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## NOTE

### RIGHTS OF SURVIVING SPOUSE IN NEW MEXICO IN PROPERTY ACQUIRED BY DECEDENT SPOUSE WHILE DOMICILED ELSEWHERE

When married adults move to New Mexico, with the intent to remain,<sup>1</sup> a problem arises regarding their marital property rights that is not presently covered either by existing New Mexico case law or statute. The problem is particularly acute when the newcomers are from any of the forty-two states that follow the common law with regard to marital property rights.<sup>2</sup> In most of the common law states, married persons, when predeceased by their spouse, acquire valuable property rights in both real and personal property acquired either by the decedent spouse during coverture (dower and curtesy rights) or owned by the decedent spouse at the time of his death (right to a statutory share).<sup>3</sup> In New Mexico, and in the other community property states, property acquired by the spouses during marriage is community property,<sup>4</sup> and the surviving spouse takes at least one-half such property upon the other spouse's death.<sup>5</sup>

In the common law jurisdictions, the term "separate property" may be used generically to describe the property owned individually by one of the spouses.<sup>6</sup> Such property is subject to the other spouse's marital claims (dower, etc.) when the property-owning spouse

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1. That is, become domiciliaries of New Mexico for the purposes of marital property and succession. See Clark, *New Mexico Community Property Law: The Senate Interim Committee Report*, in *Comparative Studies in Community Property Law* 81, 99-103 (Charmatz & Daggett eds. 1955).

2. Besides New Mexico, the current other community property states are Arizona, California, Idaho, Louisiana, Nevada, Texas, and Washington.

3. See Marsh, *Marital Property in Conflict of Laws* 1-67 (1952) [hereinafter cited as Marsh], for a compilation of the rights given surviving spouses by the various states.

4. N.M. Stat. Ann. § 57-4-1 (Repl. 1962). See 1 de Funiak, *Principles of Community Property* § 66 (1943). Of course, this excludes property acquired by either spouse during marriage by gift, bequest, devise, or descent. N.M. Stat. Ann. §§ 57-3-4, -5 (Repl. 1962).

5. N.M. Stat. Ann. § 29-1-9 (Supp. 1963). If the husband dies intestate, the wife takes all the community property. *Ibid.*

6. For example, the wages of a husband in a common law state are his property. He may have the common law duty of support of his wife and children, but they have no present interest in the money itself. In the community property state, the wages belong equally to both spouses, although the husband may have certain powers of management and control. Clark, *Community of Property and the Family in New Mexico* 22 (1956); 1 de Funiak, *op. cit. supra* note 4, at § 66.

predeceases the other. In the community property states, all property that is not community property is called separate property,<sup>7</sup> but this community-property-state "separate property" differs from common law "separate property" because the community property spouse has absolutely<sup>8</sup> no interest in the other spouse's separate property, present or potential.<sup>9</sup> With this semantic, but unfortunately crucial, distinction in mind, the conflict of laws problem that can arise due to the possible methods of treating marital property rights may now be posed by the following hypothetical:<sup>10</sup>

*H* and *W* were both domiciled in New York when they were married. *H* owned \$25,000 in securities when they were married. Upon *H*'s retirement in 1963, *H* and *W* moved to sunny Albuquerque, bringing the \$25,000 that *H* acquired before marriage and another \$75,000 that *H* saved from his earnings during coverture in New York. They became domiciliaries of New Mexico. *H* then dies predeceasing *W*<sup>11</sup> and disinheriting *W*<sup>12</sup> as to all his property. The will is probated in New Mexico.<sup>13</sup> The New Mexico courts would be faced with the following questions: (1) should they treat the problem as one of marital property rights or of succession? (2) When question (1) is resolved, should they then apply New York

7. N.M. Stat. Ann. §§ 57-3-4, -5, 57-4-1 (Repl. 1962); Clark, *op. cit. supra* note 6, at 13-14, 16-22.

8. Cf. N.M. Stat. Ann. § 29-1-10 (1953), which gives the surviving spouse one-fourth of the intestate spouse's separate property.

9. See Brockelbank, Community Property Law of Idaho 304-16 (1962), for an excellent discussion of the differences between "separate property" in a common law state and in a community property state.

