Community property may be part of an Oregon estate

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It's no surprise that many Oregon residents came from other states; in the United Van Lines 37th annual migration study, Oregon was ranked as "the state to which the most people relocated in 2013." Many of those people came from states with community property systems, such as Washington and California. What happens to property acquired by a married couple in a community property state when one spouse dies after the couple has moved to Oregon?

There are at least four questions an estate planner ought to ask clients about community property—starting with *could* this client have any community property?

The response will depend on whether the client has ever lived in or owned property in a community property state. Besides our neighbors to the north and south, six other states recognize community property: Arizona, Idaho, Louisiana, New Mexico, Nevada, and Texas. In addition, Wisconsin has a community-property-like system. If your client has ever lived in or owned property in one of these jurisdictions, you may have a community property issue.

Assuming there could be community property, the next logical question is whether the client actually acquired any such property. In general, a community property system treats property acquired during a marriage as jointly owned, although each state's system is unique. Most community property statutes do not apply to property acquired by gift or inheritance, but do apply to money and other benefits earned through employment. Additionally, the manner in which title was taken to property can create a community property interest (or raise a presumption of community property). You'll need to look closely at the law of the specific jurisdiction in question to determine if any assets were acquired as or transmuted into community property. The characterization of property can vary widely from jurisdiction to jurisdiction.[1]

In addition, the existence of community property depends on the existence of a recognized relationship— usually marriage. In states that recognize putative and/or common law marriages, those marriages will implicate the community property system. Same-sex marriages, where recognized, will also create community property issues, which have not yet been fully resolved. In addition, California and some other states apply their community property systems to registered domestic partnerships.

If there is any community property, the next step is to attempt to identify what will happen to it upon the death of one spouse if the client takes no action. In a community property jurisdiction, each spouse generally has the right to dispose of his or her half of the community property at death. That raises the question of what happens to that community property when the couple moves to Oregon, a common-law jurisdiction

The Oregon solution is simplified by the Uniform Disposition of Community Property Rights at Death Act (Uniform Act), adopted by Oregon in 1973.[2] ORS 112.705-112.775. The Uniform Act applies to:

(1) All personal property, wherever situated:
   (a) Which was acquired as or became, and remained, community property under the laws of another jurisdiction; or
   (b) All or the proportionate part of that property acquired with the rents, or income of, or the proceeds from, or in exchange for, that community property; or
   (c) Traceable to that community property.
(2) All or the proportionate part of any real property situated in this state which was acquired with the rents, issues or income of, the proceeds from or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property. ORS 112.715.

Under the Uniform Act, community property, or any property traceable to community property or the proceeds of community property, is treated much the same as it would be in the community property state: "Upon death of a married person, one-half of the property to which [the Uniform Act] appl[ies] is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this state." ORS 112.735.

If community property concepts still apply to certain property, how do you determine which property is affected by the Uniform Act? The comments to the Uniform Disposition of Community Property Rights at Death Act give an illustrative example:

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

In this example, even though only the C Co. stock was purchased with community property in a community property state, all of the shares are subject to the Uniform Act, because all were "traceable to community property or the proceeds therefrom[.]" *Id*.

Real estate is subject to a slightly different analysis, as in this example:

> H and W, while domiciled in California, purchased a residence in California. They retained the residence in California when they were transferred to Wisconsin. After becoming domiciled in Wisconsin they used community funds, drawn from a bank account in California, to purchase a Wisconsin cottage. H and W subsequently became domiciled in Michigan; they then purchased a condominium in Michigan for $20,000 using $15,000 of community property funds drawn from their bank account in California and $5,000 earned by H after the move to Michigan. H died domiciled in Michigan; title to all of the real property was in H's name. Assuming Michigan had enacted this Act, three-fourths of the Michigan condominium would be property subject to this Act; the Michigan statute would not, however, apply to either the Wisconsin or California real estate. If Wisconsin had enacted this Act, the Wisconsin statute would apply to the Wisconsin cottage. *Unif. Disposition of Community Prop. Rights at Death Act § 1, comment on Subsection (2).*

As the committee noted, the analysis "is confined to real property located within the enacting state (since presumably the law of the situs of the property will govern dispositive rights)." *Id*. Still, with tracing of funds and proceeds, a property purchased in a common law jurisdiction could become subject to the Uniform Act and treated as community property.

The committee on the Uniform Disposition of Community Property Rights at Death Act noted that these rules "leave[] to the courts the difficult task of working out the precise interest which will be treated as the 'proportionate part' of the property subject to the dispositive formula of Section 3 [ORS 112.735 in Oregon]."

However, in making those determinations, the Uniform Act also supplies two rebuttable presumptions:

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

(2) Real property situated in this state and personal property wherever situated acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship, is presumed not to be property to which [the Uniform Act applies]. ORS 112.725. These are *rebuttable* presumptions—a community property agreement between the spouses, for example, could take the property outside the purview of the Uniform Act.

The fourth question, therefore, is what can you do as a planner to deal with the community property? The client could decide to leave the property as is, in which case the estate planner must plan around the community property (remembering that each spouse can generally dispose of only his or her half of the community property at death). But if the client wants to make a change, the Uniform Act "do[es] not prevent married persons from severing or altering their interests in property to which [the Uniform Act] appl[ies]." ORS 112.775(2). The planner can consider whether the spouses should deliberately transmute or sever their community property interests (keeping in mind that such an agreement may create a conflict between joint clients, especially if one spouse is significantly more wealthy). ■

Footnotes

1. See 1 Est. Plan. & Cmty. Prop. L.J. 169, 172 (2008-2009) Selected Problems in Planning with Retirement Benefits: Community Property Issues and Creditor's Rights, Golden, Alvin J (noting differences in community property treatment of retirement accounts between California and Texas, among other differences).
2. The Uniform Act has also been adopted in Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Minnesota, Montana, New York, North Carolina, Utah, Virginia, and Wyoming. *Unif. Disposition of Community Prop. Rights at Death Act Refs & Annos.*

For additional information, see *Administering Oregon Estates (2012 rev.), Chapter 4, Intestate Succession, Wills, and Community Property,* § 4.3 and Louis A. Mezzullo, "The Mobile Client: Tax, Community Property, and Other Considerations," 803-3rd Tax Mgmt. (BNA) Estates, Gifts, and Trusts.