

A User's Guide to Prosecuting Claims under Florida's Uniform Disposition of Community Property Rights at Death Act¹

By

Juan C. Antúnez²
Stokes McMillan Antúnez P.A.
Miami, Florida
www.flprobatelitigation.com
www.smpalaw.com

I. Introduction.

Black letter Florida law tells us that “[a]dministration of an estate is governed by the law of the decedent’s domicile.”³ In fact, the Florida Probate Rules require disclosure of a decedent’s domicile in seven separate rules.⁴ But what about *marital* domicile (i.e., the “domicile that a

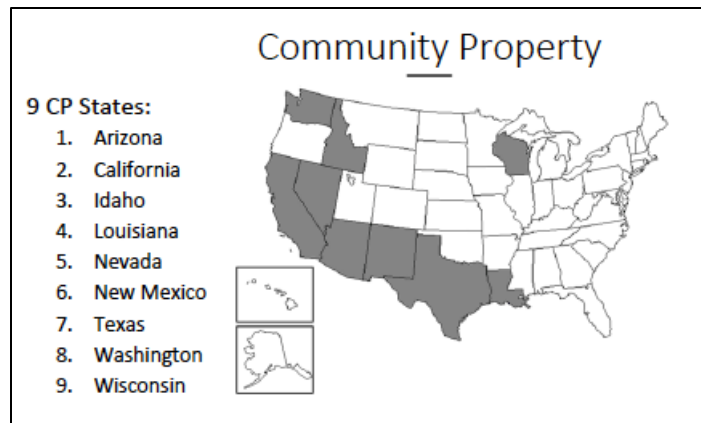
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² The author is a partner with Stokes McMillan Antúnez P.A., a boutique trusts and estates law firm located in Miami, Florida. He is a 1996 graduate of the New York University School of Law (J.D.), and a 2003 graduate of the University of Miami School of Law (LL.M. in Estate Planning). Mr. Antúnez has previously served as an adjunct law professor for the LL.M. in Estate Planning program at the University of Miami School of Law, and frequently lectures at continuing legal education seminars for professional groups on areas related to trusts and estates. Mr. Antúnez has published the *Florida Probate & Trust Litigation Blog* since 2005. Mr. Antúnez co-authored the Florida chapter of *International Succession*, published by Oxford University Press, and was the sole author of the Florida chapter of *ADR and Trusts: an international guide to arbitration and mediation of trust disputes*, published by Spiramus Press. Prior to law school Mr. Antúnez volunteered for service with the United States Marine Corps Reserve (4th ANGLICO, West Palm Beach, Florida), including combat duty during the first Gulf War.

³ *Nahar v. Nahar*, 656 So.2d 225, 229-230 (Fla. 3d DCA 1995) (citing *Biederman v. Cheatham*, 161 So.2d 538 (Fla. 2d DCA), *cert. denied*, 168 So.2d 146 (Fla.1964).

⁴ *See* Florida Probate Rule 5.122(a)(2) (“The petition for appointment of a curator shall be verified and shall contain ... the decedent’s ... state and county of *domicile*.”) (emphasis added); Rule 5.171(c) (“A person who is absent from the place of that person’s last known *domicile* for a continuous period of 5 years ... is presumed dead.”) (emphasis added); Rule 5.200(b) (“The petition for administration shall be verified by the petitioner and shall contain ... the ... state and county of the decedent’s *domicile*.” (emphasis added); Rule 5.210(a)(2) (“A petition to admit a decedent’s will to probate without administration shall be verified by the petitioner and shall contain ... the ... state and county of the decedent’s *domicile*.” (emphasis added); Rule 5.3425(a)(1) (“The petition for an order authorizing the search of a safe deposit box leased or co-leased by a decedent must be verified and must contain ... The decedent’s ... state and county of *domicile*.”) (emphasis added); Rule 5.405(b)(2) (“The petition [to determine protected

husband and wife, as a married couple, have established as their home.”)⁵ This distinct species of domicile is never even mentioned in Florida’s probate rules. So it shouldn’t come as a surprise to anyone that Florida attorneys may be inclined to focus primarily (perhaps exclusively) on a decedent’s domicile at death. This is a trap for the unwary. Why? Because a decedent’s marital domicile – which in today’s highly mobile society often changes multiple times over the course of a lifetime – can dramatically reshape the ultimate disposition of a Florida estate if at any time in the past the decedent’s marital domicile was located in a “community property” jurisdiction.



The choice-of-law rules underlying community-property claims in Florida probate proceedings were codified in the Uniform Disposition of Community Property Rights at Death Act (the “Uniform Act”). To date, the Uniform Act’s been adopted in 17 common-law states.⁶ Florida adopted its version of the Uniform Act in 1992 (“Florida CP Act”).⁷ “The purpose of the [Uniform Act] is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their ‘community’ rights. It thus follows the typical pattern of

homestead real property owned by the decedent] shall be verified by the petitioner and shall state ... the county of the decedent’s *domicile* at the time of death.” (emphasis added); Rule 5.530(a)(2) (“The petition [for summary administration] must be verified as required by law and must contain ... the ... state and county of the decedent’s *domicile*.”) (emphasis added).

⁵ See Black’s Law Dictionary (11th ed. 2019) (defining “matrimonial domicile”). See also *Farrell v Farrell*, 710 So.2d 151, 152 (Fla. 3d DCA 1998) (“[Appellee] argues, and we agree, that the *only place* where the parties had established a matrimonial domicile is in Florida, as this is the *only state* where the “parties lived together as husband and wife either actually or constructively.” (quoting Black’s Law Dictionary definition of matrimonial domicile) (emphasis in original); *Gould v. Gould*, 194 N.Y.S. 745, 747-748 (N.Y. App. Div. 1922) (“While it is true that a man can have but one domicile, it does not necessarily follow that the husband and wife may not establish a matrimonial domicile different from that of the husband. ... [T]here can be a personal domicile distinct from the matrimonial domicile. The matrimonial domicile ... may be defined to be the place where a husband and wife have established a home, in which they reside in the relation of husband and wife. It is the place where the marital contract is being performed; and although one party or the other may abandon the relation and leave the jurisdiction, nevertheless the res remains in the place where the contract was last being performed.”)

⁶ See Disposition of Community Property Rights at Death Act (1971), list of adopting jurisdictions. Available at: <https://www.uniformlaws.org/committees/community-home?communitykey=cc060023-d743-4d32-b7e5-35b12cba4fb8&tab=groupdetails>

⁷ See Fla. Stat. § 732.216 (Sections 732.216-732.228 may be cited as the “Florida Uniform Disposition of Community Property Rights at Death Act.”). *Laws 1992, c. 92-200, § 4.*

community property which permits the deceased spouse to dispose of ‘his half’ of the community property, while confirming the title of the surviving spouse in ‘her half.’”⁸

There are three must-read cases any Florida probate attorney tasked with evaluating a community-property claim should analyze. The first is *Quintana v. Ordone*, 195 So.2d 577 (Fla. 3d DCA 1967), a pre-Uniform Act opinion applying the “partial mutability” choice-of-law rule to community-property claims that has since been codified in the Uniform Act and Florida’s CP Act. It’s also one of only two Florida appellate decisions in the last 50 years directly addressing community property claims in a Florida probate proceeding. The second is *Estate of Bach*, 548 N.Y.S.2d 871 (Sur. Ct. 1989), a New York Surrogate’s Court judgment providing a detailed roadmap for how asset tracing works in these cases and also the proper procedure for spouses seeking to prosecute community-property claims in jurisdictions that have adopted the Uniform Act (New York adopted its version of the Uniform Act in 1981). Finally, there’s *Johnson v. Townsend*, 259 So. 3d 851 (Fla. 4th DCA 2018), the first and only appellate decision to examine Florida’s CP Act and to apply Florida’s probate creditor filing deadlines to these claims (in this case the claim was filed late, and thus forfeited). *Johnson* is especially important because it underscores the very narrow window of opportunity afforded to surviving spouses seeking to prosecute claims under Florida’s CP Act. All three of these cases are discussed in depth below under the “Case Studies” subheading of these materials.

A. Community-property states and spousal property rights:

There are two distinct property systems in the United States: common law and community property. “Common law is the dominant property system in the United States and has been adopted by 41 states [including Florida]. The theory underlying common law is that each spouse is a separate individual with separate legal and property rights.”⁹

“The community property system has been adopted by nine states: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin. The U.S. Territories of Guam and Puerto Rico are also community property jurisdictions.”¹⁰ According to census data, U.S. community property states include our two most populous states (California at #1 and Texas at #2), and collectively represent over 30% of the entire U.S. population.¹¹ “The theory underlying

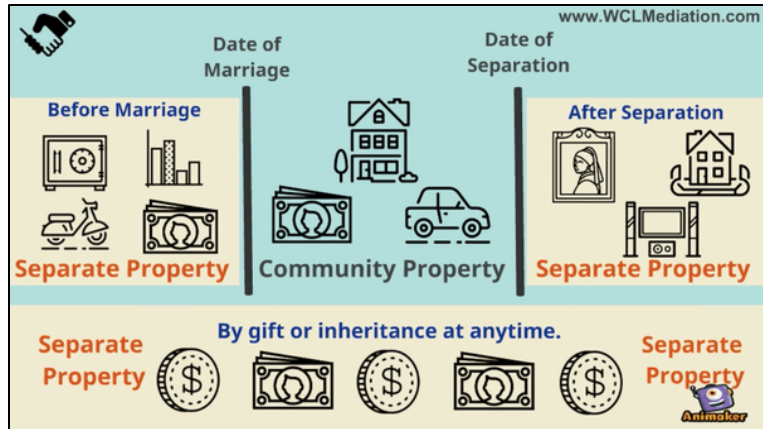
⁸ Uniform Act, Prefatory Note. Available at: <https://www.uniformlaws.org/viewdocument/final-act-with-comments-26?CommunityKey=cc060023-d743-4d32-b7e5-35b12cba4fb8&tab=librarydocuments>

⁹ IRM § 25.18.1.2.1 (02-15-2005). Available at: https://www.irs.gov/irm/part25/irm_25-018-001#idm140332604209888.

¹⁰ IRM § 25.18.1.2.2 (03-04-2011). Available at: https://www.irs.gov/irm/part25/irm_25-018-001#idm140332604209888.

