy is dubious. For example, if the community interest cannot be protected by a homestead claim or other exemption, the buy-in theory allows a creditor, who can reach community property, but not the owning spouse’s separate property, to force a sale of the community interest. Such an action would inevitably be followed by a partition action that could force the separately owned interest.

Creditor’s rights aside, the buy-in remedy raises the possibility that the nonowning spouse can block the owner’s effort to sell the item voluntarily. One of the most important provisions of UMPA section 9 provides that “a bona fide purchaser from a spouse having the right to manage and control” community property acquires a title “free of any claim of the other spouse.” For purposes of this section a bona fide purchaser is a good faith purchaser who “does not have notice of an adverse claim by a spouse.” Another section of the Act entitles a spouse to a court order adding that spouse’s name to the title to nonbusiness community property. Imagine a case where title to a piece of land is in husband Jim’s name because it was originally his separate property. By way of improvement, the community buys in to three percent of the ownership. Wife Ellen learns Jim is planning to sell the land to a potential buyer, Buck. She advises Buck of the community interest and of her desire not to have the community interest sold—at least not to have her share sold. Apparently, until a court order adds Ellen’s name to the title, Jim has management power and may sell the property, even though Buck is not now a

126. For example, suppose that $1000 worth of community labor is expended to improve separate property. Is the value of that labor figured as a percentage of the property’s value after improvement? Or is it compared against the worth of separate equity in the property? It may even be measured against the amount of separate money put into the property, or the combination of separate money and separate labor (assuming the UMPA will continue to treat the owner spouse’s labor as separate).

127. See UMPA § 8(b). This described situation will probably be very common under the UMPA.

128. UMPA § 9(c).

129. UMPA § 9(a), (c).

130. UMPA § 9(c).
bona fide purchaser.\textsuperscript{132} Despite the notice given to the potential buyer, Jim can go through with the sale and convey his separate interest plus, perhaps, his half of the community share of title.

Bona fide purchaser status would allow the buyer to take "free of any claim of the other spouse" in community property.\textsuperscript{133} If the buyer is not a bona fide purchaser, he obviously takes subject to some claim of the other spouse. Is her claim to the entire community share or does it extend only to half of the community interest?\textsuperscript{134} Does title to the whole property pass to the buyer subject to a "claim" of the spouse to regain a half interest? Would that half be her separate property or community? Would she have to make restitution to the buyer of the amount of payment by him attributable to her half of the small community share in the property? The UMPA should be revised to define the extent of such a claim.\textsuperscript{135}

Rejecting the buy-in solution for improvements cases would reduce some of the confusion, but would not wholly eliminate the aforementioned uncertainties.\textsuperscript{136} The Act creates doubts by indicating there is to be a cash buy-in when the community makes

\textsuperscript{132} The comment to \$ 15 of the UMPA says the "add-a-name" provision is to protect a spouse from disposition of community property by the other spouse. \textit{Id}. This should mean the spouse is entitled to an "and" form of title and can object to the court's adding the name via an "or" form of title. The latter would still leave the other spouse empowered to sell the entire property to a bona fide purchaser. See UMPA \$ 5(a)(6). Section 15 should make this specific.

\textsuperscript{133} UMPA \$ 9(c).

\textsuperscript{134} In other words, is \$ 9 providing a way for one spouse to partition the community by selling community property over the objection of the other spouse? This could be done in California under the much-maligned decision of Mitchell v. American Reserve Ins. Co., 110 Cal. App. 3d 220, 222-24, 167 Cal. Rptr. 760, 761 (1980) (despite dual management statute husband can mortgage a half interest and foreclosure operates to partition the community property). For criticism of Mitchell, see H. VERRALL & G. BIRD, CALIFORNIA COMMUNITY PROPERTY 347 (4th ed. 1983); Reppy, \textit{supra} note 14, at 205 n.223. At least one court has declared it wrong. Andrade Dev. Co. v. Martin, 138 Cal. App. 3d 330, 336-37 n.3, 187 Cal. Rptr. 863, 867-88 n.3 (1982).

\textsuperscript{135} It is proposed here that \$ 9, which deals with the bona fide purchaser, should be eliminated. The transaction would then be governed by \$ 5, which entitles the husband to sell the entire property either because title to all of it is in his name (the premarriage title or inheritance title) or because the community portion is untitled and either spouse can sell it. UMPA \$ 5(a). Under \$ 5, the wife's disagreement with the decision to sell is irrelevant. Her communication of her disapproval to the buyer would not make the buyer less than bona fide because the husband would be exercising powers conferred on him by \$ 5. Section 15(c), enabling the wife to have her name added to title, is ample protection for her. Perhaps the UMPA could authorize her to obtain a temporary restraining order to forestall the contemplated sale by the husband while pursuing her \$ 15 remedy.