10. For more general works that treat the problems discussed in this note, see Marsh; Schreter, "Quasi-Community Property" in the Conflict of Laws, 50 Calif. L. Rev. 206 (1962); Abel, Barry, Halsted & Marsh, *Rights of a Surviving Spouse in Property Acquired by a Decedent While Domiciled Outside California*, 47 Calif. L. Rev. 211 (1959); 32 J.S.B. Cal. 576 (1957); Deering, *Separate and Community Property and the Conflict of Laws*, 30 Rocky Mt. L. Rev. 127 (1958).

Throughout this Note the reference will be to the widow's situation, but in most cases, the remarks will be equally applicable to widowers. The proposed statutory changes, notes 75 to 78 *infra* and accompanying text, make no distinction as to which spouse is the surviving one. Cf. N.M. Stat. Ann. §§ 29-1-8, -9 (1953, Supp. 1963).

11. See note 3 *supra*.

12. A similar situation would arise when the husband dies intestate. When the husband completely disinherits his wife, she takes nothing (there are apparently no provisions in New Mexico allowing either spouse to renounce a will, see note 61 *infra*), when the husband dies intestate, she takes one-fourth of the separate property [N.M. Stat. Ann. § 29-1-10 (1953)]; both of which are, of course, less than the wife's right to take one-half the community property on her husband's death. N.M. Stat. Ann. § 29-1-9 (Supp. 1963).

13. This fact situation will be referred to throughout the note as the "hypothetical" situation.

or New Mexico law to the facts? This Note will attempt to suggest some of the considerations involved in resolving these problems.

The problem is of particular significance to New Mexicans because the California courts (California being the only state that has had substantial litigation over the problem) have resolved the problem by depriving the widow of the rights that she would have had under the law of the common law state and by also finding that she is not entitled to any protection under the community property law which would protect a widow who has always lived in California.<sup>14</sup> California has reached a harsh result, and one perhaps unnecessary under modern conflict of laws principles, but, nevertheless, the California decisions must be heeded by New Mexico because many of our community property laws were copied or patterned after those of California.<sup>15</sup>

## I

### THE CALIFORNIA SITUATION AND ITS STATUTORY SOLUTION<sup>16</sup>

California is the most populous, and probably the richest, of the community property states, and, like the rest of them, was relatively late-settled. These factors have meant that many people moved to California as married adults, bringing already acquired marital property with them.<sup>17</sup> California courts took the position that property acquired by the husband in a common law state was his separate

14. Schreter, *supra* note 10, at 207-09. See note 27 *infra* and cases cited therein.

15. Clark, *op. cit. supra* note 6, at 13; 1 de Funiak, *op. cit. supra* note 4, at § 53. See note 72 *infra*.

16. Three are statutory provisions in three jurisdictions which seem to reinforce the general rule that marital-property characteristics of property continue unchanged after a change of domicile and transportation of the property into the new domiciliary jurisdiction. In Louisiana, Arizona, and Texas there are provisions in the community property statutes that they shall apply to married persons who remove to those jurisdictions, with respect to 'property . . . acquired after their arrival,' . . . [La. Civ. Code Ann. art. 2401 (West 1952)] or 'property acquired in this state,' . . . [Ariz. Rev. Stat. Ann. § 25-217 (1956) (omission between property and acquired also); Tex. Rev. Civ. Stat. Ann. art. 4627 (1960)]. . . . These provisions seem to indicate that the marital-property laws of these jurisdictions do not apply to property acquired in the old domicile and brought with the spouses upon removal.

Marsh 209 n.105. (Emphasis Marsh's.)

Only in California has there been an attempt to change the general rule by statute, and provide that the law of the new domicile shall govern even with respect to property acquired while the spouses were domiciled elsewhere.

Marsh 209.

17. See Schreter, *supra* note 10, at 206.

property<sup>18</sup> (in the community property sense) and used their succession rules relating to the disposition of California separate property on the death of the husband in distributing this property that was acquired elsewhere as separate property in the common law sense.<sup>19</sup> In the hypothetical situation,<sup>20</sup> this meant that *W* would not take any part of either the \$25,000 acquired before marriage or the \$75,000 acquired during marriage because it was all separate property in the community property sense, giving *H* complete power to disinherit *W* and leaving *W* no recourse.<sup>21</sup>