¹¹ See US States - Ranked by Population 2020. Available at: <http://worldpopulationreview.com/states>. See also U.S. Census, NST-EST2019-01: Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019. Available at: <https://www2.census.gov/programs-surveys/popest/tables/2010-2019/state/totals/nst-est2019-01.xlsx?#>

community property is analogous to that of a partnership. Each spouse contributes labor (and in some states, capital) for the benefit of the community, and shares equally in the profits and income earned by the community. Thus, each spouse owns an automatic 50% interest in all community property, regardless of which spouse acquired the community property.”¹²



Source: <https://www.youtube.com/watch?v=9c4C-VeeXUk>.

A married couple’s community property “estate” is terminated in one of only two ways: by divorce or death. By statute,¹³ as well as case law,¹⁴ Florida has categorically rejected all forms of community property rights in divorce proceedings. That being said, previously acquired community property rights are in practice largely preserved in these proceedings because Florida law suggests “that equal or 50/50 is the proper starting point in making an equitable distribution of marital assets,”¹⁵ regardless of whose name the asset is titled in.¹⁶ With regard to testamentary community property rights Florida’s approach is distinctly different. In this context, community property rights are explicitly preserved by Florida’s CP Act, if only to a limited degree.

B. Marital Property Choice-of-Law Rule: Partial Mutability:

While not expressly using the term, in its *Quintana* opinion (discussed below) the 3d DCA, in accordance with broadly accepted U.S. choice-of-law principles, adopted the partial mutability

¹² IRM § 25.18.1.2.2 (03-04-2011).

¹³ “Title to disputed assets shall vest only by the judgment of a court. This section does not require the joinder of spouses in the conveyance, transfer, or hypothecation of a spouse’s individual property; affect the laws of descent and distribution; or establish community property in this state.” Fla. Stat. § 61.075(8) (emphasis added).

¹⁴ See *Estabrook v. Wise*, 348 So.2d 355 (Fla. 1st DCA), cert. denied, 354 So.2d 980 (Fla. 1977), cert. denied, 435 U.S. 971, 98 S.Ct. 1612, 56 L.Ed.2d 63 (1978) (“Florida is not a community property state, and thus is not required to recognize an encumbrance predicated upon a foreign state’s community property law. The establishment of non-record title interests arising out of marital claims should be settled in the forum state.”); *Green v. Green*, 442 So.2d 354, 355 (Fla. 1st DCA 1983) (“Florida is not a community property state ...”); *Herrera v. Herrera*, 673 So.2d 143, 144 (Fla. 5th DCA 1996) (“Florida is not a community property state.”)

¹⁵ *Herrera*, 673 So.2d at 144. See also Fla. Stat. § 61.075(1) (“In a proceeding for dissolution of marriage ... the court shall set apart to each spouse that spouse’s nonmarital assets and liabilities, and in distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors ...”) (Emphasis added.)

¹⁶ See Fla. Stat. § 61.075(6)(a)1.a. (“Marital assets and liabilities” include: *Assets acquired* and liabilities incurred *during the marriage*, individually by *either spouse* or jointly by them.) (Emphasis added.)

choice-of-law rule for testamentary property rights of couples whose prior marital domicile was located in a community property jurisdiction.

Under this conflict-of-laws rule, the right of a spouse in a movable asset acquired during marriage is determined by the law of the state in which the spouses had their marital domicile at the time of the acquisition of the asset. Thus, if the spouses change their marital domicile during the marriage, it is entirely possible that different movable assets will be governed by different laws. This conflict-of-laws rule is widely known as “partial mutability” because the law of the original marital domicile does not remain the governing law as to assets acquired after a change in marital domicile has taken place. In other words, there is “mutability.” However, it is only “partial” because with respect to rights acquired at a particular marital domicile, they are not mutable and are not lost simply by moving to a new marital domicile that does not recognize those spousal rights.¹⁷

This choice-of-law rule has deep historical roots in the U.S.,¹⁸ is “emphasized explicitly by the Restatement (First) of Conflict of Laws § 290 and in actual application by the Restatement (Second) of Conflict of Laws § 259,”¹⁹ and was codified in the Uniform Act.

C. Florida’s CP Act:

Florida’s CP Act is a powerful tool that can be used from the “outside in” by surviving spouses seeking recover estate assets rightfully belonging to them, and also from the “inside out” by personal representatives seeking to bring new assets into an estate for the benefit of beneficiaries or probate creditors.

But there’s a catch. Florida’s CP Act is not self-executing; community property rights are forfeited if not claimed during the course of a probate proceeding. And with respect to surviving spouses, the filing deadline is the same exceedingly small – and often unforgiving – set of deadlines generally applicable to probate creditors, as recently established in *Johnson v. Townsend*, 259 So. 3d 851 (Fla. 4th DCA 2018). The *Johnson* case is a cautionary tale underscoring Florida’s public policy favoring the “speedy” and final determination of probate proceedings.²⁰ And while

¹⁷ Schoenblum, Jeffrey, *U.S. Conflict of Laws Involving International Estates and Marital Property: A Critical Analysis of Estate of Charania v. Shulman*, 103 Iowa L. Rev. 2119, 2121 (2018). *See also Newman v. Newman*, 558 So.2d 821 (Miss. 1990) (“[T]he ... prevailing rule in American jurisdictions [is]: The law of the domicile at the time of acquisition of movable property determines the spouse’s interests. ... *This rule is characterized as one of partial mutability, as distinguished from full mutability (the rights to marital property vary with the actual domicile) and immutability (the rights to marital property are governed by the law of the marital domicile).* *See H. Marsh, Marital Property in Conflict of Laws* 103–10 (1952).”) (Emphasis added.)

¹⁸ “For nearly 200 years, the prevailing doctrine in the United States has been ‘partial mutability.’” *See Schoenblum, supra* note 17, at 2121.

¹⁹ *Id.* at FN 54.

²⁰ *See Estate of Brown*, 117 So.2d 478 (Fla. 1960) (“Public policy requires that estates of decedents be speedily and finally determined.”); *In re Estate of Gay*, 294 So.2d 668 (Fla. 4th DCA 1974) (The “announced public

personal representatives are as a general rule statutorily exempt from liability for missing these filing deadlines, their attorneys are not.²¹ A chilling statutory omission when coupled with Florida's third-party beneficiary rule for standing in legal malpractice actions, which opens the door to malpractice claims by non-client third party beneficiaries, such as claims asserted against a guardian's attorney by the non-client beneficiaries of the deceased ward's estate,²² claims asserted by a successor personal representative against a predecessor personal representative's counsel,²³ and claims asserted by a former ward against the attorney for his former court-appointed guardian.²⁴

D. The number of migrants to Florida from community property jurisdictions (both domestic and foreign) is too large to ignore.

In most common law jurisdictions probate practitioners can take comfort in the fact that they are unlikely to ever encounter the kind of multi-jurisdictional choice-of-law/marital property

policy of this state ... requires that estates of decedents be speedily and finally determined.”) (citing *Estate of Brown*, 117 So.2d 478 (Fla. 1960)).

²¹ See Fla. Stat. § 732.221 (“The *personal representative has no duty* to discover whether any property held by the surviving spouse is property to which ss. 732.216-732.228 apply, unless a written demand is made by a beneficiary within 3 months after service of a copy of the notice of administration on the beneficiary or by a creditor within 3 months after the first publication of the notice to creditors.”) (Emphasis added); Fla. Stat. § 732.223 (“The *personal representative has no duty* to discover whether property held by the decedent is property to which ss. 732.216-732.228 apply unless a written demand is made by the surviving spouse or the spouse’s successor in interest within 3 months after service of a copy of the notice of administration on the surviving spouse or the spouse’s successor in interest.”) (Emphasis added.) See also Uniform Act, Perfection of Title of Surviving Spouse, *cmt.* (“This section is *designed to eliminate any liability of the personal representative* for a breach of his fiduciary duty by failing to search for or to discover whether property held by the decedent is property defined in [Fla. Stat. § 732.217], unless a written demand is made by the surviving spouse or the spouse’s successor in interest.”) (Emphasis added.)

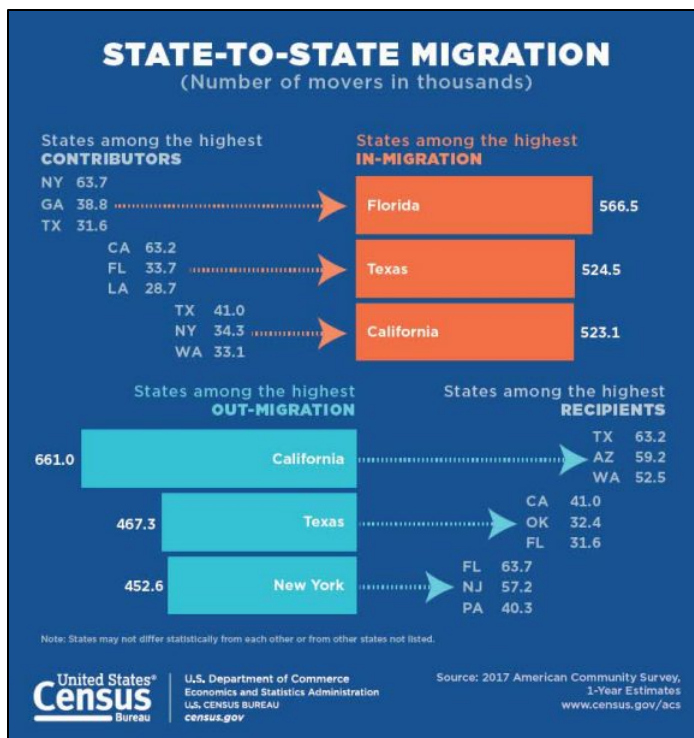
²² See *Hodge v. Cichon*, 78 So.3d 719 (Fla. 5th DCA), *review denied*, 99 So.3d 942 (Fla. 2012) (The third-party intended beneficiary exception to the rule requiring the plaintiff in a legal malpractice action to be in privity with the attorney is not limited to will drafting cases.).

