

# Florida Uniform Disposition of Community Property Rights at Death Act: *Time for an Update?*

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Immigration into Florida from other states and countries continues apace, and Florida property continues to be an attractive investment opportunity for outsiders. As attorneys rush to help the recent arrivals and outside investors adjust to our legal landscape, it is a worthwhile effort to consider how Florida law may be modernized and expanded to accommodate the legal baggage that these immigrants and investors bring with them. The need for review and modernization is particularly relevant in the often-overlooked area of marital property rights.

The assets of married Florida residents are subject to what is known as a “separate property” regime. Under the separate property regime assets earned by a spouse are, in the absence of spousal gifts or a valid marital agreement to the contrary, wholly owned and controlled by the spouse who earns them.<sup>1</sup> Subject to the earning spouse’s duty of support, the non-earning spouse has no right to own or to control the earning spouse’s assets unless or until those assets are divided upon death or dissolution of marriage.

Many other states and foreign countries have a very different marital property regime known as community property.<sup>2</sup> While community property rights vary from jurisdiction to jurisdiction, in a community property jurisdiction income earned during marriage does not belong solely to the earning spouse but instead is owned by the spouses equally. Importantly, unless the couple has taken formal steps to transmute their wealth into separate property, the community property nature controls even if the title to the assets is in the sole name of just one spouse. Among other consequences, this means that upon the death of the first spouse to die, the surviving spouse is entitled to outright ownership of one-half of the community property assets however titled.

## **Tax Consequences of Community Property**

Community property is subject to many tax consequences that are not applicable to separate property. The best known of these is likely the step up in basis in both halves of appreciated community property (i.e., the one-half passing through the

taxable estate of the decedent and the one-half owned by the surviving spouse) upon the death of the first spouse to die, but there are many other tax consequences to consider. For example, recognizing community property can also reduce or avoid the payment of estate tax upon the death of the first spouse to die, if such property is properly reported as belonging one-half to the surviving spouse notwithstanding title in the name of the decedent, or can create an estate tax once community property titled in the name of the survivor is counted.<sup>3</sup> As another example, a U.S. taxpayer spouse married to a non-resident alien who resides in a community property jurisdiction must report and pay taxes on the spouse’s earnings as well as his or her own, while such earnings in a separate property jurisdiction need not be reported or taxed. As another example, a married couple with community property cannot undertake most common estate tax minimization strategies, such as, for example, transferring property earned during the marriage to a grantor retained annuity trust, with community property, unless or until such property is first transmuted into separate property. In fact, when one spouse transfers community property to an irrevocable trust with the other spouse as a beneficiary (such as an irrevocable life insurance trust), the primary purposes of the trust may be frustrated. It is incumbent upon the owners of community property, and their advisors, to understand how the community property nature of the ownership affects their tax situation during the marriage and upon the death of a spouse.

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### **Community Property Rights in Florida**

Given the differences between the separate property regime and the community property regime, much confusion ensues when a married couple purchases Florida property with community property assets or moves to Florida while owning community property. Florida attorneys, accountants, bankers, and other professionals often fail to realize the community property nature of the assets they are dealing with or planning for.<sup>4</sup> Without proper planning, valuable spousal rights and valuable tax characteristics may be lost. While issues can arise while both spouses are still alive, errors are particularly impactful upon the death of the first spouse to die. Community property assets that are titled in the name of the surviving spouse may inadvertently fail to pass in accordance with the estate plan of the first to die, and assets that are titled in the name of the decedent spouse may inadvertently fail to be equally divided with the surviving spouse. Appreciated assets not recognized as community property may also lose the generous income tax treatment afforded to community property in the step up in basis applicable to both spouses' one-half ownership interest on the death of the first to die. To assist with tracing, division, and taxation of community property, assets are often held in joint revocable trusts specifically formulated to treat separate and community property in accordance with their respective character.<sup>5</sup>

### **Florida Law on Community Property**

In 1992, Florida adopted the Florida Uniform Disposition of Community Property Rights at Death Act ("FUDCPRDA").<sup>6</sup> This Act, which has seen only minor revisions since its passage, offers some much-needed guidance regarding division upon death of community property assets. To oversimplify, FUDCPRDA generally applies to property which was or is traceable to assets originally acquired as community property. FUDCPRDA confirms that upon the death of a married person, such property belongs one-half to the deceased spouse (which one-half is not part of the elective estate for elective share purposes) and one-half to the surviving spouse. Importantly, a purchaser for value or a lender with a security interest takes title after the death of the first spouse to die (but interestingly, not during their joint lives) free of any rights of the other spouse or his or her personal representative or beneficiary.<sup>7</sup> The probate court has no duty to discover whether assets titled in a decedent's name are community property and a personal representative has no duty to discover whether property titled in the decedent's name is community property unless a written demand is made by the surviving spouse within three months after service of a copy of the notice of administration.<sup>8</sup> FUDCPRDA also attempts to exempt real property titled as tenants by the entireties and protected homestead from its scope, though it is not entirely clear that a vested right in property can be lost without any knowing waiver.<sup>9</sup>

