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J. RODNEY JOHNSON

# The Uniform Disposition of Community Property Rights at Death Act: Virginia in 1979?

THE presence of community property in the estate of a Virginia domiciliary poses a series of problems that are being faced with increasing regularity by a growing number of Virginia attorneys. While Virginia has always followed the common-law system of property ownership, Virginia also adheres to the general rule that "(a) change of domicile from a state where the community property prevails to a common-law state does not affect the community character of property previously acquired".<sup>1</sup> Thus, although Virginia's common-law system of property ownership will govern the property rights of married persons who have moved from a community property state to Virginia insofar as their future property is concerned, the laws of the state where the married persons were domiciled at the time any community property was acquired will continue to control their vested rights in this community property as well as their rights in any after acquired property that is purchased with the proceeds of or income from this community property.

## The Magnitude of the Problem

A rough idea of the magnitude of this problem of "transplanted" community property in Virginia and the other common-law states can be derived from a comparison of the great number of Americans who live in the community-property states with the statistics relating to the mobility of the American people. According to the *Statistical Abstract of the United States*, the eight community-property states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington contain 21.5% of the Population of the United States—a total of 46,339,000 individuals.<sup>2</sup> According to this same source, approximately four to five million persons moved from these community-property states to other states during the five-year period 1970-75.<sup>3</sup> How

<sup>1</sup> *Commonwealth v. Terjen*, 197 Va. 596, at 597, 90 S.E.2d 801 (1956).

<sup>2</sup> Table No. 10 Population—States: 1960 to 1976, and Table No. 2 Population: 1900 to 1977, U.S. Department of Commerce, Bureau of the Census.

<sup>3</sup> Table No. 46 Mobility Status of the Population: 1970-1975, U.S. Department of Commerce, Bureau of the Census.

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EDITOR'S NOTE: Professor Johnson and Thomas S. Word, Jr., Esquire, are the Virginia members of the Committee on Property Problems of the Migrant Client that was created by the American Bar Association's Section on Real Property, Probate and Trust Law.

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many of these four to five million persons might have moved to Virginia during this five-year period is of course quite speculative. It would be even more speculative to attempt an estimate of the total number of persons currently domiciled in Virginia who were domiciled in a community-property state at any time in the past. However, it can reasonably be assumed that there are a number of such persons, and it is a matter of non-debatable law that ". . . their change of domicile . . . (did) not affect the community character of property previously acquired"<sup>4</sup> by them and brought into Virginia.

## The Problem Illustrated

The presence of this "transplanted" community property in Virginia can raise a variety of problems during the lifetimes of the persons owning such property and this kind of property is almost guaranteed to cause problems when one of them dies. Let us assume, for example, the following hypothetical for purposes of illustrating some of these problems as well as the suggested legislative response to them. John and Mary Deaux moved to Virginia some five years ago from one of the community-property states, where they were domiciled during the first twelve years of their married life. John has been employed during the entirety of this seventeen year period with Sears and Roebuck, starting off in the stockroom and now the manager of the appliance department in Hometown, Virginia. Mary has remained at home during the entirety of their married life and has spent all of her time raising children and keeping house. Under these facts Mary, the "non-acquiring spouse," would be recognized as having a present, equal interest in all of the income earned (and assets purchased therewith) by John, the "ac-

<sup>4</sup> *Commonwealth v. Terjen*, *supra* note 1.



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quiring spouse," during the twelve years they lived in the community property state even though John may have taken "title" to the assets so acquired in his sole name. Any property owned by either John or Mary prior to the marriage or acquired during the marriage by gift or inheritance would be classified as "separate" property in which the other spouse would have no rights. John and Mary have been reading a financial planning series in *Local Newspaper* which has prompted them to contact *Local Lawyer* about the preparation of a "simple" will for them. First of all, if neither John nor Mary mentions that some of their assets were accumulated while they were domiciled in a community-property state, what is *Local Lawyer's* duty in regard to questioning them about past domiciles in order to ascertain the possible existence of "tainted" property? Is it malpractice if he doesn't? Let us assume that John and Mary reveal this information to *Local Lawyer* and also inform him that they under-