²³ See *Bookman v. Davidson*, 136 So.3d 1276, 1280 (Fla. 1st DCA 2014), (Successor personal representative of estate had standing and duty, pursuant to statute governing power and rights of successor representatives, to bring legal malpractice suit against attorney who had been retained by estate’s original personal representative alleging that the original representative, through attorney’s guidance, improperly disclaimed or transferred estate’s assets; original representative had power to engage attorney and to pay attorney from estate funds and duty to pursue assets of the estate, and successor representative stepped into the shoes of original representative.)

²⁴ *Saadah v. Connors*, 166 So.3d 959 (Fla. 4th DCA 2015) (Ward was an intended third-party beneficiary of the services provided by attorney for court-appointed emergency temporary guardian, and thus attorney owed ward a duty of care sufficient to support assertion by ward of a legal malpractice claim against attorney after the guardianship terminated.)

issue the Uniform Act is designed to address. Not so in Florida, a longtime magnet for migrants, both domestic and international. In this state, the numbers are simply too large to ignore.

Florida is the first choice for relocating retirees within the U.S.²⁵ And according to census data, the largest recipient of overall state-to-state migration in the U.S.,²⁶ as well as the single largest recipient of all migrants from Puerto Rico (a U.S. territory and community property jurisdiction).²⁷ To the extent any of these domestic migrants are married couples coming from any of our domestic community property jurisdictions, they bring with them their testamentary community property rights. But it doesn't end there.



The inflow of community-property couples to Florida also includes international migrants. “Under the law of most countries in continental Europe and virtually all countries in Latin America, spouses own property ‘in community’ unless they have expressly adopted another marital property regime such as separation of property.”²⁸ Florida is the number one destination for South American migration to the U.S.,²⁹ and according to census data, the single largest

²⁵ See Silva, Derek CEPF, *Where Retirees Are Moving – 2019 Edition*, SmartAsset (April 25, 2019) (According to the study’s press release, this ranking is based on net migration data from the U.S. Census Bureau and reflects the number of people age 60 and older moving into Florida minus the number moving out of Florida). Available at: <https://smartasset.com/financial-advisor/where-are-retirees-moving-2019>.

²⁶ See Kerns, Kristin and Locklear, L. Slagan, *Three New Census Bureau Products Show Domestic Migration at Regional, State, and County Levels*, U.S. Census Bureau, April 29, 2019. Available at: <https://www.census.gov/library/stories/2019/04/moves-from-south-west-dominant-recent-migration-flows.html>.

²⁷ See Glassman, Brian, *A Third of Movers From Puerto Rico to the Mainland United States Relocated to Florida in 2018*, U.S. Census Bureau, Sept. 26, 2019. Available at: <https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html>

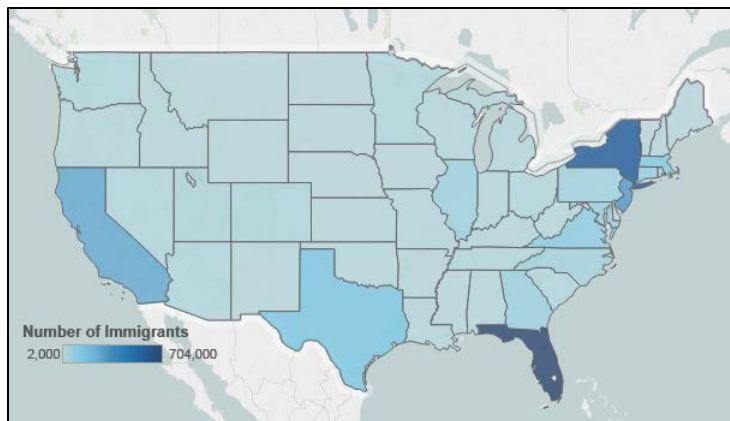
²⁸ See Galligan, Michael W., *International Estate Planning for U.S. Citizens: An Integrated Approach*, Estate Planning, a Thomson Reuters publication (October 2009). See also Willey, Charles W., *Effect in Montana of Community-Source Property Acquired in Another State (And Its Impact on a Montana Marriage Dissolution, Estate Planning, Property Transfers, and Probate)*, 69 Mont. L. Rev. 313, 365 (2008) (“At present, Cuba and all of the major countries of Latin America, excluding Honduras, utilize the community property system. ... Argentina, Bolivia, Brazil and Chile speak in terms of ‘marriage partnership.’ El Salvador and Mexico have an optional community property system, and Paraguay and Uruguay have an ‘opt-out’ community property system.”)

²⁹ See Zong, Jie and Batalova, Jeanne, *South American Immigrants in the United States*, Migration Policy Institute (Nov. 7, 2018). “In the 2012–16 period, most immigrants from South America lived in Florida (25 percent),

recipient of all international migration to the U.S.³⁰ To the extent any of these international migrants are married and come from community property jurisdictions, they too bringing their testamentary community property rights with them.

II. A deep dive into Florida’s CP Act:

The first three sections of Florida’s CP Act “form the heart of the Act; the succeeding sections might almost be described as precatory and have been added to clarify situations which would probably follow from the first three sections but which might raise questions.”³¹ Fla. Stat. § 732.217 defines the scope of Florida’s CP Act, Fla. Stat. § 732.218 gives rise to a series of rebuttable presumptions intended to aid in the identification and tracing of community-property assets, and Fla. Stat. § 732.219 defines a surviving spouse’s dispositive rights with regard to any such assets.



Top States of Residence for South Americans in the United States, 2012–16. Source: Zong, Jie and Batalova, Jeanne, *South American Immigrants in the United States*, Migration Policy Institute (Nov. 7, 2018).

New York (20 percent), or New Jersey (11 percent). The five counties with the most South Americans were Miami-Dade County in Florida, Queens County in New York, Broward County in Florida, Los Angeles County in California, and Kings County in New York. Together, these counties accounted for nearly 30 percent of the South American immigrant population in the United States. ... In 2017, the five largest countries of origin were Colombia (783,000, or 24 percent of all South American immigrants), Peru (459,000, 14 percent), Ecuador (454,000, 14 percent), Brazil (451,000, 14 percent), and Venezuela (351,000, 11 percent). Together, they accounted for 78 percent of the total South American immigrant population in the United States.” *Id.* Available at: <https://www.migrationpolicy.org/article/south-american-immigrants-united-states#DistributionStateCity>.

³⁰ See Knapp, Anthony, *Net Migration between the U.S. and Abroad Added 595,000 to National Population Between 2018 and 2019*, U.S. Census Bureau, Dec. 30, 2019. “Florida, California, Texas, New York and Massachusetts typically gain the most migrants from abroad and comprise about half of net international migration for the nation most years. ... Between the last census in 2010 and July 1, 2019, international migration added 1,107,000 people to Florida; 1,022,000 to California; 819,000 to Texas; 698,000 to New York; and 362,000 to Massachusetts.” *Id.* Available at: <https://www.census.gov/library/stories/2019/12/net-international-migration-projected-to-fall-lowest-levels-this-decade.html>.

³¹ Uniform Act, Prefatory Note.

A. Fla. Stat. § 732.217 defines the scope of Florida’s CP Act:

1. Personal Property:

Fla. Stat. § 732.217(1) Subsection (1): Personal Property	Uniform Act (Commentary)
<p>“[Florida’s CP Act applies] to the disposition at death of the following property acquired by a married person: ... <i>Personal property</i>, wherever located, which: (a) Was acquired as, or became and remained, community property under the laws of another jurisdiction; (b) Was acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, community property; or (c) Is <i>traceable</i> to that community property.” (Emphasis added.)</p>	<p>“Subsection (1) is designed to cover all personal property which was acquired while the spouses were domiciled in a community property state, to the extent that it would have been treated as community property by that state at the time of acquisition and that no further action terminated the community character of the property. It also includes any property which was not originally community property but became such by agreement and, further, <i>brings within the Act any personal property which can be traced back to a community source</i>. Again, the Act only applies if there was no severance of the community interests [per Fla. Stat. § 732.225].”³² (Emphasis added.)</p>

Uniform Act, § 1, Example 1. “H and W, while domiciled in California, purchased 100 shares each of A Co., B Co., and C Co. stock with community property (earnings of H). H and W were transferred to [Georgia,] a common law state which [has] 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 [Florida] 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 [Florida] 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.”³³

UNIFORM ACT, EXAMPLE 1: ASSET TRACING: PERSONAL PROPERTY

Marital Domicile	A Co.	B Co.	C Co.	D Co.	E Co.	Community Property
California	\$100	\$100	\$100	--	--	\$300
Georgia	(\$100)	\$100	\$100	\$100	--	\$300
Florida	--	(\$100)	\$100	(\$50) \$50	\$150	\$300
Community Property	--	--	\$100	\$50	\$150	\$300

³² Uniform Act, Subsection (1): Personal Property, *cmt.*

³³ Uniform Act, Subsection (1): Personal Property, *Example 1.*

2. Real Property:

Fla. Stat. § 732.217(2) Subsection (2): Real Property	Uniform Act (Commentary)
<p>“[Florida’s CP Act applies] to the disposition at death of the following property acquired by a married person: ... <i>Real property</i>, except real property held as tenants by the entirety, which is located in this state, and which: (a) 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 (b) Is <i>traceable</i> to that community property.” (Emphasis added.)</p>	<p>“Subsection (2) deals with real property and is confined to real property located within [Florida] (since presumably the law of the situs of the property will govern dispositive rights). The policy and operation of this subsection are intended to be the same as those set forth in subsection (1).”³⁴</p>

Uniform Act, § 1, Example 2. “H and W, while domiciled in California, purchased a residence in California. They retained the residence in California when they were transferred to Wisconsin. After becoming domiciled in Wisconsin, they used community funds, drawn from a bank account in California, to purchase a Wisconsin cottage. H and W subsequently became domiciled in [Florida]; they then purchased a condominium in [Florida] 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 [Florida]. H died domiciled in [Florida]; title to all of the real property was in H’s name. Assuming [Florida] had enacted this Act, three-fourths of the [Florida] condominium would be property subject to this Act; the [Florida] 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.”³⁵

UNIFORM ACT, EXAMPLE 2: ASSET TRACING: REAL PROPERTY

Marital Domicile	California Residence	Wisconsin Cottage	Florida Condominium (Non-Homestead)	Community Property
California	Titled in H’s Name Alone			100%
Wisconsin		Titled in H’s Name Alone		0% (Wisconsin has not adopted the Uniform Act)
Florida			Titled in H’s Name Alone	75% (Purchased using \$15,000 of community property funds)