\textsuperscript{136} Refer to notes 125-34 \textit{supra} and accompanying text.
mortgage payments following a separate down payment. That is not the only way to be fair to the community. A remedy of reimbursement in improvements cases does not necessarily mean that the value of the community right could be measured by taking into account the increase in the value of the property itself. The amount of reimbursement could be expressed as a percentage of the increased value. If the reimbursement right were secured by a lien on the property (as currently occurs in some community property states) the problem of creditors forcing a sale would be eliminated. But the problem of Ellen's attempt to block Jim's sale would remain: she would assert that her adverse claim was based not on a share of community ownership but on a community lien.

D. Classifying Tort Recoveries for Personal Injuries

Section 4 of the Act classifies as separate property all components of a recovery during marriage on a tort claim for personal injuries "except for the amount of that recovery attributable to expenses paid or otherwise satisfied from" community property. This proposition is unacceptable for several reasons.

First, any portion of a recovery representing lost earnings during marriage should be community property, as it is in a majority of the community property states. Lost earnings should be com-

137. Cf. In re Marriage of Warren, 28 Cal. App. 3d 777, 782-83, 104 Cal. Rptr. 860, 864 (1972) (dictum) (reimbursement can be measured by amount of value added by the improvement when that exceeds the amount spent).


139. There is only one reported decision in which a community property state authorized a creditor during marriage to seize the community's interest existing in the form of a lien on separate property that resulted from community improvements. Conley v. Moe, 7 Wash. 2d 355, 362-64, 110 P.2d 172, 174-75 (1941). There the court merely allowed the garnishment of the claim and did not specifically say that the creditor of the community could foreclose the community's lien at an earlier date than a representative of the community could. Id. at 364, 110 P.2d at 175. That is, the creditor in Conley may have had to wait until dissolution of the marriage by divorce or death to convert the claim it had seized into money.

140. Yet if Jim really wanted the sale to go through he could arrange an escrow of cash proceeds to discharge the community lien.

141. UMPA § 4(g)(6).

munity property because the damages are recovered in lieu of what would have been community earnings, as the UMPA specifically acknowledges. Nor should it make any difference in a state that has abolished spousal immunity that the tortfeasor was the victim’s spouse. Almost certainly, an insurance company will have paid the damages that one spouse collects in tort from the other. The couple probably acquired the insurance policy with community funds. To classify such recovery as separate should be justifiable only where the tort is willful (on the theory that the tortfeasor, by misconduct, has forfeited his community half interest).

Moreover, because the spouses have not divorced, the tortfeasor apparently has been forgiven. If the victim spouse dies, it seems unfair to allow him to bequeath to third parties all of the money recovered for lost earnings as allowed under the UMPA. This penalty is too harsh for mere negligence of the survivor. Likewise, if there is a subsequent divorce, the recovery attributable to predivorce lost earnings ought to be divisible community property. In most states it would be nondivisible if characterized as separate property.

Damages paid for future medical bills also ought to be community property. Medical bills should be community debts under the UMPA’s “interest of the marriage” test. Like the damages paid for lost earnings, these may be converted into separate property when the marriage terminates for any reason other than the death of the victim spouse.

The UMPA offers only one reason for rejecting the majority rule that only the pain and suffering component of a personal injury award received during marriage is the victim spouse’s separate

If the marriage terminates with some of the recovery for future lost earnings still on hand, it is converted into separate property of the injured party (if he is still alive) because it is now held in lieu of income that would have been separate had the person been able to work. See In re Marriage of Bugh, 125 Ariz. 190, 192-93, 608 P.2d 329, 331-32 (1980); Hicks v. Hicks, 546 S.W.2d 71, 73-74 (Tex. Civ. App.—Dallas 1976, no writ); In re Marriage of Brown, 100 Wash. 2d 729, 737-39, 675 P.2d 1207, 1212-13 (1984); La. Civ. Code Ann. art. § 2344 (West 1984). This is the reverse of the reclassification the UMPA makes at divorce but not at dissolution of the community by the death of the victim spouse. See UMPA § 17(2).