In 1917, the California legislature attempted to solve the problem with a statute determining marital property rights for all newcomers, effective when they became domiciled in California.<sup>22</sup> It declared that all real property situated in California and all personal property, wherever situated, acquired while domiciled elsewhere that would not have been the separate property of either spouse if acquired while domiciled in California was community property.<sup>23</sup> In the hypothetical,<sup>24</sup> *W* would have then taken one-half of the \$75,000 because it would have been community property,<sup>25</sup> but she would not have taken any part of the \$25,000 because it would have been *H*'s separate property even if acquired while *H* was domiciled in California.<sup>26</sup> The transition of the \$75,000 from common law separate property to community property occurred when *H* and *W* became domiciliaries of California, thus creating immediate rights in the marital property, not merely determining succession rights. In 1934, the Supreme Court of California held this statute to be invalid as unconstitutionally depriving a husband of a vested property right without due process of law.<sup>27</sup> Thereafter, the Cali-

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18. See note 9 *supra* and accompanying text.

19. Estate of O'Conner, 218 Cal. 518, 23 P.2d 1031 (1913); Kraemer v. Kraemer, 52 Cal. 302 (1877). See also *In re Ball's Estate*, 92 Cal. App. 2d 93, 206 P.2d 1111, 1114-15 (1949); Schreter, *supra* note 10, at 206-10, on which this brief summary of the California history is largely based.

20. See text at p. 374. Assume, of course, that the new domicile of *H* and *W* is California.

21. Cal. Civ. Code §§ 162-63. Cf. N.M. Stat. Ann. §§ 29-1-8, -9, 30-1-1 (1953, Supp. 1963).

22. Cal. Stat. 1917, ch. 581, § 1.

23. *Ibid.*

24. See text at p. 374.

25. Cal. Prob. Code § 201; Cal. Stat. 1917, ch. 581, § 1.

26. Cal. Civ. Code § 163.

27. Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934). The court noted previous decisions in which it held that property brought to California from a common law state did not become community property. Estate of Boselly, 178 Cal. 715, 175 Pac. 4 (1918); Estate of Niccolls, 164 Cal. 368, 129 Pac. 278 (1912). Cf. August v. Tillian, 51

for California legislature treated the problem solely as one of succession, rather than marital property rights, and has enacted various statutes giving the wife rights in the marital property brought into the state by the husband, but not affecting his inter vivos rights in the property,<sup>28</sup> as the 1917 statute attempted to do. The first such revised statute only covered personalty.<sup>29</sup> Under the present California law, for purposes of succession, the widow is entitled to one-half of

all personal property wherever situated and all real property situated in this state heretofore or hereafter acquired:

(a) By the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time of its acquisition; or

(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere.<sup>30</sup>

In the hypothetical,<sup>31</sup> this statute would mean that on *H*'s death (*W* clearly acquiring no rights in the property before that time<sup>32</sup>), *W* would take one-half of the \$75,000 that would have been community property if it had been acquired in California,<sup>33</sup> but *W* would not take any part of the \$25,000 because it would have been *H*'s separate property in California.<sup>34</sup> Thus, California has satisfactorily resolved the dilemma by statute, protecting the widow by

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N.M. 74, 178 P.2d 590 (1947); *Laughlin v. Laughlin*, 49 N.M. 20, 155 P.2d 1010 (1944); *In re Faulkner's Estate*, 35 N.M. 125, 290 Pac. 801 (1930); *Strong v. Eakin*, 11 N.M. 107, 66 Pac. 539 (1901).

It has been suggested that the *Thornton* decision holding the 1917 statute unconstitutional was not constitutionally demanded and that marital property rights could properly be reclassified "according to community concepts" when acquired in common law states by persons who subsequently become domiciliaries of community property states. Schreter, *supra* note 10, at 210; Marsh 211.

28. Cal. Stat. 1935, ch. 831, § 1 (adding Cal. Prob. Code § 201.5); Cal. Stat. 1957, ch. 490, §§ 1-4 (amending Cal. Prob. Code § 201.5 and adding Cal. Prob. Code §§ 201.6-.8); Cal. Stat. 1961, ch. 636, § 22, at 1844 (amending Cal. Prob. Code § 201.5). See also Schreter, *supra* note 10; Abel, Barry, Halsted & Marsh, *supra* note 10; California Law Revision Comm'n, Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired While Domiciled Elsewhere (1956) [hereinafter cited as 1956 California Law Comm'n Study].