³⁴ Uniform Act, Subsection (2): Real Property, *cmt.*

³⁵ Uniform Act, Subsection (2): Real Property, *Example 2.*

Marital Domicile	California Residence	Wisconsin Cottage	Florida Condominium (Non-Homestead)	Community Property
				drawn from their bank account in California and \$5,000 earned by H after the move to Florida)

3. Marriage Requirement:

Section 732.217 limits the scope of Florida’s CP Act exclusively to property acquired by a “married” person. However, the possible universe of couples with community property rights moving to Florida is not limited to married persons. For example, California,³⁶ Washington,³⁷ and Nevada³⁸ all extend community property rights to non-married, registered domestic partners. These non-married couples are by definition excluded from the scope of Florida’s CP Act. (Registered domestic partners aren’t married for federal tax purposes either.)³⁹

In the international context, the basic principle is that a valid marriage according to the law of a foreign nation will be recognized as such in Florida.⁴⁰ This recognition is not extended to non-married couples who nevertheless have property rights under some form of marriage substitute. For example, “reputed spouses” under Israeli law,⁴¹ and couples in a “union in fact” under

³⁶ See Cal. Fam. Code § 297.5(a) (West 2006) (“Registered domestic partners shall have the same rights ... as are granted to and imposed upon spouses.”); Cal. Fam. Code § 760 (West 2006) (“[A]ll property, real or personal, wherever situated, acquired by a married person [or registered domestic partner] during the marriage [or registered domestic partnership] while domiciled in this state is community property.”).

³⁷ See Wash. Rev. Code Ann. §26.16.030 (West 2011) (“Property... acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property.”).

³⁸ See Nev. Rev. Stat. Ann. §122A.200 (LexisNexis 2010) (“Domestic partners have the same rights ... as are granted to and imposed upon spouses.”).

³⁹ IRS Publication 555 (01/2019), *Community Property* (“For federal tax purposes, marriages of couples of the same sex are treated the same as marriages of couples of the opposite sex. The term ‘spouse’ includes an individual married to a person of the same sex. However, individuals who have entered into a registered domestic partnership, civil union, or other similar relationship, that isn’t considered a marriage under state law, aren’t considered married for federal tax purposes.”) Available at: <https://www.irs.gov/publications/p555>

⁴⁰ See generally *Montano v. Montano*, 520 So.2d 52 (Fla. 3d DCA 1988).

⁴¹ See *Cohen v. Shushan*, 212 So.3d 1113, 1116 (Fla. 2d DCA 2017) (While Israel has . . . established the reputed spouse relationship as something of an alternative to marriage, and indeed, has conferred a broad array of rights to reputed spouse couples that . . . are ‘equal’ to marriage, Israeli law has purposely kept the status of these two relationships separate. Reputed spouses are not married spouses under Israeli law.”)

Colombian law,⁴² have both been rejected as marriage substitutes by Florida courts. It's reasonable to assume the same result would apply in the context of Florida's CP Act.

And then there's "common law" marriage. Texas is the only community property state that permits residents to enter into a common law marriage. But there are a total of nine states and the District of Columbia that still permit couples to enter into common law marriage.⁴³ Although Florida law no longer recognizes the validity of common law marriages contracted in this state after 1968, it will respect a common law marriage validly created in a jurisdiction recognizing such marriages,⁴⁴ including presumably for purposes of Florida's CP Act.

B. Rebuttable presumptions applicable under Florida's CP Act:

"The purposes of the rebuttable presumptions are simply to assist a court in applying the definitions in Section 1, through a process of tracing the property to a community property origin."⁴⁵

1. What "Comes In": Florida property that is presumed to be community property:

<p>Fla. Stat. § 732.218(1) Florida property that <i>is</i> presumably community property</p>	<p>Uniform Act (Commentary)</p>
<p>"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 <i>is presumed</i> to have been acquired as, or to have become and remained, <i>property to which these sections apply</i>." (Emphasis added.)</p>	<p>"Subsection (1) of Section 2 deals with property acquired by the spouses while domiciled in a community property state. It thus provides that if one of the spouses acquired property while so domiciled, <i>such property is 'presumed' (a rebuttable presumption) to have been and remained community</i>. It may be shown, of course, that such property was the separate property of the spouse and the law of the state of domicile may furnish the rule. For example the law of community domicile may provide the rule that property acquired in the name of the wife shall be deemed to be her separate property or that a particular subsequent act effectively severed the community property interests."⁴⁶ (Emphasis added.)</p>

⁴² See *American Airlines v. Mejia*, 766 So.2d 305 (Fla. 4th DCA 2000) ("Unión Marital de Hecho" under Colombian law was not the equivalent of common law marriage in the United States, and thus, partner to *unión* could not be a surviving spouse under state law for purposes of Wrongful Death Act.)

⁴³ See Goffe, Wendy, *Yours, Mine and Ours: An Introduction to the Laws of the U.S. Community Property States*, Remarks at Estate Planning Essentials: Marital Deductions Post-DOMA and Community Property (July 9, 2014). Available at: http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/VCWB0709_chapter_02_thumb.pdf.

⁴⁴ See Fla. Stat. § 741.211 (Common-law marriages void); and *Anderson v. Anderson*, 577 So.2d 658, 660 (Fla. 1st DCA 1991) ("The law in Florida on this point is consistent with the general rule recognized in other jurisdictions that the validity of a marriage is to be determined by the law of the jurisdiction where the marriage was entered into.")

⁴⁵ Uniform Act, Rebuttable Presumptions, *cmt.*

⁴⁶ Uniform Act, Rebuttable Presumptions, Subsection (1) of Section 2, *cmt.*

Uniform Act, § 2, *Example 1*. “H, married to W and domiciled in California, acquired stock; later H and W became domiciled in [Florida]. Such property, if retained, is presumed to be property subject to this Act. By operation of Section 1 the proceeds of sale or exchange of such stock, and property acquired with the proceeds or income of such stock, would be deemed subject to the Act. If, however, upon the death of H, H’s personal representative rebutted the presumption by evidence that the stock was acquired by H with his separate property (or by inheritance) neither the stock nor property acquired with that property or the income therefrom (unless the income itself would be subject to the Act because, under the applicable law, income from separate property is deemed to be community property), would be subject to this Act. Similarly, the presumption may be rebutted by showing that such property, though originally community property, was effectively severed by an act of the spouses. It should be emphasized that the presumption is simply one of procedural convenience and neither changes the nature of the property interests nor prevents an interested person from showing the separate nature of the property.”⁴⁷

REBUTABLE PRESUMPTION: EXAMPLE 1

Marital Domicile	Stock	Proceeds of Sale/Exchange	Rebuttable Presumption
California	\$100		The CA stock, if retained, is presumed to be property subject to Florida’s CP Act. By operation of Fla. Stat. § 732.217 the proceeds of a sale or exchange of such stock, and property acquired in FL with the proceeds or income of such stock, would be deemed subject to Florida’s CP Act.
Florida		\$100	

2. What “Stays Out”: Florida property that is presumed NOT to be community property:

Fla. Stat. § 732.218(2) Florida property that <i>is</i> presumably NOT community property	Uniform Act (Commentary)
“Real property located in this state, other than homestead and real property held as tenants by the entirety, and personal property wherever located acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property and title to which was taken in a form which created rights of survivorship are presumed to be property to which these sections do <i>not</i> apply.” (Emphasis added.)	“Subsection (2) sets up a rebuttable presumption that where a domiciliary of a common law state acquired property in such form as to indicate that title was in joint tenancy, tenancy by the entireties, or some other form of joint ownership with right of survivorship, <i>it will be presumed that the property is not subject to the Act</i> . This presumption was deemed appropriate as expressing the normal expectations of the spouses and to facilitate ascertainment of title to real property

⁴⁷ Uniform Act, Rebuttable Presumptions, Subsection (1) of Section 2, *Example 1*.

Fla. Stat. § 732.218(2) Florida property that <i>is</i> presumably NOT community property	Uniform Act (Commentary)
	located in the enacting state, as well as personal property wherever located.” ⁴⁸ (Emphasis added.)

Uniform Act, § 2, Example 2. “John and Mary Jones, formerly domiciled in California, became domiciled in [Florida] and purchased a residence, taking title in the names of “John and Mary Jones as joint tenants, and not as tenants in common, with right of survivorship.” Regardless of the source of the funds, the [Florida] residence would be presumed to be held in joint tenancy and not subject to this Act.”⁴⁹

REBUTABLE PRESUMPTION: EXAMPLE 2

Marital Domicile	Income	Purchase of FL real property	Rebuttable Presumption
California	\$100		Regardless of the CA source of the funds, FL real property owned with rights of survivorship is presumed to be excluded from Florida’s CP Act.
Florida		\$100	

3. TBE and Homestead Property Excluded from Florida’s CP Act:

There are two forms of marital property Florida’s CP Act excludes from a spouse’s pre-existing community property rights: real property owned as tenants by the entireties (“TBE”)⁵⁰ and “homestead property.”⁵¹ Real property owned as TBE is by definition excluded from the scope of Florida’s CP Act in Fla. Stat. § 732.217(2), which provides in relevant part as follows:

Sections 732.216-732.228 apply to the disposition at death of the following property acquired by a married person: ... (2) Real property, *except real property held as tenants by the entirety*, which is located in this state ... (Emphasis added.)

⁴⁸ Uniform Act, Rebuttable Presumptions, Subsection (2) of Section 2, *cmt.*

⁴⁹ Uniform Act, Rebuttable Presumptions, Subsection (2) of Section 2, *Example 2.*

⁵⁰ “Property held as a tenancy by the entireties possesses six characteristics: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests in the account must be identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their joint names).” *Beal Bank, SSB v. Almand & Assocs.*, 780 So.2d 45, 52 (Fla.2001) (footnote omitted).

⁵¹ See Fla. Stat. § 732.227: “For purposes of ss. 732.216-732.228, the term ‘homestead’ refers only to property the descent and devise of which is restricted by s. 4(c), Art. X of the State Constitution.”