stand their rights in connection with the community property they brought into Virginia five years ago but, they ask, "How will our various community-property assets, common-law assets, and mixed assets be identified when we die, what are our dispositive rights in regard to our combined estate, and is there anything we can do now to eliminate any confusion and uncertainty when we die?" Let us assume that John dies and *Local Bank* qualifies as personal representative on his estate. In the course of its administration, *Local Bank* discovers that John and Mary lived in a community property state for twelve years. Does *Local Bank* have a fiduciary duty to search out and discover any possible community property or assets into which community property can be traced? Let us assume that John devises the ever popular *Blackacre* to his brother, Bob, who wishes to sell *Blackacre* to the adjoining landowner, Harry. Consummation of the sale is delayed until one year has passed from the time of John's death, at the title company's request, in order to protect Harry from the possibility of a claim under an after-discovered will. Three days after the sale is consummated, Mary brings an action against Harry in which she alleges that *Blackacre* was purchased with the proceeds realized upon the sale of community-property assets shortly after she and John came to Virginia. Therefore, she alleges, *Blackacre* was community property at John's death and, although "title" thereto was taken in John's name alone, John's will devising *Blackacre* to Bob only passed John's undivided one-half interest to Bob in fact and thus she and Harry are now equal tenants in common of *Blackacre*. How does Harry's lawyer respond? How does the lawyer for *Local Bank*, that supplied Harry's financing and took back a purchase-money deed of trust on *Blackacre* as security for the funds advanced, respond to this attack on its security? How do the lawyers for the title insurance company that insured Harry's fee simple title respond if a claim is filed against them? This listing of hypothetical possibilities could continue on but it is believed that case has been made, at this point, for the proposition advanced in the opening sentence that the presence of community property in the estate of a Virginian poses a series of problems that are being faced with increasing regularity by a growing number of Virginia lawyers.

#### **A Partial Solution to the Problem**

This series of problems is exacerbated by a complete lack of answers or even guiding authority in Virginia.

There are no statutes and only one case<sup>5</sup> dealing with such "transplanted" community property. Of course Virginia is not alone in suffering these problems associated with "transplanted" community property or in having little or no authority for their resolution. In recognition of the widespread nature and importance of these problems, the American Bar Association's Section on Real Property, Probate and Trust Law created the *Committee on Property Problems of the Migrant Client* approximately eleven years ago to study these problems and report accordingly. This committee's study led it to the formation of a four-year association with the National Conference of Commissioners on Uniform State Laws which resulted in the promulgation by the NCCUSL of the Uniform Disposition of Community Property Rights at Death Act in April, 1971. The Act was approved by the American Bar Association in February, 1972.<sup>6</sup> The primary purpose of the 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."<sup>7</sup> While this primary purpose has already been accomplished by the Virginia-Supreme Court's decision in *Commonwealth v. Terjen*, the adoption of the Act would be quite beneficial in Virginia because it would provide a number of answers, guidelines, and presumptions to help resolve the practical problems that are encountered in administering such property.

### What the Act Does Not Do

Prior to a section by section discussion of the Act, it might be helpful to note at the outset what the Act

<sup>5</sup> *Commonwealth v. Terjen*, *supra* note 1. This case has been the subject of comment on three occasions and each writer has concluded that the court erred in its interpretation of the nature of the rights of married persons under California's community-property system. See De Funiak, *Commonwealth v. Terjen; Common Law Mutilates Community Property*, 43 Va. L. Rev. 49 (1957); Moore, *Community Property Problems for the Common Law Lawyer*, Estate Planning in Depth Resource Materials, Vol. 1, p. 625, at 642, ALI/ABA (1977); and *Recent Decision*, 42 Va. L. Rev. 724 (1956).

<sup>6</sup> A more complete treatment of the origin and work of the Committee on Property Problems of the Migrant Client, as well as a discussion of the need for the Uniform Act, will be found in McClanahan, *Property Problems of the Migrant Client—A Statutory Solution*, 111 Trusts & Estates 950 (1972). Mr. McClanahan is Chairman of the Committee.

<sup>7</sup> Prefatory Note, page 3, Uniform Disposition of Community Property Rights at Death Act.

does NOT do. First—The Act does not attempt to deal with any of the problems that may arise during the lifetime of John and Mary in connection with their "transplanted" community property. These lifetime problems are thought to be not only of less importance but also of much greater difficulty to deal with in the context of a Uniform Act and thus they are not treated. Second—The Act has no effect on the rights of lifetime creditors of John or Mary as they present their claims during the post-death period. Third—The Act does not enlarge the rights of a surviving spouse in the "transplanted" community property beyond what they would have been under the laws of the community property state where the property in question was originally acquired. Fourth—The Act has no effect on property acquired by John and Mary after they become Virginia domiciliaries (except as such property is acquired with the proceeds of or profits from community property). Fifth—The Act does not prevent John and Mary from severing the community property nature of their previously acquired property and casting ownership of such property in whatever alternate form they may desire during their joint lives. As a matter of fact, the Act would provide a legislative sanction of such severance which, in turn, would cause the "community" character of the property in question (and its attendant problems) to cease to exist and the Act, then, to be no longer applicable.

### UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT

SECTION 1. [*Application.*] This Act applies to the disposition at death of the following property acquired by a married person:

(1) all personal property, wherever situated:

(i) which was acquired as or became, and remained, community property under the laws of another jurisdiction; or,

(ii) all or the proportionate part of that property acquired with the rents, issues, or income of or the proceeds from, or in exchange for, that community property; or

(iii) traceable to that community property;

(2) all or the proportionate part of any real property situated in this state which was acquired with the rents, issues or income of the proceeds from or in exchange for, property acquired as or which became, and re-

mained, community property under the laws of another jurisdiction, or property traceable to that community property.

The purpose of Section 1 is to define the property that is subject to the Act. In recognition of the general principle that the law of a decedent's domicile controls the disposition of his personal property, regardless of where it may be situated, while the law of the state where a decedent's real property is located determines the disposition of such property on the death of its owner. Section 1 of the Act is divided into two subsections which provide separate, though similar, rules for personal property and real property. Both subsections are controlled by the same policy considerations; viz., whatever property (a) was acquired as community property, or (b) though not so acquired, became community property by agreement of the parties while domiciled in a community property state, or (c) was acquired with the income from community property, or (d) is property traceable to a community property source, is "property subject to the Act" unless the spouses have agreed to the contrary. While both of the subsections would also require an apportionment of property where a part of the consideration therefor is community property and the other part of the consideration is separate property, the Act is content to stop at this statement of policy and leave it to the courts in the enacting states to determine what the "proportionate part" should be. This is believed to be a sound approach because of the large number of differing factual patterns that can be expected to arise in the future and the variety of rules that have been developed already in an attempt to do equity under these differing circumstances.<sup>8</sup>

SECTION 2. [*Rebuttable Presumptions.*]  
In determining whether this 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 this Act applies; and

(2) real property situated in this State and personal property wherever situated

acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship, is presumed not to be property to which this Act applies.

Section 2 contains several rebuttable presumptions that are designed to facilitate the application of the definitions contained in Section 1 and to aid the court in determining what property in a decedent's estate is property subject to the Act. Subsection (1) presumes that all property in John's estate which was acquired while John and Mary were domiciled in a community property state is in fact community property. Subsection (2) presumes that all Virginia realty and all personal property wherever located that was acquired by John while a domiciliary of Virginia is not property subject to the act if title to the property in question was taken in the names of John and Mary with survivorship. It will be obvious to the most casual reader that there are many situations for which no presumptions have been provided. The official comments caution us, however, that "no negative implications were intended to be raised by lack of inclusion of other presumptions in Section 2; areas not covered were simply left to the normal process of ascertainment of rights in property."<sup>9</sup>

SECTION 3. [*Disposition upon Death.*]

Upon death of a married person, one-half of the property to which this Act applies 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. With respect to property to which this Act applies, the one-half of the property which is the property of the decedent is not subject to the surviving spouse's right to elect against the will [and no estate of dower or curtesy exists in the property of the decedent.]

Section 3 provides that upon the death of John one-half of the property to which the Act applies belongs to Mary. If John dies testate the other one-half of the property will go to the beneficiaries named in his will, free from any claims on the part of Mary

<sup>9</sup> Prefatory Note, page 4, Uniform Disposition of Community Property Rights at Death Act.

<sup>8</sup> Moore, *op. cit.* note 5, *supra*, at page 631.

to dower in the realty or a statutory forced share of the personalty. If John should die intestate, his one-half will be disposed of according to the statutes of descent and distribution free from any claim of dower on the part of Mary. It should be noted, however, that under Virginia intestate succession law, if John should die without children or descendants of deceased children surviving him, Mary will be John's heir and distributee and thus will succeed to his one-half; and, even if John is survived by children or descendants of deceased children, Mary will still succeed to  $\frac{1}{3}$  of John's personal property as distributee.

SECTION 4. [*Perfection of Title of Surviving Spouse.*] If the title to any property to which this Act applies was held by the decedent at the time of death, title of the surviving spouse may be perfected by an order of the [court] or by execution of an instrument by the personal representative of the heirs or devisees of the decedent with the approval of the [court]. Neither the personal representative nor the court in which the decedent's estate is being administered has a duty to discover or attempt to discover whether property held by the decedent is property to which this Act applies, unless a written demand is made by the surviving spouse or the spouse's successor in interest.

Section 4 provides that if any of the property titled in John's name at the time of his death is property subject to the act, Mary's title thereto may be perfected by court order or by deed from John's personal representative or successors in interest with the approval of the court.<sup>10</sup> Most importantly, however, from a fiduciary administration standpoint, this section also provides that John's personal representative has no duty to discover or attempt to discover if any of the property titled in John's name at the time of his death is property subject to the Act, unless Mary makes a written demand upon the personal representative.