29. Cal. Stat. 1935, ch. 831, § 1. See Marsh 211-12.

30. Cal. Prob. Code § 201.5. See also Cal. Prob. Code §§ 201.6-.8.

31. See text at p. 374.

32. Cal. Civ. Code § 163; *cf.* Cal. Prob. Code § 201.8; note 78 *infra* and accompanying text.

33. Cal. Civ. Code § 164.

34. Cal. Civ. Code § 163.

giving all widows essentially the rights that a life-long California domiciliary who becomes a widow would have.

## II

### PROFESSOR MARSH'S ANALYSIS AND SOLUTION<sup>35</sup>

Professor Marsh states that it is established that, unless there is some statutory authority such as California has provided, the widow cannot claim any interest as a community interest in property acquired by the husband while domiciled in a common law state and then brought into a community property state.<sup>36</sup> However, suppose in the hypothetical<sup>37</sup> that *W* proves the law of New York would have given her a claim to a one-half interest in the property held by her husband at his death, and she claims that she is entitled to this one-half of the property acquired while the couple was domiciled in New York.<sup>38</sup> Professor Marsh would resolve the case as follows:

Her claim to a share of the . . . [holdings] of the husband free from his attempted testamentary disposition . . . [would be] characterized as an issue of marital property by the community property state, and the choice-of-law rule refers the court to the law of the first domicile as the governing law. By that law, she . . . [would be] entitled to . . . [one-half] of the husband's . . . [holdings at death] despite his attempt to bequeath the property to a third person. *Therefore, it would seem that, by applying this law, the wife should prevail.*<sup>39</sup>

Thus, in the hypothetical,<sup>40</sup> *W* would take one-half of the entire \$100,000 that *H* held at his death because that is what she would

35. The most comprehensive, and probably the best, reference in the conflict of laws in the marital property area is Marsh, Marital Property in Conflict of Laws, *op. cit. supra* note 10. Professor Marsh also was research consultant for the California Law Revision Commission when they suggested amendments to the California law in 1956 and 1960. See 1956 California Law Comm'n Study; California Law Revision Comm'n, Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere (1960).

36. Marsh 227, citing many cases in his note 9, including Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934).

37. See text at p. 374. The New York law referred to is only an assumption for purposes of this discussion.

38. Marsh 232-33.

39. *Id.* at 228. (Emphasis added.)

40. See text at p. 374.

have taken if the couple had remained in New York, New York being the governing law.

Professor Marsh notes that two objections might be raised against this solution. The first is the different characterization of the problem used by the two states involved. Under Professor Marsh's analysis, the community property state, for the purposes of its conflicts rule, characterizes the problem as one of "marital property." However, the common law state has classified its law relating to the property rights of a surviving spouse as a rule of "succession." Thus, the common law state would have no internal law relating to "marital property" rights of a surviving spouse, and, thus, no appropriate law for the community-property-state court to apply to the problem.<sup>41</sup> Second, he suggests that a *renvoi* problem could result. The forum community property state has characterized the problem as one of marital property and thus refers to the domicile of the decedent at the time of acquisition of the property to determine its status. But if the court also refers to the common law state's conflict of laws rules, then the court would in turn refer to the law of the domicile at the decedent's death as the proper law to be used for succession. If the community property state rejected the *renvoi*, it could use Professor Marsh's solution and apply the common law state's rules of succession;<sup>42</sup> but if the community property state accepted the *renvoi*, it probably would apply its law of succession and probably find separate property in the community sense, leaving the wife with nothing. He rejects these arguments as not grounded by "any reason in policy or logic,"<sup>43</sup> and states that "it seems doubtful that a mere change of domicile should be held to alter the respective interests of the spouses in property, in the absence of some special reason, and none suggests itself here."<sup>44</sup> However, he does observe that the California courts have refused to apply his reasoning and have held that the wife is *not* entitled to protection under either the community property or common law system.<sup>45</sup> "Such a result is clearly both illogical and unjust, and a correct analysis of the problem does not support it."<sup>46</sup>

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41. Marsh 228.

42. *Id.* at 228-29.

43. *Id.* at 228.

44. *Id.* at 229.

45. *Id.* at 231.

46. *Id.* at 229-33.