And homestead property is excluded by Fla. Stat. § 732.225, which creates a “conclusive presumption” establishing that community-property spouses moving to Florida and purchasing homestead property in this state intended to “sever” any community-property interests in such property. Fla. Stat. § 732.225 provides in relevant part as follows:

The reinvestment of any property to which these sections apply in real property located in this state which is or becomes homestead property *creates a conclusive presumption* that the spouses have agreed to *terminate* the community property attribute of the property reinvested. (Emphasis added.)

TBE and homestead property are also carved out of Florida’s CP Act in Fla. Stat. § 732.218(2), a poorly drafted and logically confusing amendment to the Uniform Act which states that certain real property is presumed not to be community property, but not homestead and TBE property.⁵² As one critic (Richard Warner) has noted, this “is a blatant double negative and hence ... cannot be used for the support of anything.”⁵³ In fact, according to Mr. Warner Florida’s CP Act’s entire treatment of homestead and TBE property is of dubious efficacy.⁵⁴

C. Descent and distribution of property subject to Florida’s CP Act:

<p style="text-align: center;">Fla. Stat. § 732.219 Disposition upon death</p>	<p style="text-align: center;">Uniform Act (Commentary)</p>
<p>“Upon the death of a married person, one-half of the property to which ss. 732.216-732.228 apply 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. <i>The decedent’s one-half of that property is not in the elective estate.</i>” (Emphasis added.)</p>	<p>“This section deals with the dispositive rights, at death, of (1) a married person domiciled in the enacting state as to personal property and (2) of any married person, including a nondomiciliary of the enacting state, as to real property located in the enacting state; it also sets forth rules for intestate succession to property subject to this Act. ...</p> <p>While [this section] applies to the dispositive rights of persons domiciled in [Florida], the Act, as a practical matter, may be effective as to property located outside the state only to the extent that the state of the situs of the property is willing to recognize the policy of the domiciliary state. ...</p> <p>Dower and curtesy do not exist in community property and have been abolished in many common law states; policy considerations suggest that no such interest</p>

⁵² Fla. Stat. § 732.218(2) provides in relevant part as follows: “Real property located in this state, *other than* homestead and property held as tenants by the entirety, ... [is] presumed to be property to which these sections *do not* apply.” (Emphasis added.)

⁵³ See Warner, Richard M., *Florida Community Property Rights Simplified*, at 3.17, Aug. 23, 2019, 38th Annual Attorney Trust Officer Conference, The Florida Bar, Course No. 3241R. Available at: <https://www.rpptl.org/uploads/VOLUME1revised.pdf>

⁵⁴ See *id.* generally.

Fla. Stat. § 732.219 Disposition upon death	Uniform Act (Commentary)
	should exist in property subject to this Act, since the surviving spouse already has a one-half interest in such property. Similar reasons suggest a denial of any right in the surviving spouse to elect a statutory share in the one-half of the property over which the decedent had a power of disposition.” ⁵⁵

1. Testate Disposition:

“The dispositive pattern is the usual one encountered in the community property states; the deceased spouse may dispose of his one-half of the community property, subject to the provisions of [Fla. Stat. § 732.226].”⁵⁶

Uniform Act, Testate Disposition, Example. “H and W were formerly domiciled in California and are now domiciled in [Florida]. All of their property was community property prior to the move from California to [Florida]. At H’s death he held title to a home in [Florida] which had been purchased with the proceeds of the sale of a home in California which had been community property. Stock acquired as community property in California was held in his name in safety deposit boxes located in Illinois and [Florida]. H and W had acquired a cottage in California as community property, held in H’s name, and it was so held at the time of his death. H and W acquired a [Florida] resort condominium, taking title as tenants by the entireties. H acquired bonds issued by his employer with earnings in [Florida] and held title in his own name. The [Florida] residence and the stock would be deemed property subject to this Act and H would have the right under Section 3 to dispose of half of that property by his will. The remaining property would not be deemed subject to this Act.”⁵⁷

UNIFORM ACT, TESTATE DISPOSITION: EXAMPLE

Asset	Title			
	H	W	Joint	Subject to Florida CP Act?
Florida RE (Home)	X			Yes
Stock	X			Yes
California RE (Cottage)	X			NO
Florida RE (Resort Condominium)			TBE	NO
Florida Bonds	X			NO

⁵⁵ Uniform Act, Disposition upon Death, *cmt.*

⁵⁶ Uniform Act, Disposition upon Death, *cmt.* See also Fla. Stat. § 732.226: “Sections 732.216-732.228 do not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.”

⁵⁷ Uniform Act, Testate Disposition, *Example.*

2. Intestate Succession:

“If the property subject to this Act passes by intestate succession, [Florida] law ... applies to the decedent’s one-half, again subject to [Fla. Stat. § 732.226].”⁵⁸

Uniform Act, Intestate Succession, Example. “[If under Fla. Stat. § 732.102] a surviving spouse is entitled to [on-half] of the decedent’s property by intestate succession, the result of the Act is to give to her [75%] of the property subject to the Act. For example, if the spouses had recently moved to a common law state and owned [\$100,000] of property (all being personal property held in the husband’s name and acquired as community property), the wife would be entitled to one-half of the property [\$50,000] and would receive [one-half] of the husband’s half [\$25,000] for a total of [\$75,000].”⁵⁹

UNIFORM ACT, INTESTATE SUCCESSION: EXAMPLE

	Spouse	Children of Prior Marriage	Total
CP Claim Succeeds	\$50,000 <u>\$25,000</u> \$75,000	\$50,000 <u>(\$25,000)</u> \$25,000	\$100,000
% of Total	75%	25%	100%
CP Claim Fails	\$50,000	\$50,000	\$100,000
% of Total	50%	50%	100%

D. Potential Claimants under Florida’s CP Act:

1. Surviving Spouse:

Florida’s CP Act can be used from the “outside in” by a *surviving spouse* seeking to extract community property from an estate.

Fla. Stat. § 732.223 Perfection of Title of Surviving Spouse	Uniform Act (Commentary)
“If the title to any property to which [Florida’s CP Act] apply was held by the decedent at the time of the decedent’s death, title of the surviving spouse may be perfected by an order of the probate court or by execution of an instrument by the personal	“This section simply provides for perfection of title interests of the surviving spouse (e.g. where title was in the name of the deceased spouse) by orders of the court of appropriate jurisdiction (e.g. the probate court) in [Florida].” ⁶⁰

⁵⁸ Uniform Act, Disposition upon Death, *cmt.* See also Fla. Stat. § 732.226: “Sections 732.216-732.228 do not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.”

⁵⁹ Uniform Act, Intestate Succession, *Example.*

⁶⁰ Uniform Act, Perfection of Title of Surviving Spouse, *cmt.*

Fla. Stat. § 732.223 Perfection of Title of Surviving Spouse	Uniform Act (Commentary)
representative or the beneficiaries of the decedent with the approval of the probate court. ...”	

2. Personal Representative and/or Beneficiary:

Florida’s CP Act can also be used from the “inside out” by a *personal representative/beneficiary* seeking to bring new assets into an estate by recovering community property titled in the name of a surviving spouse. This second line of recovery benefits surviving heirs and/or creditors of an otherwise insolvent estate.

For example, assume that a wife with community-property rights predeceases her husband, and that the subject community property is titled solely in her husband’s name. If the beneficiaries of the wife’s estate are expected to be different from the beneficiaries of her husband’s estate (e.g., it’s a second marriage and both spouses had children from prior marriages), the beneficiaries of wife’s estate may have an interest in bringing more assets into wife’s estate by claiming a one-half interest in the community property titled solely in surviving husband’s name. Section 732.221 of Florida’s Act provides an avenue of recourse in such cases. Assume the same facts as above, but that wife’s estate is insolvent and thus unable to satisfy validly pending creditor claims. Section 732.221 of Florida’s Act can also aid the creditors of wife’s estate in such cases by bringing new assets into the estate to satisfy their claims. In both cases the Act is used to marshal new assets into the estate of a pre-deceased spouse.

Fla. Stat. § 732.221 Perfection of Title of Personal Representative or Beneficiary	Uniform Act (Commentary)
“If the title to any property to which [Florida’s CP Act] apply is held by the surviving spouse at the time of the decedent’s death, the <i>personal representative or a beneficiary</i> of the decedent may institute an action to perfect title to the property. ... The personal representative has no duty to discover whether any property held by the surviving spouse is property to which ss. 732.216-732.228 apply, unless a written demand <i>is made by a beneficiary</i> within 3 months after service of a copy of the notice of administration on the beneficiary or <i>by a creditor</i> within 3 months after the first publication of the notice to creditors.” (Emphasis added.)	“This section is a corollary to [Fla. Stat. § 732.223]. Since title is apparently in the surviving spouse, the section simply provides for an action by the personal representative, heirs, or devisees ...” ⁶¹

⁶¹ Uniform Act, Perfection of Title of Personal Representative, Heir or Devisee, *cmt.*

III. Case Studies

A. *Quintana v. Ordone*, 195 So.2d 577 (Fla. 3d DCA 1967)

Quintana involved conflicting claims by a surviving spouse and children from a prior marriage to stock of a Florida corporation purchased in the 1950s by the decedent for \$100,000, at a time when his marital domicile was located in Cuba, a community-property jurisdiction. The decedent and his wife migrated to Florida in 1960, establishing a new marital domicile in this state. In 1963 the decedent sold his Florida stock in exchange for a promissory note having a face amount of \$810,000 plus a contract “for additional monies.”⁶² Shortly thereafter he died intestate, survived by his wife and three children from a prior marriage.

The following chart provides a rough estimate of the value of wife’s community property claim, adjusted for inflation. In 1963, Florida intestate estates were divided among a decedent’s heirs in equal shares, with a spouse receiving the same amount as each child.⁶³ Thus, assuming the three named plaintiffs in this case represented all of the decedent’s surviving children, the surviving spouse’s intestate share would have been one-fourth (3 children + 1 spouse = 4 heirs). Also, for purposes of the following chart it is assumed that the 1963 date-of-death value of the promissory note and contract is equivalent to the purchase price of the stock, which was \$100,000. Adjusted for inflation, the value of \$100,000 in 1963 is equivalent to \$835,480 in 2019,⁶⁴ which is the figure used below.