143. UMPA § 17 comment (“Certain Personal Injury Recoveries”).
144. UMPA § 8(a).
145. Wisconsin provides that recovery for personal injury is separate property “except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property and except for the amount attributable to loss of income during marriage.” Wis. Stat. Ann. § 766.31(7)(f) (West Supp. 1984-85) (emphasis added). Thus Wisconsin takes a middle road between the majority rule and the UMPA.
property. The comments to section 17 state that to force determination of how much of an award is community prior to dissolution of the marriage allegedly "would impair the litigating posture." 146 Furthermore, according to the Act, the question of how much is logically community is not "significant" until divorce. 147

Unfortunately, the Act's approach could aggravate many situations in which a spouse, say for example, the husband, is injured and his wife has no management power over marital property. He cannot work to earn community property and she may be unable to work due to the need to stay at home and care for him. The community rents and profits from his large personal injury award are eaten up in day to day expense. Yet, hundreds of thousands of dollars may be on hand, received in lieu of his lost earnings. This award logically should be community, but the UMPA makes it the husband's separate property. The funds need to be managed and reinvested, but the wife has no role in doing so. 148 Creditors of the wife who can reach only community property and her separate property will also find it very "significant" that the UMPA has rejected the appropriate classification of much of the personal injury recovery on hand.

The UMPA's drafters erroneously assumed that the classification of the recovery would often affect the "litigating posture" over the tort claim. Ordinarily, this classification would not occur until after trial when a creditor levies or when the wife seeks to exercise management power. In one situation, however, the classification issue does affect the litigating posture. In most states, 149 if the wife has been concurrently negligent with another tortfeasor in causing

146. UMPA § 17 comment ("Certain Personal Injury Recoveries").
147. Id.
148. Money paid to the victim as community property probably would be untitled and subject to equal management under UMPA § 5(a)(2). Even if the victim husband had immediately invested all of it in stocks in his name, his wife could have joined in shared management power with him by obtaining an "add-a-name" order under UMPA § 15(c).
149. Two community property states have taken the position that the contributory negligence of one of the two marital partners should not reduce (under comparative negligence) or bar (under contributory negligence) a recovery in tort by the community partnership. CALIF. Civ. Code § 5112 (West 1988); WASH. Rev. Code Ann. § 4.22.020 (1984-85 Supp.). It is believed that this was done in California because courts were improperly characterizing pain and suffering damages as community property rather than as the victim's separate property. There is no indication that § 5112 was enacted because the contributory negligence doctrine as applied to a business partnership was not equally applicable to a marital partnership. See Reppy, The Effect of the Adoption of Comparative Negligence on California Community Property Law: Has Imputed Negligence Been Revived? 28 Hastings L.J. 1359 (1977), reprinted in 4 COMMUNITY PROP. J. 219 (1977).
the husband’s injuries, the community, but not the separate, recovery must be either reduced proportionately under a comparative negligence system or barred altogether by contributory negligence.\textsuperscript{150}

Apparently, the UMPA is trying indirectly to eliminate contributory negligence (in either its pure or comparative negligence form) as a factor barring or limiting the total tort recovery. The Act’s tort recovery classification provisions are thus contrary to basic community property theory that treats the actions of both spouses equally in determining what conduct—beneficial or harmful—should be credited or charged against the community. Legislatures should be aware of this possible effect on basic tort law. If the victim husband’s negligence reduces his separate recovery, the wife’s negligence should reduce the community recovery just as the husband’s would.

Section 4 provides an exception to the UMPA rule that, during marriage, all tort recovery for personal injuries is separate property: the portion of the recovery “attributable to expenses paid or otherwise satisfied from” community property is itself community property. This exception invites manipulation and penalizes carelessness in situations where one spouse’s negligence has contributed to the other spouse’s injuries. If either spouse should use community funds to pay medical bills before obtaining the recovery, in most states contributory negligence would bar recovery for such expenses, or at least reduce recovery under a comparative negligence theory. A legislature adopting the community property classification for tort recovery should take steps to prevent the reverse of this kind of manipulation—using the victim’s separate funds to pay medical expenses in order to avoid reduction of the community recovery. One commentator has suggested a flat rule that, in order to provide a more equitable solution, recovery for medical expenses should be community even if separate funds are used to pay the bills.\textsuperscript{151} To the extent there was a community recovery, the separate estate could be reimbursed.\textsuperscript{152} In any event, a legislature considering enactment of the UMPA should carefully

\textsuperscript{150} See W. Reppy & C. Samuel, supra note 1, at 181-84; Reppy, supra note 149, 23 Hastings L.J. at 1360-61, 4 Community Prop. J. at 219-20; Note, Comparative Negligence: Tort Damage Relief for the Marital Community, 9 Idaho L. Rev. 56, 56 (1972).