SECTION 5. [*Perfection of Title of Personal Representative, Heir or Devisee.*] If the title to any property to which this Act applies is held by the surviving spouse at the time of the decedent's death, the personal representative or an heir or devisee of the

<sup>10</sup> It may be preferable to change the reference to "court" at this point to "commissioner of accounts" in order to conform Section 4 to Virginia probate procedure and to provide for maximum flexibility.

decedent may institute an action to perfect title to the property. The personal representative has no fiduciary duty to discover or attempt to discover whether any property held by the surviving spouse is property to which this Act applies, unless a written demand is made by an heir, devisee, or creditor of the decedent.

Section 5, which is a corollary to Section 4, deals with property that is in Mary's name at John's death and provides that John's personal representative or successors in interest may bring an action to perfect their title to any such property that is property subject to the Act. Again it is provided that John's personal representative has no duty to discover or attempt to discover whether any of the property so titled in Mary's name is property subject to the Act unless one of John's creditors or successors in interest makes a written demand upon the personal representative.

SECTION 6. [*Purchaser for Value or Lender.*]

(a) If a surviving spouse has apparent title to property to which this Act applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the personal representative or an heir or devisee of the decedent.

(b) If a personal representative or an heir or devisee of the decedent has apparent title to property to which this Act applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the surviving spouse.

(c) A purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.

(d) The proceeds of a sale or creation of a security interest shall be treated in the same manner as the property transferred to the purchaser for value or a lender.

Section 6, which is rather clearly designed to protect post-death purchasers for value and lenders, does so by focusing on apparent title at the time of the transaction in question. Thus if John held title to any property subject to the Act at the time of his death, John's devisee can transfer a perfect title to a purchaser for value even though Mary has placed the purchaser on notice of her claim to an interest therein. Similarly, if paper title to such property is in

Mary at the time of John's death, Mary has the power to transfer a perfect title to a purchaser for value even though such purchaser has notice of the estate's claim to an interest therein. The comments to this section emphasize that value is the only requirement for the purchaser to be fully protected. This "immunity" of a purchaser for value is also extended to a lender who takes a security interest in property subject to the Act from a surviving spouse or successor in interest who has apparent title. The drafters point out that this approach (a) will permit reliance on apparent title, (b) will facilitate determination of title and disposition of property where adequate consideration is paid, and (c) will merely continue the inter vivos rule that a spouse with apparent title may transfer perfect title to community property to a third party who gives value therefor. While this section intends to facilitate the transfer of property by protecting the rights of a purchaser for value or a lender, it is not intended to affect the rights of Mary and John's successors in interest among themselves. Thus the section provides that where such a sale cuts off the rights of these parties to particular property, the proceeds of the sale shall stand in the place of the property sold and be subject to their claims accordingly.

SECTION 7. [*Creditor's Rights.*] This Act does not affect rights of creditors with respect to property to which this Act applies.

Section 7 is self-explanatory.

SECTION 8. [*Acts of Married Persons.*] This Act does not prevent married persons from severing or altering their interests in property to which this Act applies.

Section 8 may be the most important section of the Act for estate planning purposes because it recognizes the right of John and Mary to sever the community nature of their "tainted" property and create any different form of ownership that would have been permitted by the laws of the state where they were domiciled when they originally acquired the property. There is presently a lack of complete agreement among Virginia lawyers concerning the ability of married persons to deal with each other in regard to their rights in each other's property. Thus this section should prove particularly helpful to estate planners because of its recognition of the rights of married Virginians to deal with each other in regard to their "tainted" property which represents the most troublesome category.

SECTION 9. [*Limitations on Testamentary Disposition.*] This Act does 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.

Section 9 provides that the Act does not enlarge John's or Mary's dispositive rights in the "transplanted" community property beyond what they would have been under the laws of the community property state where the property in question was originally acquired.

SECTION 10. [*Uniformity of Application and Construction.*] This Act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

SECTION 11. [*Short Title.*] This Act may be cited as the Uniform Disposition of Community Property Rights at Death Act.

SECTION 12. [*Repeal and Effective Date.*] The following acts and laws are repealed as of the effective date of this Act:

- (1)
- (2)

Passage of the Act would not require the repeal of any statutes.

SECTION 13. [*Time of Taking Effect.*] This Act shall take effect. . . .

It is anticipated that the Act will be introduced into the 1979 Session of the General Assembly.

### Conclusion

It is believed that the Act represents a desirable addition to Virginia law because it provides valuable assistance through its definitions, rules, presumptions, and guidelines (a) to help insure the preservation of married persons' rights in "transplanted" community property, and (b) to enable Virginia lawyers, fiduciaries, lenders, and title companies to more effectively perform their roles vis-a-vis such property. Moreover, in addition to minimizing future litigation and facilitating the planning and administration of estates that consist in part of "transplanted" community property, adoption of the Act in Virginia would achieve a desirable uniformity of treatment of this area of the law with our sister states.