VALUE OF WIFE’S CLAIM COMMUNITY PROPERTY UNDER INTESTATE SUCCESSION

	Wife	3 Children from Prior Marriage	Total
Wife’s CP Claim Succeeds	\$417,740 <u>+ \$104,435</u> \$522,175	\$417,740 <u>(\$104,435)</u> \$313,305	\$835,480
% of Total	62.5%	37.5%	100%
Wife’s CP Claim Fails	\$208,870	\$626,610	\$835,480
% of Total	25%	75%	100%
Value of Wife’s CP Claim (Inflation Adjusted)	\$522,175 <u>(\$208,870)</u> \$313,305		

⁶² *Quintana*, 195 So.2d at 578.

⁶³ See Fla. State. § 731.23 (1963).

⁶⁴ See US Inflation Calculator. Available at: <https://www.usinflationcalculator.com>.

1. Question 1: Did the decedent and the surviving spouse ever share a marital domicile in a community property jurisdiction (either domestic or foreign)? YES

Answering this one simple question is likely the most important step in the entire process. Once Florida probate counsel are attuned to the issue of *marital domicile*, what was once an “unknown unknown”⁶⁵ becomes just another issue to be worked through; no more nor less complicated than any of the other varied property-law issues that can (and often do) arise in any Florida probate proceeding. *Quintana* provides in relevant part as follows:

“The defendant and the deceased were married on September 10, 1936, in Oriente Province in Cuba. Both parties were Cuban Nationals. Under the then existing laws of Cuba the marriage was under the regime of ‘Sociedad de Gananciales’, a form of community property marriage. The deceased had no assets at the time of his marriage. The husband and wife were domiciled in Cuba until 1960. A Florida domicile was established when the couple moved here in 1960. They remained in Florida up to the time of the husband’s death on September 1, 1963.”⁶⁶

2. Question 2: Has the applicable filing deadline passed? NO

Florida has a strong public policy favoring the “speedy” and final determination of probate proceedings.⁶⁷ Which means most filing deadlines in probate proceedings are, by design, exceedingly short (think months, not years). These small windows of opportunity apply with equal force to our most cherished spousal protections, such as the right to claim an elective share,⁶⁸ or a

⁶⁵ This phrase was made famous by U.S. Secretary of Defense Donald Rumsfeld. See DoD News Briefing – Secretary Rumsfeld and Gen. Myers, United States Department of Defense, United States Department of Defense (Feb. 12, 2002). (“Reports that say that something hasn’t happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also *unknown unknowns—the ones we don’t know we don’t know*. And if one looks throughout the history of our country and other free countries, *it is the latter category that tend to be the difficult ones.*”) (Emphasis added.) Available at: <https://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636>

⁶⁶ *Quintana*, 195 So.2d at 578.

⁶⁷ See *Estate of Brown*, 117 So.2d 478 (Fla. 1960) (“Public policy requires that estates of decedents be speedily and finally determined.”); *In re Estate of Gay*, 294 So.2d 668 (Fla. 4th DCA 1974) (The “announced public policy of this state ... requires that estates of decedents be speedily and finally determined.”) (citing *Estate of Brown*, 117 So.2d 478 (Fla. 1960)).

⁶⁸ See Fla. Stat. § 732.2135(1) (“Except as provided in subsection (2), the election must be filed on or before the earlier of the date that is *6 months after the date of service of a copy of the notice of administration* on the surviving spouse, or an attorney in fact or guardian of the property of the surviving spouse, *or the date that is 2 years after the date of the decedent’s death.*”) (Emphasis added.)

one-half interest in the homestead as a tenant in common,⁶⁹ or exempt property.⁷⁰ Florida’s Probate Code is silent with regard to any explicit deadlines to file community-property claims. In *Quintana*, the 3d DCA addressed this statutory gap in a way that favored surviving spouses. As will be seen in the discussion of the 4th DCA’s decision in *Johnson v. Townsend*, the pendulum has since swung decisively the other way.

In *Quintana* we’re told the decedent died on September 1, 1963. The appellate opinion wasn’t published until almost four years later on February 14, 1967. We’re not told exactly when surviving spouse first asserted her community property claims, but we are told she failed to do so “within the six months provided for in s 733.16 Fla. Stat., F.S.A., the non-claim statute.”⁷¹ Fla. Stat. § 733.16 was a creditor-claim filing deadline statute.⁷² (This statute “was repealed in 1974 as part of the Probate Code’s adoption in 1976.”)⁷³ Nowhere in the *Quintana* opinion is any mention made of anyone contesting the framing of wife’s community property claim as a form of creditor claim.

It’s natural to expect that probate counsel in common law jurisdictions, like Florida, are not focused on possible community property claims, perhaps until it’s too late. Fortunately for the surviving spouse in this case, her failure to file a timely claim was excused by the then-applicable “trust exception” to filing deadlines. *Quintana* provides in relevant part as follows:

⁶⁹ See Fla. Stat. § 732.401(2)(b) (“The election must be made *within 6 months after the decedent’s death* and during the surviving spouse’s lifetime. The time for making the election may not be extended except as provided in paragraph (c).”) (Emphasis added.)

⁷⁰ See Fla. Stat. § 732.402(6) (“Persons entitled to exempt property shall be deemed to have waived their rights under this section unless a petition for determination of exempt property is filed by or on behalf of the persons entitled to the exempt property on or before the later of the date that is *4 months after the date of service of the notice of administration or the date that is 40 days after the date of termination* of any proceeding involving the construction, admission to probate, or validity of the will or involving any other matter affecting any part of the estate subject to this section.”) (Emphasis added.)

⁷¹ *Quintana*, 195 So.2d at 579.

⁷² See Fla. Stat. § 733.16(1) (1963) (“No claim or demand, whether due or not, direct or contingent, liquidated or unliquidated, or claim for personal property in the possession of the personal representative or for damages, including but not limited to actions founded upon fraud or other wrongful act or commission of the decedent, shall be valid or binding upon an estate, or upon the personal representative thereof, or upon any heir, legatee or devisee of the decedent unless the same shall be in writing and contain the place of residence and post-office address of the claimant, and shall be sworn to by the claimant, his agent or attorney, and be filed in the office of the county judge granting letters. *Any such claim or demand not so filed within six months from the time of the first publication of the notice to creditors shall be void* even though the personal representative has recognized such claim or demand by paying a portion thereof or interest thereon or otherwise; and no cause of action, at law or in equity, heretofore or hereafter accruing, including but not limited to actions founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom such claim may be made, whether suit be pending at the time of the death of such person or not, unless such claim be filed in the manner and within the said six months as aforesaid.”) (Emphasis added.)

⁷³ *Johnson v. Townsend*, 259 So. 3d 851, 858 (Fla. 4th DCA 2018).

“A resulting trust is generally found to exist in transactions affecting community property in noncommunity property states where a husband buys property in his own name. ... It is well settled that the Florida nonclaim statute, s 733.16, supra, does not apply so as to require the cestui to file a claim against the estate of the trustee.”⁷⁴

3. Question 3: When first acquired, was the contested asset community property under the laws of the couple’s marital domicile? YES

The *Quintana* court determined that when first acquired the contested assets were community property under Cuban law. This question is now codified in section 732.217 of Florida’s CP Act.⁷⁵ *Quintana* provides in relevant part as follows:

“On or about June 12, 1952, the husband purchased for \$50,000.00, five thousand shares of Okeelanta Sugar Refinery, Inc. stock, a Florida corporation. An additional five thousand shares was acquired for \$50,000.00 on October 30, 1958. ...

Whether the source of the purchase price of the stock was from enterprises within Cuba or Florida is not material. What is material and not in conflict is that the husband and wife were domiciled in Cuba at the time of the acquisition of the stock. ... Therefore, under the laws of Cuba the stock did not vest in the husband but in the ‘Sociedad de Gananciales’. Thus the wife had a vested interest in the stock equal to that of her husband.

The interest which vested in the wife was not affected by the subsequent change of domicile from Cuba to Florida in 1960.”⁷⁶

4. Question 4: Can the current assets of the probate estate be traced back to community property? YES

For over a century prior to the *Quintana* decision, U.S. courts in common-law states had developed a “resulting trust” theory as an asset-tracing tool. Under this theory, common law courts fashioned ownership interests under their property laws that approximated the community-property rights that existed under the laws of a couple’s community-property marital domicile.⁷⁷

⁷⁴ *Quintana*, 195 So.2d at 578.

⁷⁵ See Fla. Stat. § 732.217(1) (“[Florida’s CP Act applies] to the disposition at death of the following property acquired by a married person: (1) Personal property, wherever located, which: (a) Was acquired as, or became and remained, community property under the laws of another jurisdiction; [or] (b) Was acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, community property”)

⁷⁶ *Quintana*, 195 So.2d at 578-80 (internal citations omitted).

⁷⁷ See Oldham, J. Thomas, *What if the Beckhams Move to L.A. and Divorce? Marital Property Rights of Mobile Spouses when They Divorce in the United States*, 42 Fam. L.Q. 263, 266 (2008).

Thus, assets acquired in a common-law state titled solely in one spouse’s name that could be traced back to community property were deemed to be held one-half in trust for the non-title holding spouse.⁷⁸ And this is exactly what the *Quintana* court did. This asset-tracing step is now codified in section 732.217 of Florida’s CP Act.⁷⁹ *Quintana* provides in relevant part as follows:

“Since the promissory note and contract were acquired while the husband and wife were domiciled in Florida, this transaction is controlled by our law. ... A resulting trust is generally found to exist in transactions affecting community property in noncommunity property states where a husband buys property in his own name. Therefore, while the husband held legal title to the note and contract, he held a one-half interest in trust for his wife.”⁸⁰

The asset tracing table for this case would be as follows (using inflation adjusted figures):

Marital Domicile	Stock	Promissory Note & Contract	Community Property
Cuba	\$835,480	--	\$835,480
Florida	(\$835,480)	\$835,480	\$835,480
Community Property	--	\$835,480	\$835,480

5. Question 5: Was evidence presented rebutting the presumption that the contested property (or assets traceable to such property) is community property? NO

The *Quintana* court determined that under the law of the marital domicile at the time the contested property was acquired, all property acquired during the marriage was presumed to be

⁷⁸ See *Rozan v. Rozan*, 129 N.W.2d 694 (N.D. 1964) (Use of community property funds of husband and wife, by husband, with wife’s consent, to acquire in his own name realty in North Dakota (a common law state), gave rise to an implied trust whereby one-half of the realty was held in trust for the wife.); *Stone v. Sample*, 62 So.2d 307 (Miss. 1953) (Where husband purchased mineral rights in Mississippi (a common law state) with community property funds, taking legal title in his own name, a trust resulted in favor of wife, the husband holding title to wife’s one-half interest in trust for her, and the mineral rights and the income therefrom were the joint property of husband and wife.); *Depas v. Mayo*, 11 Mo. 314, 49 Am.Dec. 88 (1848) (A husband and wife, residing in Louisiana (a community property state), and having, during the marriage, acquired a large amount of property, temporarily removed to Missouri (a common law state). While in Missouri, a part of the money belonging to the community was by the husband invested in real estate, and the title taken in his own name. They subsequently returned to Louisiana, and there the wife obtained a divorce from him. In a suit in equity by the wife in Missouri to recover her interest in the land, it was held that the land would be considered in equity as held by the husband in a resulting trust for the wife, to the extent of her interest in the money invested in the purchase; there being no evidence of any assent on the part of the wife to a change in the property by the investment.)