\textsuperscript{152} Id. at 373-74.
examine all aspects of the issues concerning classification of tort recoveries.\textsuperscript{153}

\textbf{E. Survivorship Marital Property}

Section 11(e) of the Act provides that, if a document of title states that the spouse holds an asset as “survivorship marital property,” then “[o]n the death of a spouse, the ownership rights of that spouse vest . . . solely in the surviving spouse by nontestamentary disposition . . . .”\textsuperscript{154} This section also specifically provides that the first spouse to die lacks testamentary power.\textsuperscript{155} Oddly, section 10 of the Act does not require that documents of title with such survivorship provisions be signed by both spouses even though the documents constitute, in effect, a marital property agreement varying the law otherwise applicable.\textsuperscript{156} Section 10 is unacceptable because it does not assure that the spouse losing testamentary control has agreed to the loss, or even knows of it.\textsuperscript{157}

\textbf{F. Classification of Life Insurance Policies}

In dealing with the classification of life insurance policies, the Act employs several special rules. First, if an insured spouse names himself as owner, the policy is community property even if all the premiums were paid solely with separate funds.\textsuperscript{158} Second, if the

\textsuperscript{153} This reexamination process should also consider the scope of the term “personal injury.” UMPA § 4(g)(6). It is not clear if this term would encompass recoveries for invasion of privacy, loss of consortium, or defamation. These would not seem to be personal injury torts. A good argument can be made that if damages for pain and suffering in a personal injury claim are to be separate, then so should damages for anguish caused by defamation or invasion of privacy. Perhaps the Act should employ a broader concept than “personal injury” in creating a category of tort where recovery is separate property.

\textsuperscript{154} UMPA § 11(e).

\textsuperscript{155} Id.

\textsuperscript{156} UMPA § 10(a) requires the signatures of both spouses for marital property agreements.

\textsuperscript{157} The proper rule is stated in Schindler v. Schindler, 126 Cal. App. 2d 697, 694-95, 272 P.2d 566, 570-71 (1954), in which the wife participated by signing papers involved with the purchase of joint property with community funds. The UMPA seems to be following the erroneous decision of In re Estate of Kruse, 7 Cal. App. 3d 471, 477-78, 86 Cal. Rptr. 491, 494-95 (1970), which declared that the husband could unilaterally convert community property into joint tenancy property.

\textsuperscript{158} UMPA § 12(c)(l). One possible explanation for the special rule could be that a term policy creates no community rents or profits. Thus the proceeds should be made community property as a substitute for those rents or profits. The problem with this explanation is that the UMPA has a flat rule providing that one spouse owes no obligation to the other to make separate property productive. UMPA § 2(b).
insured acquires a policy and names his spouse as the owner, the policy is the spouse’s separate property even if the spouse used community funds to pay premiums.\(^{159}\) Third, the section on life insurance creates an exception to the antigift rule of the UMPA.\(^{160}\) No matter how much community money the insured uses for premiums, the Act presumes that the other spouse consented to the gift when the beneficiary is the donor’s parent or child, even if the child is from a prior marriage.\(^{161}\) Fourth, a married person can use community property to pay premiums on his life insurance for the benefit of a former spouse incident to a property settlement agreement and the community then has no interest in the policy.\(^{162}\) Apparently the community is not entitled to reimbursement for this payment of a separate debt either.\(^{163}\)

It is unclear how the first rule applies if the policy purchased with separate funds not only names the insured spouse as owner but also recites an intention that it be his separate property. Surely such a designation would not be against public policy. At a minimum, the UMPA should make that option available. Additionally, if a spouse is careful enough to use only separate funds to pay premiums, the courts should find the presumption of community ownership rebutted.\(^{164}\) The comment to section 12 says that comparative “simplicity” is obtained by a flat rule that a policy naming the insured spouse as owner is community even though paid for with separate funds.\(^{165}\) But simplicity could also be advanced by the extreme position of adopting a general community for all assets. Simplicity in this context is just not that important a goal. Thus states adopting the UMPA should modify section 12 so that the normal rules of classification apply to life insurance, except when one spouse names the other as owner of the policy because then a gift is presumed.