## III

## HOW SHOULD NEW MEXICO HANDLE THIS PROBLEM?

There are apparently no cases in New Mexico in which the wife has been completely disinherited on her husband's death. Because New Mexico's community property laws are substantially the same as California's were before the California legislature enacted their statutory solution,<sup>47</sup> indicating that the newcomer New Mexico wife could be effectively disinherited, some reflection on how New Mexico should face the problem, if it arises, is appropriate. If the problem should arise, and assuming that no statutory guides are provided by the legislature, the New Mexico Supreme Court can do either as the pre-1935 California courts did and find that a wife in *W*'s position<sup>48</sup> has no protection under either the common law or community property systems, or it can use Professor Marsh's reasoning to give the wife the rights she would have had if she had stayed in the common law jurisdiction.<sup>49</sup> However, the New Mexico legislature could save the court from making the decision by enacting a statute similar to California's Probate Code section 201.5,<sup>50</sup> which protects the widow's succession rights by application of community property concepts.<sup>51</sup>

One can attempt to determine whether it would be possible for the New Mexico Supreme Court to reach a satisfactory solution on the basis of New Mexico precedent, without having to follow the California cases. This would seem justified, as surely the California court's decision to deprive the widow of any protection need not bind our court, thereby causing it to do something that would seem to be against any conceivable public policy.<sup>52</sup> Nevertheless, it is more realistic to accept the proposition that the California court's holding will be of sufficient influence to induce our court to hold

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47. Compare N.M. Laws 1907, ch. 37, § 10 [now, as amended, N.M. Stat. Ann. § 57-4-1 (Repl. 1962)], with Cal. Stat. 1897, ch. 72, § 1 [now, as amended, Cal. Civ. Code § 164]. They are virtually identical. See note 28 *supra* and accompanying text for the California solution.

48. See text at p. 374.

49. Or the court could conceivably give the wife community property rights saying that due process so requires, see note 27 *supra*. *Contra*, Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934).

50. See also Cal. Prob. Code §§ 201.6-.8.

51. See Professor Clark's warning, in note 74 *infra*, about piecemeal legislative changes in the community property area.

52. Marsh 231-32. See also *Wooley v. Shell Petroleum Corp.*, 39 N.M. 256, 265, 45 P.2d 927, 932 (1935): "When a court is called upon to recognize foreign law, it is bound to consider domestic public policy."

similarly. This leads to the conclusion that a statute based on the California experience should be offered in case the New Mexico legislature is inclined to insure that widows are not denied what is surely their due under both the English common law concept of dower, as refined in the statutory share, and the Spanish-Mexican civil law concept of community of property.

*A. Could New Mexico Apply Professor Marsh's Reasoning and Give the Widow the Rights She Had in Her Former Domicile?*

The widow would be entitled to whatever share in the husband's property that she would have been entitled if he had died domiciled in the state in which the property was acquired. The claim would be characterized as one of marital property by the New Mexico court, and, by a choice of law rule, the court would refer to the law of the domicile at the time the property was acquired as the governing law.<sup>53</sup> Of course, there is the practical problem that the law of any of the other forty-nine states may have to be referred to in any given case, but this objection would seem superfluous when compared to the alternative of allowing a widow to be disinherited.

In *In re Faulkner's Estate*,<sup>54</sup> the decedent had come to New Mexico in 1907 with his second wife and children and purchased a farm near Dexter for about \$20,000, the proceeds of a sale of separate property owned by him in Illinois. The trial court had found that the farm was community property,<sup>55</sup> thus going to the second wife and all the children;<sup>56</sup> the plaintiffs contended that the farm was separate property, and thus, they, as children of the former marriage, would have a claim to a larger interest in the property.<sup>57</sup> The Supreme Court of New Mexico reversed the trial court,<sup>58</sup> finding that there

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53. Marsh 228-29. And, of course, the court would ignore how the internal law is classified in the common law state (*i.e.*, marital property or succession), but would use the law of the common law state that would give the widow the appropriate interest in the decedent spouse's property. See note 41 *supra* and accompanying text.

54. 35 N.M. 125, 290 Pac. 801 (1930).

55. *Id.* at 126, 290 Pac. at 801. One must keep in mind that in a community property state, there is always the presumption that any given property is community property. N.M. Stat. Ann. § 57-4-1 (Repl. 1962). The burden is always on the person alleging that property is separate to so prove it. Of course, the assumption throughout this note is that the property has been shown to be separate. The distinction between the community and common law separate property also must be kept in mind.