⁷⁹ See Fla. Stat. § 732.217(1) (“[Florida’s CP Act applies] to the disposition at death of the following property acquired by a married person: (1) Personal property, wherever located, which: ... (c) *Is traceable to ... community property.*”) (Emphasis added.)

⁸⁰ *Quintana*, 195 So.2d at 580 (internal citations omitted).

community property. This rebuttable presumption is now codified in section 732.218 of Florida's CP Act.⁸¹ *Quintana* provides in relevant part as follows:

“Section 1407 of the Civil Code of Cuba, the place of the domicile at the time of the acquisition of the stock, provides that all property of the marriage shall be considered as community property until proven to be separate property of the husband or wife. The plaintiffs presented no evidence which would tend to prove that the stock was the separate property of the husband or purchased from proceeds of his separate property. The uncontradicted evidence does show that the husband brought no assets to the marriage.”⁸²

6. Question 6: What is the proper disposition of the community-property assets held by the probate estate? Answer: 50% to wife, remaining 50% distributed to wife and remaining heirs per intestacy statute.

In *Quintana* the trial court had originally ruled against the surviving spouse's community-property claim, declaring that the contested property “was solely owned by the deceased at the time of his death [and thus] the estate of the deceased [was] the owner of the property.”⁸³ The appellate court reversed this decree, and “remanded with directions to enter a decree in accordance with [its] opinion.”⁸⁴ Based on the forgoing, this direction presumably resulted in the surviving spouse receiving “her half” of the community property “off the top,” and also receiving a one-fourth share of husband's remaining half of the property in accordance with Florida's then applicable intestate statute (see above chart, *VALUE OF WIFE'S CLAIM: INTESTATE SUCCESSION*). While not expressly using the term, in so holding the 3d DCA adopted the partial mutability choice-of-law rule (defined above) for testamentary property rights of couples whose prior marital domicile was located in a community property jurisdiction.

B. *Estate of Bach*, 548 N.Y.S.2d 871 (Sur. Ct. 1989)

The power of asset tracing in cases involving married couples moving from community property jurisdictions to common law jurisdictions cannot be overstated. A dramatic example is the *Estate of Bach*, a post-Uniform Act case out of New York applying the same rules that would apply under Florida's CP Act. New York adopted its version of the Uniform Act in 1981 (“NY's CP Act”). This case is also instructive as a procedural guide for prosecuting claims under Florida's CP Act, because, as observed by the New York court, it “is a classic example of the operation of

⁸¹ See Fla. Stat. § 732.218(1) (“In determining whether [Florida's CP Act applies] to specific property, the following rebuttable presumptions apply: (1) Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as, or to have become and remained, property to which these sections apply.”)

⁸² *Quintana*, 195 So.2d at 580.

⁸³ *Quintana*, 195 So.2d at 579.

⁸⁴ *Quintana*, 195 So.2d at 581.

the Uniform Act.”⁸⁵ According to the “legislative memorandum” for NY CP Act, the purpose of the statute was to “recognize and define the rights of married persons in property acquired while they ... resided in a community property state, after they have moved to a non-community property (‘common law’) state.”⁸⁶

In this case testator “Arthur Bach (Arthur) died on April 4, 1987, survived by his wife Franca. Under his will dated June 17, 1985, Arthur gave Franca her elective share⁸⁷ in trust with remainder to his brother Kurt. The balance of his estate is disposed of 75% to Kurt and 25% among named charities.”⁸⁸ We are not told the value of the estate. However, based on what we are told, if wife succeeds in her community-property claim, we can estimate that her share of the estate *doubles from one third to two thirds*. For purposes of simplicity, it is assumed that wife’s elective share goes to her outright, and that the share going to the decedent’s brother is limited to his outright distribution.

**VALUE OF WIFE’S CLAIM
COMMUNITY PROPERTY UNDER TESTATE SUCCESSION**

	Wife	Decedent’s Brother	Charities	Total
Wife’s CP Claim Succeeds	50.00% + 16.65% <u>66.65%</u>	25.00%	8.35%	100.00%
Wife’s CP Claim Fails	33.30%	50.00%	16.70%	100.00%
Value of Wife’s CP Claim	66.65% <u>(33.30%)</u> 33.35%			

⁸⁵ *Estate of Bach*, 548 N.Y.S.2d 871, 874 (Sur. Ct. 1989)

⁸⁶ *Estate of Bach*, 548 N.Y.S.2d at 874-875 (quoting Memorandum in Support of S.1151, 1981 N.Y. Legis. Ann., at 111).

⁸⁷ Under EPTL § 5-1.1-A, New York spouses are entitled to an elective share equal to one-third (1/3) of the deceased spouse’s net estate.

⁸⁸ *Estate of Bach*, 548 N.Y.S.2d at 873.

1. Question 1: Did the decedent and the surviving spouse ever share a marital domicile in a community property jurisdiction (either domestic or foreign)? YES

The answer to this question is yes. *Bach* provides in relevant part as follows:

“Arthur and Franca were married in Bolivia about fifty years ago. ... Furthermore, it is undisputed that Bolivia is a community property country.”⁸⁹

2. Question 2: Has the applicable filing deadline passed? NO

We are not told what the applicable post-death filing deadline is for this kind of claim in New York, but we are told surviving spouse filed her claim the month after her husband died. Presumably this satisfied the applicable filing deadline. The decedent died on April 4, 1987, and on “May 20, 1987, [wife] commenced a proceeding to discover that part of her husband’s estate which constitutes ‘community property.’”⁹⁰

In terms of procedure, under NY’s CP Act “the surviving spouse is required to make a written demand upon the court or the personal representative of the deceased spouse. If the fiduciary or the beneficiaries do not acquiesce, the surviving spouse must bring a proceeding to discover community property in the possession of the personal representative.”⁹¹ This is the same procedure a Florida surviving spouse would be required to follow under section 732.223 of the Florida’s CP Act. Surviving spouse complied with these requirements.

3. Question 3: When first acquired, was the contested asset community property under the laws of the couple’s marital domicile? YES

The decedent and his wife moved to New York from Bolivia 30 years prior to his death. However, while in Bolivia and while married to his surviving spouse, the decedent owned a textile business with his brother. This business was sold after the couple had moved to New York.

4. Question 4: Can the current assets of the probate estate be traced back to community property? YES

In this case the surviving spouse traced her contested community-property rights back 30 years! *Bach* provides in relevant part as follows:

“Arthur and Franca were married in Bolivia about fifty years ago. During the couple’s marriage, Arthur and his brother Kurt owned a textile business. The business was initially funded during the marriage by a gift or a loan of \$10,000 from their father. Around 1957, Arthur and Franca left Bolivia to establish

⁸⁹ *Estate of Bach*, 548 N.Y.S.2d at 873.

⁹⁰ *Estate of Bach*, 548 N.Y.S.2d at 873.

⁹¹ *Estate of Bach*, 548 N.Y.S.2d at 874 (citing EPTL § 6-6.4).

permanent residence in New York following Kurt’s move a year earlier. All three eventually became U.S. citizens. While all were living in New York, the business in Bolivia was sold and the proceeds divided between Arthur and Kurt. Thereafter, Arthur never had any other source of income and he and his wife lived on the income from the proceeds of the sale of the business. Thus, there is apparently no dispute that decedent’s estate is traceable to the Bolivian assets.”⁹²

The asset tracing table for this case would be as follows:

Marital Domicile	Community Property	Community Property
Bolivia	100%	--
New York	(100%)	100%

5. Question 5: Was evidence presented rebutting the presumption that the contested property (or assets traceable to such property) is community property? NO

Under NY’s CP Act “the surviving spouse is aided by a rebuttable presumption: property acquired by the deceased spouse while domiciled in a jurisdiction which recognizes the right of a surviving spouse to community property is presumed to have been acquired as or have become, and remained, community property to which [the Act] applies.”⁹³ This is the same rebuttable presumption that would apply in a similar Florida proceeding under section 732.218 of Florida’s CP Act.

Wife’s contention that her husband’s entire estate consisted of assets traceable to community property they first acquired while domiciled in Bolivia was uncontested. Based on this concession, the court had no trouble concluding the statutory presumption had not been rebutted. *Bach* provides in relevant part as follows:

“As discussed previously, under EPTL 6–6.4, Franca would now be entitled to pursue her discovery proceeding in order to identify personal property in her husband’s estate from which she is entitled to her one-half share. However, the executor has not disputed Franca’s contention that all of Arthur’s estate consists of the proceeds of the Bolivian property. Therefore, there is nothing for Franca to discover. She has established that Bolivia is a community property country and her claim that her husband’s estate consists solely of community property assets is uncontroverted. In addition to being uncontested, her latter contention is aided by EPTL 6–6.2 which, as mentioned earlier, provides that property acquired by the deceased spouse, while domiciled in a community property jurisdiction, is

⁹² *Estate of Bach*, 548 N.Y.S.2d at 873.

⁹³ *Estate of Bach*, 548 N.Y.S.2d at 874 (citing EPTL § 6-6.2).

presumed to have been acquired and to have become and remained community property.”⁹⁴

6. Question 6: What is the proper disposition of the community-property assets held by the probate estate? Answer: 50% to wife, remaining 50% distributed to wife and remaining beneficiaries per husband’s will.

