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# INTRODUCTION TO THE FIRST ANNUAL REVIEW OF COMMUNITY PROPERTY LAW

ELIZABETH BARKER BRANDT

In 1989 a new professional group called the Family Council of Community Property States held its organizational meeting in Phoenix, Arizona. The group, comprised of delegates from the Family Law Sections of the various state bar associations in community property states, had as its goal the study and exchange of information on community property issues and developments. One of the major concerns of those in attendance at that meeting was the lack of a comprehensive, high-quality journal or professional publication devoted to community property issues. The participants attending the meeting believed that this gap in the professional literature posed serious obstacles to family law practitioners and scholars in the various community property states.<sup>1</sup>

With the support of the Family Law Council, The University of Idaho Law Review has responded to the call for a professional journal devoted to community property issues with the *Annual Review of Community Property Law*. The *Annual Review* will be published as one issue of the *Idaho Law Review* each year.<sup>2</sup> The goal of the *Annual Review* is to publish a mix of issues arising in all of the community property jurisdictions. We hope the articles will not only provide scholarly analysis of community property issues but also focus on more practical issues of interest to practitioners.

Why another publication? Why don't the many publications already devoted to family law provide an adequate forum for the discussion and analysis of community property issues?

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1. The *Community Property Journal* ceased publication in 1989. A survey of new cases and short articles was picked up by the publication *Divorce Litigation*. To date the latter publication remains the only source of analysis and new developments in the area of community property.

2. The *Annual Review of Community Property Law* is available as part of a regular subscription to the *Idaho Law Review*. It may also be obtained through a special subscription to only that issue.

Part of the reason is that community property law involves issues far broader than what most would consider family law. Because present, vested interests in property are created during the existence of an on-going marriage, community property concepts can be important to the resolution of issues arising from real estate transactions, creditor/debtor relationships, the organization and conduct of small business, wills and trusts, as well as divorce.

In addition, many practitioners and scholars in non-community property states tend to misunderstand community property (one of my colleagues likes to quip that the only thing a lawyer has to know in order to understand community property is how to divide by two) and view the community property as a foreign system of law having little relevance to them.<sup>3</sup> The result is a sense that articles discussing community property topics do not have broad appeal. Even within the "community property world" wide-ranging discussion of issues across the jurisdictions is unusual. Only one casebook takes an overview approach dealing with all the community property jurisdictions.<sup>4</sup> Within law schools, Community Property tends to be an orphan child of the curriculum, bounced to each new faculty member. The Family Law Council formed in part to meet a need for a cross-jurisdictional analysis of community property issues.

Finally, community property principles have had significant influence on the law of property division on divorce in many non-community property jurisdictions. The most pervasive and important influence of community property principles is the widespread acceptance of the idea that property acquired or possessed during a marriage should be shared between the spouses when the marriage is dissolved.<sup>5</sup> Beyond general ideas of sharing, modern revisions of the property division at divorce statutes in many jurisdictions have imported community property principles. For example, in many non-community property jurisdictions, divorce courts are required to divide property

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3. For an interesting discussion of this misunderstanding see, William Q. de Funiak & Michael J. Vaughn, *Why Community Property is so Misunderstood—Knowing its Origins is the Key*, 1 COMMUNITY PROP. J. 97, 100-03 (1975).

4. WILLIAM A. REPPY, JR. & CYNTHIA SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* (3d ed. 1991).

5. See Susan Westerberg Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977); Elizabeth A. Cheadle, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269 (1981). This sharing principal has been criticized as illusory, Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990), and as unnecessary in light of the increasing participation of women in the workplace. Mary Ann Glendon, *Is there a Future for Separate Property?*, 8 FAM. L.Q. 315 (1974).

into marital property and separate property; the equitable division powers of those courts only extend to property classified as marital property. The definitions of marital property in these jurisdictions are very similar to the definitions of community property, and the result in the two types of jurisdictions at divorce is also similar.<sup>6</sup>

This inaugural issue of the *Annual Review* will add to the professional and scholarly literature in the area of Community Property in many important ways. It contains articles of both professional and scholarly interest, covering issues, from a number of community property jurisdictions, that address the relationship between community property principles and the law of non-community property jurisdictions.

The professional articles in this issue involve analysis of a variety of issues including the discussion of new developments in transmutation principles in California,<sup>7</sup> a detailed look at premarital agreements and their treatment under the Uniform Premarital Agreements Act and California law,<sup>8</sup> and an analysis of community property principles in estate planning.<sup>9</sup> Two of the student-authored articles focus on Idaho law and address questions involving improvements and the impact of resulting changes of ownership on third parties, and the division of community property in probate. Both articles attempt to provide background on how these issues are dealt with by other community property jurisdictions. A third student-authored article addresses how each of the community property jurisdictions handles problems of migrating spouses at both divorce and death and proposes a uniform legislative approach to the problem.

The *Annual Review* also contains a detailed survey of new cases. This year's survey covers cases from Washington, Wisconsin, Texas, and Idaho. The goal of the survey is a little different from most—it is not to alert practitioners to new cases soon after they are decided. Other individual state publications and *Divorce Litigation* can perform this function much more efficiently than can the *Annual Review*. Instead, the goal of the survey is to provide up-to-date, in-depth analysis of significant new cases with particular attention to how those cases affect existing law and how they compare to similar developments in

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6. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 591-92 (2d ed. 1988).

7. Susan A. Channick, *Estate of MacDonald: A Case for Logical over Literal Statutory Construction*.

8. Sarah Ann Smith, *The Unique Agreements: Premarital and Marital Agreements, Their Impact upon Estate Planning, and Proposed Solutions to Problems Arising at Death*.

9. Gary C. Randall, *Estate Planning and Community Property*.

other jurisdictions. As part of the commitment of the Idaho Law Review to the quality of the survey, the assistance of expert practitioners from each of the Community Property states has been sought in identifying and analyzing the survey cases. These practitioners form the *Annual Review's* Board of Contributors.