56. N.M. Laws 1907, ch. 37, § 27 [now, as amended, N.M. Stat. Ann. § 29-1-9 (Supp. 1963)].

57. N.M. Stat. Ann. § 29-1-10 (1953).

58. *In re Faulkner's Estate*, 35 N.M. 125, 128, 290 Pac. 801, 802 (1930).

was sufficient evidence to overcome the statutory presumption of community property.<sup>59</sup>

If the decedent in *Faulkner* had attempted to completely disinherit his second wife,<sup>60</sup> the supreme court decision would have resulted in her taking nothing, the property going to whomever the decedent named in his will, as opposed to her taking the one-third to which she would have been entitled in Illinois by renouncing his will and taking her statutory share.<sup>61</sup> If the decedent had died intestate, the supreme court's finding would have resulted in the wife taking one-quarter of the property, rather than the five-eighths that she would have taken if the property had been found to be community.<sup>62</sup> The court's decision also would have meant that the decedent's children would have split the remaining three-quarters of the farm, rather than dividing among themselves the remaining three-eighths of the farm, as they would have done if the property had been found to be community.<sup>63</sup> Thus, assuming Illinois law provides that the wife had dower rights to one-third of her husband's holdings at his death, the supreme court decision resulted in the wife taking only one-fourth of the property (because it was classified as New Mexico separate property), rather than the one-third that she would have taken if it had been classified as Illinois separate property.

The court did not consider the fact that by classifying the property as separate property that perhaps it should retain its characteristics as Illinois-acquired separate property.<sup>64</sup> The Supreme Court

59. *Id.* at 127-28, 290 Pac. at 801-02; N.M. Stat. Ann. § 57-4-1 (Repl. 1962). See also Clark, *Presumptions in New Mexico Community Property Law: The California Influence*, 25 So. Cal. L. Rev. 149 (1952).

60. As in the hypothetical situation, see text at p. 374. The *Faulkner* opinion does not disclose whether the decedent died testate or intestate. That fact did not affect the issue with which the court was concerned. The assumptions in the text are made merely for purposes of discussion in the Note.

61. There seems to be no provision allowing a wife in New Mexico to renounce her husband's will. Even if she could, she would only take the one-quarter of the separate property under the intestacy law rather than the one-half that the New Mexico widow can claim of the community property, regardless of the testator's action. N.M. Stat. Ann. §§ 29-1-9, -10 (1953, Supp. 1963). See *Dillard v. New Mexico State Tax Comm'n*, 53 N.M. 12, 201 P.2d 345 (1948); but see *Poldervaart*, New Mexico Probate Manual 86 (1961).

The Illinois law referred to is only an assumption for purposes of discussion.

62. N.M. Laws 1907, ch. 37, § 27; N.M. Stat. Ann. § 29-1-10 (1953). N.M. Laws 1907, ch. 37, § 27 was amended by N.M. Laws 1959, ch. 147, § 1 and N.M. Laws 1961, ch. 12, § 1, and is now N.M. Stat. Ann. § 29-1-9 (Supp. 1963).

63. *Ibid.*

64. See *Brockelbank*, Community Property Law of Idaho 304-16 (1962).

of New Mexico has held uniformly that "it is the status of the property at the time of its acquisition that determines whether it is separate or community property."<sup>65</sup> Unfortunatley, this must mean that when the property originally acquired its status as separate property in Illinois, it had certain attributes, including a certain interest of the wife if she should outlive her husband; but if the same property (or exchanged property) is brought to New Mexico, it loses those attributes and becomes separate property in the community sense.<sup>66</sup> There seems to be no reason other than the California precedent that should cause New Mexico to deny the widow the benefits of the separate property's attributes from the former domicile.<sup>67</sup> However, the reasonable conclusion from an analysis of *In re Faulkner's Estate* and the California decisions is that the New Mexico court would classify such property as separate property in the community sense. To avoid a manifest injustice to widows in such circumstances, it is incumbent upon the legislature to consider enacting a statutory remedy to the problem.

### *B. Proposed Statutory Solution for New Mexico*

The landmark California case is *In re O'Conner's Estate*.<sup>68</sup> O'Conner was married in Indiana, bringing \$200,000 of securities into the marriage. A few days later he moved to California, became domiciled, and died there while seeking a divorce. O'Conner's widow claimed one-third interest in his property as her statutory share under Indiana law. The court merely said that the decedent was domiciled in California at the time of his death, and, therefore, California's law of descent and distribution applied.<sup>69</sup> As a result of the

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65. *August v. Tillian*, 51 N.M. 74, 77, 178 P.2d 590, 592 (1947). See also *Laughlin v. Laughlin*, 49 N.M. 20, 155 P.2d 1010 (1944).