Only the second of these four special rules makes sense. A husband who names his wife the owner of a policy on his life prob-

\(^{159}\) UMPA § 12(o)(1), (3).
\(^{160}\) Id. § 6
\(^{161}\) Id. § 12(c)(5).
\(^{162}\) Id. § 12(e).
\(^{163}\) An alimony or child support debt is separate under any form of a benefit or “interest of the marriage” test. Id. § 8(a), (b)(iii). Section 8(b)(1), however, treats alimony and child support obligations as if they were community debts by making community property liable.
\(^{164}\) Id. § 4(b).
\(^{165}\) Id. § 12 comment.
ably plans to remove the policy wholly from his estate for state inheritance tax purposes. The UMPA, however, ought to provide that the husband may expressly retain the community character of such a policy despite the designation of the wife as owner. For example, the policy could bear a designation stating: "Owner—the marital community of Beth and Harry Jones with Beth Jones the exclusive manager." The UMPA is unclear as to whether separate ownership by the wife is mandatory if she is to have exclusive management.166

The special rule presuming consent of the other spouse to a gift of proceeds from a community-owned policy to a parent or child is startling.167 This situation should instead be controlled by section 6168 which authorizes a gift not aggregating more than $500 per donee per year or a more expensive gift if "reasonable in amount considering the economic position of the spouses."169 Section 6 offers a perfectly sound rule to apply to life insurance proceeds. If premiums exceed $500 per year per donee, the donor spouse should have to show that his action was reasonable.170 In short, section 6 should govern gifts of life insurance to third parties, with the focus being on the amount of premiums paid rather than on the proceeds.171

The fourth special rule should also be qualified. The Act should direct the spouse who is obligated to maintain life insurance for a former wife (or for children of a prior marriage) to use separate funds to pay the premiums.172 If community funds must be used, the community estate should have a right of reimbursement. The community should have no interest in the proceeds.173

166. See id. § 12(c)(3).
167. Id. § 12(c)(5).
168. Id. § 6(a).
169. Id.
170. Moreover, the assumption that the mother-in-law, father-in-law, or stepchild of the nondonor spouse is likely to be a favorite of hers, so that she would approve of an unreasonable expenditure of community funds for insurance premiums, is contrary to human experience.
171. Wisconsin has accomplished this objective by omitting the presumption of consent. Wis. Stat. Ann. 766.61(3)(e) (West Supp. 1984-85). Thus, Wisconsin treats insurance premiums exactly as any other gift.
172. The grammar of UMPA § 6 needs to be simplified. The double "if" clause applying to gifts which do "not aggregate more than or a larger amount if . . . " is almost gibberish.
173. Refer to note 142 supra and accompanying text.
G. Quasi-Community Property

Section 17 is a quasi-community property statute.\textsuperscript{174} It directs a divorce court to treat preenactment acquisitions, and property acquired when living in a noncommunity jurisdiction, as community property if the property would be treated as such under the Act.\textsuperscript{176} If the state in which the couple divorces divides only community property, this quasi-community property will also be divided.\textsuperscript{176}

Section 17 applies only to termination of the marriage by “decree of dissolution, divorce, annulment, or declaration of invalidity,” but not to termination of the marriage by death.\textsuperscript{177} The quasi-community concept should be extended to dissolutions caused by the death of the spouse owning quasi-community property as has been done in California\textsuperscript{178} and Idaho.\textsuperscript{179}

V. Conclusion

In most states, the practitioner who deals with marital property deals with a complex and unsettled body of law. Thorough simplification of the marital property field is, perhaps, an unrealistic goal. But we should, at the very least, try to keep from creating new pitfalls. To the extent that the UMPA is a timely and equitable community property act, it has much to recommend it. Nevertheless, the difficulties it creates concerning the classification of different kinds of property, treatment of alternative living arrangements, and the use of a new legal lexicon should certainly be considered before the Act is adopted in any state.

\textsuperscript{174} See generally Reppy, Quasi-Community Property Comes to Texas, 9 COMMUNITY PROP. J. 171 (1982).
\textsuperscript{175} UMPA § 17(1).
\textsuperscript{176} See, e.g., CAL. CIV. CODE § 4800 (West Supp. 1984).
\textsuperscript{177} UMPA § 1(7).
\textsuperscript{178} CAL. CIV. CODE § 4800.5 (West Supp. 1984).
\textsuperscript{179} IDAHO CODE § 15-2-201 (1979). In Texas, the doctrine applies by statute only at divorce. TEX. FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1984). It is unclear whether Texas will judicially apply the doctrine at dissolution caused by death. See J. McKnight & W. Reppy, TEXAS MATRIMONIAL PROPERTY LAW 317-19 (1983).