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While FUDCPRDA is helpful clarification of the law in many circumstances, FUDCPRDA is based on a uniform act originally proposed in 1971, and for the most part, it does not consider the evolution of the law and society over the last fifty years. Among other shortcomings, FUDCPRDA does not take into account the application of community property to certain unmarried couples, is essentially silent with respect to treatment of community property during the joint lives of the couple,<sup>10</sup> does not cover non-probate transfers, and lacks a clear legal mechanism for claiming community property rights upon the death of the first spouse to die.<sup>11</sup>

### **New Uniform Act**

In 2021, the National Conference of Commissioners on Uniform State Laws promulgated a new and improved Uniform Community Property Disposition at Death Act (UCPDAA). UCPDAA offers an expanded roadmap for treatment of community property and provides guidance on questions, which are currently unclear under Florida law. It seems likely that the IRS will have an easier time respecting this more comprehensive and up-to-date approach to community property treatment for property in (and residents of) separate property states, including the double step up in basis for appreciated property.<sup>12</sup> Importantly, UCPDAA guidance reduces the chance of inadvertent failure to respect the formalities sufficient to maintain community property treatment.

UCPDAA provides a statutory framework for ownership and control of community property by residents of non-community property states by explicitly importing the rights commonly attached to community property status in community property jurisdictions. In doing so UCPDAA keeps the core components of FUDCPRDA, but also covers many issues left uncertain by FUDCPRDA.<sup>13</sup> For example, UCPDAA provides protections to a third party who transacts with a spouse with apparent title to community property without the FUDCPRDA limitation of such protections only to transfers upon or after the death of an owner.<sup>14</sup>

In a significant departure from FUDCPRDA, UCPDAA expands the definition of spouse, for community property purposes, to include an individual in a legal relationship (such as domestic partnership or common law marriage) in which community property could be acquired.<sup>15</sup> UCPDAA also explicitly allows for partial or proportionate community property treatment, recognizes community property in community property trusts to the extent that the applicable law and trust terms so provide, and explicitly excludes property that has been partitioned or reclassified or with respect to which rights have been waived.<sup>16</sup> UCPDAA covers the partition or reclassification of community property by allowing such transmutation by "a record signed by both community-property spouses"<sup>17</sup> – a significant

simplification over the formalities that may be required in some community property jurisdictions, if partition or reclassification is even possible in those jurisdictions.<sup>18</sup> UCPDAA also allows for a spousal waiver of community property rights,<sup>19</sup> though as a uniform law it does so by reference to the law of the adopting jurisdiction, generally, and without specifying the necessary formalities for what is essentially a gift from the waiving spouse.<sup>20</sup>

FUDCPRDA by its terms arguably applies only to probate assets of the deceased spouse and not the increasingly popular probate alternatives such as revocable trusts, joint tenants with right of survivorship title, beneficiary designations, etc., and FUDCPRDA does not offer any redress to a spouse whose community property rights have been diminished by lifetime acts of the other spouse. By contrast, upon the death of the first spouse to die, UCPDAA allows the impacted spouse or his or her representative or transferee to petition a court to assert rights based on either lifetime actions or transfers at death by granting the court discretion to apply equitable principles and to consider the law of the original applicable community property jurisdiction.<sup>21</sup> By adopting a flexible remedy, UCPDAA attempts to permit the law of the original community property state or foreign jurisdiction to influence the outcome without imposing a solution, which may fit poorly with the law of the adopting jurisdiction.<sup>22</sup> Query whether UCPDAA goes too far in its quest for flexibility such that inconsistent and uncertain results may make litigation expensive and make out of court settlement difficult. It is also worth noting that a person seeking redress for malfeasance by a spouse with respect to lifetime actions does not have a statutory remedy under UCPDAA until the death of a spouse.

UCPDAA's treatment of non-probate property significantly departs from FUDCPRDA's approach because FUDCPRDA, in an attempt to reduce the application of community property rights, attempts to exclude property held as tenants by the entireties and homestead property.<sup>23</sup> While these exclusions do simplify estate administration and avoid title concerns, they are arguably unconstitutional in that they attempt to remove a vested property interest without any knowing waiver of community property rights. Any consideration of UCPDAA in Florida would have to revisit these concerns.