66. *But see Marsh* 233.

67. *In re O'Conner's Estate*, 218 Cal. 518, 23 P.2d 1031 (1933); *Marsh* 229-30. See note 40 *supra* and accompanying text for a discussion of how the *O'Conner* case would affect the hypothetical situation.

68. *Ibid.* See also *Kraemer v. Kraemer*, 52 Cal. 302 (1877).

69. *Ibid.*

It is possible to explain this case on the basis that the California court accepted the *renvoi* and applied California law. The wife would not have had a nonbarrable interest in this property had it been acquired before marriage. [*Accord*, N.M. Stat. Ann. § 57-3-5 (Repl. 1962).] However, the court does not refer to the choice-of-law rules of Indiana at all. And although the court says at one point that 'Appellant concedes that the property in question if governed by the California law would be the separate property of decedent and subject to his testamentary disposition,' . . . [23 P.2d at 1033] the opinion as a whole seems to proceed on the theory that a wife would not have a nonbar-

*O'Conner* case, the California legislature enacted section 201.5 of the Probate Code, giving the wife one-half of the property that would have been community property if it had been acquired in California.<sup>70</sup> "Had the *O'Conner* case been correctly decided, section 201.5 would probably have been unnecessary"<sup>71</sup> in California, and, ipso facto, unnecessary in New Mexico.

Since the New Mexico Supreme Court will probably feel compelled to follow the California decisions,<sup>72</sup> it is suggested that our legislature should enact statutes similar to those of California to protect the widow's interest. This is probably the more reasonable solution (when compared to the Marsh solution<sup>73</sup>) in light of the fact that it makes the marital property rights uniform for all widows in New Mexico, rather than having one law for life-long residents who become widows and forty-nine additional—and different—laws applicable for those who come to New Mexico married to a spouse who acquired property while domiciled elsewhere.

One must be mindful of Professor Clark's warning on hasty

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able interest in any property brought by a husband from a common-law state, whether acquired before or after marriage. The opinion completely fails to justify such a rule, however. The court says: 'The mere fact that under the Indiana laws . . . the power of the husband to dispose of his personal property by will was subject to the right of his wife at her election to claim a third thereof gave her no more than an expectancy in this portion of his estate. . . . Such a limitation of the husband's right would give the wife no interest in his property during his lifetime. [But *W* is not here asserting any interest during his lifetime, but after his death.] We are satisfied that appellant had no present fixed right or interest in decedent's personal estate, or more than a mere expectancy, which depended upon survivorship to become a vested right. [But *W* has survived *H* in this case.] This being true, and he having established his domicile in California, . . . the property was subject to the law of this state, which governs its disposition and distribution whether he died testate or intestate.' . . . [23 P.2d at 1034]. It is apparent that the first two statements have no application to this case, whatever may be their abstract validity, and that the final statement is a mere announcement of the result and not a reason for it.

Marsh 230-31, quoting from *In re O'Conner's Estate*, 218 Cal. 518, 23 P.2d 1031, 1033-34 (1933).

70. Marsh 231.

71. *Ibid.* This is because the wife would either have her community property rights or the rights provided by the state where the property was acquired. While these rights from elsewhere might be less than those provided under § 201.5, still she would be offered some protection and the California legislature may not have felt compelled to enact § 201.5.

72. 1956 California Law Comm'n Study E-17 n.8: "Although the result of this case [*In re O'Conner's Estate*, 218 Cal. 518, 23 P.2d 1031 (1933)] has been criticized by the author elsewhere, . . . [Marsh 228-33], there is no doubt that it represents the present law of California and probably of the other community property states."

73. See section II of this Note, *supra* at p. 378.

statutory amendments in the community property area,<sup>74</sup> but the California experiences should allow New Mexico to avoid the possible pitfalls.

The following statutes are proposed for the perusal of the next New Mexico legislature:

### AN ACT

RELATING TO DESCENT AND DISTRIBUTION;  
ENACTING SECTIONS 29-1-9.5, -9.6, -9.7, AND -9.8  
NEW MEXICO STATUTES ANNOTATED.  
BE IT ENACTED BY THE LEGISLATURE OF THE  
STATE OF NEW MEXICO:

Section 1. A new Section 29-1-9.5 New Mexico Statutes Annotated, 1953 Compilation is enacted to read:

"29-1-9.5. Death of spouse—Property acquired while domiciled out of state or in exchange therefor—Surviving spouse's share—Disposition of other share.—Upon the death of any married person domiciled in this State one-half of the following property in his estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse: all personal property wherever situated and all real property situated in this State heretofore and hereafter acquired:

(a) By the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this State at the time of its acquisition; or

(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere.