The court entered summary judgment granting surviving spouse’s community property claim. Based on this ruling and a Bolivian martial domicile established 50 years prior, the decedent’s entire New York probate estate was distributed in “the typical pattern of community property which permits the deceased spouse to dispose of ‘his half’ of the community property, while confirming the title of the surviving spouse in ‘her half.’”⁹⁵ The end result was that surviving spouse’s share of the estate was effectively doubled (see chart above). *Bach* provides in relevant part as follows:

“Based upon all the foregoing, Franca’s cross motion for summary judgment must be granted as a matter of law. Under the provisions of [New York’s CP Act], she is entitled to one-half of her husband’s estate outright. With respect to the other half of decedent’s estate, the provisions of his will remain in force and effect.”⁹⁶

C. *Johnson v. Townsend*, 259 So.3d 851 (Fla. 4th DCA 2018)

The *Johnson* case is important for two reasons. First, it is the only appellate decision to examine Florida’s CP Act. Second, it is the first time a Florida appellate court has applied Florida’s probate creditor filing deadlines to a surviving spouse’s community-property claim (in this case the claim was filed late, and thus forfeited). Against this backdrop, the need for public awareness of these claims and the consequences of failing to act promptly has never been greater.

In *Johnson* the decedent had previously been divorced in California (a community property state).⁹⁷ In that same year, 1983, decedent married again in Georgia (a common law state), he and his wife then moved to Texas (a community property state), then ultimately they retired to Florida (a common law state).⁹⁸ The decedent passed away 15 years later in 2015 at the age of 83, survived by his wife and four daughters from his prior marriage.⁹⁹

⁹⁴ *Estate of Bach*, 548 N.Y.S.2d at 875.

⁹⁵ Uniform Act, Prefatory Note.

⁹⁶ *Estate of Bach*, 548 N.Y.S.2d at 875.

⁹⁷ See Petition for the Establishment and Probate of Lost Will of Clark A. Johnson Pursuant to Fla. Statute 733.207 (2014), *In re Estate of Clark A. Johnson, Deceased*, Case No. 50-2015-CP-001096-XXXX-NB (Fla. 15th Cir. Ct. March 4, 2015, Docket No. 7) (“Lost Will Petition”).

⁹⁸ See Petition to Determine and Perfect Surviving Spouse’s Community Property Interest in Estate Assets, *In re Estate of Clark A. Johnson, Deceased*, Case No. 50-2015-CP-001096-XXXX-NB (Fla. 15th Cir. Ct. Sept. 6, 2017, Docket No. 110) (“Community Property Petition”).

⁹⁹ See Lost Will Petition, *supra* note 97.

At the time of his death the decedent owned a \$3 million investment account he had acquired when his marital domicile was in Texas, which was titled in his name alone. Surviving spouse claimed she owned half of that account as community property.¹⁰⁰ Surviving spouse's community-property petition also originally included a reference to the sale of their Texas residence for \$1.4 million, the proceeds of which they re-invested in their Florida homestead property. This homestead property was later sold, and a substantial portion of the net proceeds of that sale were titled in ventures or investments in the decedent's name alone. In total then, surviving spouse could trace \$4.4 million in community-property assets to the couple's marital domicile in Texas. However, section 732.225 of Florida's CP Act contains a "conclusive presumption" establishing that community-property spouses moving to Florida and purchasing homestead property intended to "sever" any community-property interests in such property. Based on this statutory carve out surviving spouse appears to have abandoned her claim to the \$1.4 million of community property that passed through the Florida homestead (it's not mentioned in the appellate opinion), and instead focused exclusively on the \$3 million investment account.

The decedent's estate planning documents were complex, but essentially boiled down to a 50/50 split between his surviving spouse and children from his prior marriage.¹⁰¹ For purposes of simplicity, the damages calculation chart for this case assumes all parties received their respective shares of the estate outright and free of trust.

**VALUE OF WIFE'S CLAIM
COMMUNITY PROPERTY UNDER TESTATE SUCCESSION**

	Spouse	Children of Prior Marriage	Total
Wife's CP Claim Succeeds	\$1,500,000 <u>\$750,000</u> \$2,250,000	\$1,500,000 <u>(\$750,000)</u> \$750,000	\$3,000,000
% of Total	75%	25%	100%
Wife's CP Claim Fails	\$1,500,000	\$1,500,000	\$3,000,000
% of Total	50%	50%	100%
Value of Wife's CP Claim	\$2,250,000 <u>(\$1,500,000)</u> \$750,000		

¹⁰⁰ See Community Property Petition, *supra* note 98.

¹⁰¹ See Lost Will Petition, *supra* note 97.

1. Question 1: Did the decedent and the surviving spouse ever share a marital domicile in a community property jurisdiction (either domestic or foreign)? YES

The issue of marital domicile was not adjudicated because, as explained below, both the probate court judge and the 4th DCA concluded that wife’s claim was filed late, and thus forfeited. However, based on the allegations contained in her Community Property Petition, she claimed that the couple’s marital domicile was located in Texas prior to moving to Florida.¹⁰² For purposes of our discussion we will assume wife would have prevailed on this point.

2. Question 2: Has the applicable filing deadline passed? YES: CLAIM FORFEITED

Wife filed her Community Property Petition “two years eight-and-a-half months after the decedent’s death.”¹⁰³ She argued that since her community-property claim wasn’t a probate creditor claim, it didn’t matter how long she waited. This argument failed both at the trial court level and on appeal. First, the 4th DCA held that a surviving spouse’s claim under Florida’s CP Act is in fact “a liability of the decedent,” and thus a form of probate creditor claim, as that term is defined in our Probate Code.¹⁰⁴

“The wife’s community property interest is ‘a liability of the decedent.’ Although the decedent’s possession of the community property in his name may have created a resulting trust, *see Quintana*, 195 So.2d at 580 (‘A resulting trust is generally found to exist in transactions affecting community property in noncommunity property states where a husband buys property in his own name.’), upon the decedent’s death, his estate became liable to the wife for her community property interest. Thus, upon the decedent’s death, the wife’s community property interest was a claim which the wife had to pursue.”¹⁰⁵

Once surviving spouse lost the definitional argument, her claim (filed over two years after her husband’s death) was doomed. As a creditor claim, it was clearly untimely and consequently forfeited.

“Second, to the extent the decedent possessed the community property in his name at the time of his death, the wife’s failure to make a claim upon her community property interest within section 733.702(1)’s three-month claim period barred her later-filed untimely claim (in the form of her petition). See § 733.702(1), Fla. Stat. (2015) (“If not barred by s. 733.710, no claim or demand against the decedent’s estate that arose before the death of the decedent ...[and] *no claim for personal*

¹⁰² See Community Property Petition, *supra* note 98.

¹⁰³ *Johnson*, 259 So.3d at 854.

¹⁰⁴ See Fla. Stat. § 731.201(4): “Claim” means a *liability of the decedent*, whether arising in contract, tort, or otherwise, and funeral expense. (Emphasis added.)

¹⁰⁵ *Johnson*, 259 So.3d at 857.

property in the possession of the personal representative ... is binding on the estate, on the personal representative, or on any beneficiary unless filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor”) (emphasis added).

Third, to the extent the wife’s petition is not only a “claim” under section 731.201(4) but also a cause of action, the wife’s failure to make a claim upon her community property interest within section 733.710(1)’s two-year claim period barred her later-filed untimely claim (in the form of the petition). See § 733.710(1), Fla. Stat. (2015) (“Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent’s estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.”) (emphasis added).¹⁰⁶

But what about the “trust exception” to Florida’s probate-creditor deadlines? It worked in *Quintana*, why not now? Because the 3d DCA decided *Quintana* in 1967, almost a decade prior to Florida’s adoption of its new Probate Code in 1976. Under our current statutory framework, the trust exception no longer applies to the kind of “implied” trust relationship common-law courts had developed over time to account for community property titled solely in one spouse’s name (discussed above). According to the 4th DCA, under current Florida law a late-filed community property claim does not qualify for the trust exception in the absence of “an express trust or any other clearly defined means by which the decedent held the community property interest on her behalf.” Surviving spouse made no such allegations in this case, thus her late-filed community property claim was forfeited.

“Fourth, the wife’s reliance upon the common law trust exception is unavailing. The primary case upon which the wife relies, *Quintana*, construed section 733.16, Florida Statutes, which was repealed in 1974 as part of the Probate Code’s adoption in 1976. Thus, *Quintana*’s viability is questionable. See [*Scott v. Reyes*, 913 So.2d 13, 17 (Fla. 2d DCA 2005)] (“[T]he repeal of the former Florida Probate Law and the adoption of the Code call into question the continued viability of some of the earlier decisions that have applied the trust exception to exclude certain types of claims from the operation of the statute.”). Upon the Probate Code’s adoption, “[t]he ‘trust exception’ ... to the requirements of the nonclaim statute, as those exceptions pertain to recovery of property from an estate, have effectively been limited [by the Probate Code] to those situations where the decedent clearly held the property on behalf of the actual owner either by way of an express trust or some other clearly defined means.” *Id.* at 18 (citation omitted). In *Scott*, our sister court, applying that limitation, concluded that the trust exception was inapplicable in that case because the wife there “did not allege the existence of an express trust or any other clearly defined means by which the Decedent held the accounts on her

¹⁰⁶ *Johnson*, 259 So.3d at 857-858.

behalf.” *Id.* Similarly here, the wife did not allege the existence of an express trust or any other clearly defined means by which the decedent held the community property interest on her behalf.”¹⁰⁷

This is the key holding of *Johnson*. And while reasonable people might disagree with the 4th DCA’s reasoning and ultimate conclusions,¹⁰⁸ no one wants to be the test case. Play it safe: frame your community-property petition as a creditor claim and file it in accordance with all applicable probate-creditor deadlines. That’s the primary take-away from this case. You’ve been warned ...

* * * * *

¹⁰⁷ *Johnson*, 259 So.3d at 858.

¹⁰⁸ See Warner, Richard M., *Florida Community Property Rights Simplified*, at 3.23, Aug. 23, 2019, 38th Annual Attorney Trust Officer Conference, The Florida Bar, Course No. 3241R. Available at: <https://www.rpptl.org/uploads/VOLUME1revised.pdf>