In what is arguably a significant improvement on the FUDCPRDA provisions, UCPDAA specifically provides mechanisms by which a surviving spouse can claim community property rights on the death of the first to die, as well as statutes of limitations with respect to those claims. Importantly, the surviving spouse can make a claim in probate but may also proceed directly against an heir, devisee, or non-probate transferee of the decedent who is in possession of the property.<sup>24</sup> Given the lack of specificity in FUDCPRDA,

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one Florida court has determined that such rights must be pursued by creditor claim,<sup>25</sup> which is a poor fit for securing vested ownership rights in property titled in the name of the decedent. Unlike FUDCPRDA, UCPDDA also goes an extra step to provide a mechanism for an heir, devisee, or non-probate transferee to raise community property claims with the personal representative or directly with the surviving spouse in possession of the property.<sup>26</sup>

## Conclusion

Community property rights will likely never fit comfortably within Florida's separate property marital property regime, and FUDCPRDA contains only guidance for Florida advisors. UCPDDA offers great insight into ways that Florida law could be expanded and modernized. A thorough review and at least a partial adoption of UCPDDA will likely provide great comfort to Floridians who have immigrated from community property jurisdictions, community property investors, and attorneys advising with respect to community property.



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## Endnotes

1 The earning spouse can invest separate property in ways that mitigate this sole ownership and control. For example, the earning spouse can establish joint accounts, tenancy by the entireties property, homestead, property with spousal ERISA rights, and similar investments with the non-earning spouse that provide shared current rights to ownership and control.

2 Under Florida's new Community Property Trust Act, married couples may now establish community property, but only through a specially formed and administered trust known as a community property trust. Fla. Stat. §§ 736.1501-1512 (2023). This article does not cover Florida community property trusts, except to mention the overlap between property held in such trusts, and property traceable to community property established by a married couple in a community property jurisdiction.

3 Recognizing community property is particularly important for non-resident aliens with property located in Florida, since these property owners are eligible for only a very small estate tax exemption and no estate tax marital deduction.

4 While there is some debate as to the best way to refer to the rights associated with assets located in a separate property state but traceable to community property, this article will simply refer to the assets themselves as community property assets.

5 Such trusts are not to be confused with trusts established under Florida's Community Property Trust Act. The trusts referred to in the preceding sentence need no specific statutory enabling language to maintain community property status.

6 Fla. Stat. §§ 732.216-732.228 (2021).

7 Fla. Stat. § 732.222 (2023).

8 Fla. Stat. § 732.223 (2023). In addition, pursuant to Fla. Stat. § 732.221 (2023), the personal representative has no duty to uncover any community property titled in the name of the surviving spouse, unless a written demand is made by a beneficiary or creditor.

9 Community property acquired by a married couple in a community property jurisdiction "does not lose its character by virtue of a move to a common law state." See *In re: Marriage of Moore & Ferrie*, 18 Cal. Rptr. 2d 543 (Court of Appeal, First District, Division 2, 1993).

10 In addition, Fla. Stat. § 61.075(8) (2018), makes it clear that community property is not taken into account in the division of property upon divorce.

11 This lack of clarity is showcased in the case of *Johnson v. Townsend*, 259 So. 3d 851 (Fla. 4th DCA 2018), in which the court determined that a surviving spouse can lose his or her vested property rights in community property titled in the name of the deceased spouse if he or she fails to file a creditor claim with respect to such property.

12 See IRS Field Service Advisory, 1993 WL 1609164 (Nov. 24, 1993).

13 Community property rights not covered by FUDCPRDA presumably still attach to community property in Florida, but without specific statutory authority and with uncertain and perhaps inconsistent results. Without any clarifying Florida law, a holder of community property rights in Florida must look back to the rights granted in the relevant community property jurisdiction where the rights arose, which may differ from jurisdiction to jurisdiction and may be difficult to determine especially with respect to jurisdictions outside the U.S.

14 Uniform Community Property Disposition at Death Act, § 10 (2021). Unlike FUDCPRDA, which provides protection to a purchaser or a lender for value whether or not such person was on notice of the community property nature of the property, UCPDDA extends liability protection only to those who in good faith do not know or have any reason to know (but without any duty to inquire) that the other party is exceeding or improperly exercising such party's authority.

15 Uniform Community Property Disposition at Death Act, § 2(1) (2021).

16 Uniform Community Property Disposition at Death Act, § 3 (2021).

17 Uniform Community Property Disposition at Death Act, § 4 (2021).

18 Note that an equal division of community property into separate property of each spouse may have the unexpected consequence of providing an elective share right in the now separate property that would have been avoided had the property remained community property.

19 Uniform Community Property Disposition at Death Act, § 4 (2021).

20 It is possible or even likely that Florida would require a prenuptial agreement or a postnuptial agreement for a valid waiver.

21 Uniform Community Property Disposition at Death Act, § 4 (2021).

22 *Id.*

23 Fla. Stat. § 732.218 (2023).

24 Uniform Community Property Disposition at Death Act, § 8 (2021).

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

26 Uniform Community Property Disposition at Death Act, § 8 (2021).