All such property is subject to the debts of the decedent, community debts, funeral expenses of the decedent, the family allowance and the charge and expenses of administration.

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74. Clark, *New Mexico Community Property Law: The Senate Interim Committee Report*, in *Comparative Studies in Community Property Law* 81, 104 (Charmatz & Daggett eds. 1955): "Piecemeal legislation has not always brought about the desired changes without also, in many cases, creating complications larger than those it attempts to correct." See also Wood, *Community Property Law of New Mexico* (New Mexico Senate Interim Committee on Community Property, Twenty-First Legislature, 1954), which does not discuss any conflict of laws problems.

As used in this section personal property does not include and real property does include leasehold interests in real property."<sup>75</sup>

Section 2. A new Section 29-1-9.6 New Mexico Statutes Annotated, 1953 Compilation is enacted to read:

"29-1-9.6. Death of non-domiciliary spouse leaving will disposing of non-community realty in state—Election of surviving spouse.—Upon the death of any married person not domiciled in this State who leaves a valid will disposing of real property in this State which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in the decedent's domicile at death. As used in this section real property includes leasehold interests in real property."<sup>76</sup>

Section 3. A new Section 29-1-9.7 New Mexico Statutes Annotated, 1953 Compilation is enacted to read:

"29-1-9.7. Election of surviving spouse to take under or against will.—Whenever a decedent had made provision by a valid will for the surviving spouse and the spouse also has a right under Section 29-1-9.5 of this chapter to take property of the decedent against the will, the surviving spouse shall be required to elect whether to take under the will or to take against the will unless it appears by the will that the testator intended that the surviving spouse might take both under the will and against it."<sup>77</sup>

Section 4. A new Section 29-1-9.8 New Mexico Statutes Annotated, 1953 Compilation is enacted to read:

"29-1-9.8. Restoration of decedent's estate of property in which surviving spouse had expectancy.—Whenever any married person dies domiciled in this State who has made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value, of property in which the surviv-

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75. See Cal. Prob. Code § 201.5. See also Swihart, *Federal Taxation of New Mexico Community Property*, 3 *Natural Resources J.* 104, 168-69 (1963). Professor Swihart urges that the New Mexico legislature give the wife testamentary power over one-half the community property. This would not affect the statutes proposed here, but his article should be examined by anyone concerned with the area.

76. See Cal. Prob. Code § 201.6. The proposed §§ 29-1-9.6 to -8 have not been discussed in this Note, but would be desirable companion sections to the proposed § 29-1-9.5. For a complete discussion of the necessity and purposes of §§ 29-1-9.6 to -8, see Abel, Barry, Halsted & Marsh, *Rights of a Surviving Spouse in Property Acquired by a Decedent While Domiciled Outside California*, 47 *Calif. L. Rev.* 211, 216-31 (1959); 1956 California Law Study Comm'n E-7 to E-8, E-12 to E-13, E-27 to E-31.

77. See Cal. Prob. Code § 201.7; note 76 *supra*.

ing spouse had an expectancy under Section 29-1-9.5 of this chapter at the time of such transfer, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. If the decedent has provided for the surviving spouse by will, however, the spouse cannot require such restoration unless the spouse had made an irrevocable election to take against the will under Section 29-1-9.5 of this chapter rather than to take under the will. All property restored to the decedent's estate hereunder shall go to the surviving spouse pursuant to Section 29-1-9.5 of this chapter as though such transfer had not been made."<sup>78</sup>

### CONCLUSION

It is evident that the marital property rights of surviving spouses of couples that have moved to New Mexico during their adult life may be lost or reduced because of the move. This is clearly contrary to the philosophy of both the common and civil law, but has been merely an unfortunate outgrowth of the increasing contact of the two systems of family law. Thus, the proposed sections 29-1-9.5 to -8 should be enacted by the New Mexico legislature to clear this confusion and provide surviving spouses the protection needed in our mobile society.

ROBERT J. WERNER\*

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78. See Cal. Prob. Code § 201.8; note 76 *supra*. See notes 31 to 34 *supra* and accompanying text for a discussion of how these proposed statutes would affect the hypothetical situation.

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