

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9195 HOUSE JUDICIARY

9195

Number 1131

MR. THWAITES explained that under the current common law of the United States, the tangible personal property passes in the state of which the person is domiciled. If someone in Oregon had tangible personal property, Oregon would impose a tax on that tangible personal property. However, if they had placed that property in an Alaska trust, the domicile of that property is then Alaska. Then the portion of the estate tax return concerning the tangible personal property, even though it's a Florida resident, would be paid to the Alaska Department of Revenue under the trust.

REPRESENTATIVE BERKOWITZ asked who is opposed to the bill and why.

Number 1225

MR. THWAITES responded that it would be the other jurisdictions that want to impose or protect their right to tax and levy against those assets. There is a certain right of the citizens of the United States, under the U.S. Constitution, to be able to freely transfer these things back and forth. He explained that Delaware's reaction to our last trust bill was that within 19 days after Alaska had passed legislation, they introduced and passed a similar statute. They even cited the Alaska statute as what they were trying to copy. He said, "They kind of messed it up because there were some other things that were placed in there that didn't make it work for tax reasons and they're attempting to straighten those out this years. But I think that Delaware and South Dakota are likewise trying to capitalize on being a destination situs, if you will, for those kinds of assets and it only affects the personality, it doesn't affect the real estate."

REPRESENTATIVE BERKOWITZ asked if there is any Alaskan opposition.

MR. THWAITES responded that he isn't aware of any.

Number 1259

CHAIRMAN GREEN asked if HB 196 is an addendum to the legislation passed last year. He asked if HB 196 covers intestation.

MR. THWAITES explained the legislation last year covered the trust law. There are many parts to HB 196. The main part of the bill, as far as probate goes, is the probate portion. Mr. Thwaites referred to the section regarding the trustees that Representation Ryan spoke about does affect the corporate fiduciaries or individual fiduciaries that might be involved. He said, "For example, if your bother-in-law and sister-in-law acted as a trustee along with an Alaska bank or someone else, they wouldn't be liable for the bank's actions and the bank wouldn't be liable for their actions. So it makes it more acceptable for those corporate fiduciaries to accept that work. Presently, in most jurisdictions the corporate fiduciaries -- if they're going to have some liability, they're concern about, 'If I have a little bit of the liability, I'm going to have all the liability.' And they're less than willing to go ahead and co-administer a fund and this will limit that exposure and encourage co-administration so that you

have a family member involved, perhaps with the corporate fiduciary and not having the liability pass back and forth one to the other."

Number 1330

REPRESENTATIVE CROFT said there are some portions of the bill that are uniform laws or come from uniform reforms. There are some that merely relate to transferability of trust properties. He said those seem to him to be acceptable because he tends to trust the uniform drafters. A transfer type of operation seems to him to be substantively neutral. It just allows them to bring the trust property to Alaska or it expedites the ways they can do that. Representative Croft stated he is more interested in the substantive changes. He said, "Aside from the ones that we've have adopted out of uniform laws and aside from things that simply relate to how someone would transfer their trust property up here, what are the major substantive changes to our trust law? And in particular, I'm concerned about the penalty clause in Section 15 -- an explanation of why that's good public policy."

MR. THWAITES said he would defer the question to Richard Hompesch who has spent a considerable amount of time working on the statute.

Number 1427

REPRESENTATIVE PORTER referred to Section 19 and said he doesn't understand the term "or otherwise." He read, "A cause of action or claim for relief with respect to a fraudulent transfer under (b)(1)," which describes a "fraudulent transfer" of this section "or otherwise is extinguished unless the action is brought."

MR. THWAITES explained he thinks it is meant to broaden this limitation to correspond to the statute that was adopted under our trust act. He noted there is also a 4-year, 1-year statute. This makes it consistent and it expands that definition to cover the broader terminologies. Mr. Thwaites said he believes Mr. Hompesch can speak to that. He said basically, it brings the existing statute in compliance with trust statute. Mr. Thwaites referred to the Uniform Trust Act that is referred to in the bill and said there was a comment by the Attorney General's Office last year about that because the uniform commissioners are talking about modifying the Uniform Act. He said, "What we have here was the existing Uniform Act that was in existence and is currently the law for the state of Alaska, not the new revised version that they haven't adopted. We also adopted the 1993 version of the Uniform Probate Code, and so there are many versions of that and there are lots of variations. And while ours is called the 'Uniform Probate Code,' we did not adopt all the provisions out of it, and there are provisions for variations there." Mr. Thwaites said that whenever we have a uniform act, he believes the connotation is that we are substantially similar and our concept is the same as the Uniform Act, but every state has a little variation, one way or the other, from those acts.

Number 1594

BOB MANLEY, Attorney, testified via teleconference from Anchorage. He noted he is primarily involved in estate planning. He urged the

committee to adopt the proposed committee substitute language as it is an improvement of the Alaska Trust Act. It basically generates greater (indisc.) action for people disposing of their property. The Alaska Trust Act that was passed last year has received a lot of national commentary. Mr. Manley referred to the Heckerly (ph) Institute in Florida and said one of the (indisc.) involved "North to The Future, The Alaska Trust," which establishes Alaska as a situs for money management. He said it is important to keep current and modify with the current trends.

MR. MANLEY referred to Representative Porter having a question about the Fraudulent Transfers Act and said, "What this provision regarding the 4-year and 1-year statute of limitations does is adopt exactly the language or almost exactly the language of the Uniform Fraudulent Transfers Act which is that the cause of action is extinguished after that 4-year or 1-year period run. And previously, we simply provided that the cause of action I believe expired or at least was no longer brought. So it was procedural rather than substance and the change, (1) the patterns that's closer to that - Uniform Fraudulent Transfer statute of limitation; and second, it makes it more likely that a court outside of Alaska will recognize the validity of our statute of limitations and that's Section 19."

MR. MANLEY continued, "The other thing that I want to point out and urge you to consider favorably is the new Section 20 which provides that if a fraudulent conveyance action is brought and it's acceptable -- in other words, if somebody was trying to cheat their creditor and they knew who their creditors were and they hid the money in the Alaska trust, the Alaska court and any other courts are going to approve invasion of that. However, if because of the expiration of the statute of limitations are otherwise the Alaska courts do not view it as a fraudulent conveyance. If it's, as Mr. Thwaites mentioned, one of those future - future (indisc.) creditors in the future. What this does is it prevents the creditor from going in the back door and instead of getting to the trust assets, suing the trustee for conspiracy to commit a fraudulent conveyance or the equivalent which might have a different statute of limitations. So simply this makes it better or safer for individuals and institutions (indisc.) trustees. I think if you follow the local bank stocks you'll see that NBA (National Bank of Alaska) has had a tremendous runoff in the last year, North Rim has been shooting up. We've got a new Alaska trust company. There are some new financial institutions also that looking at Alaska seriously for establishing bases of operation and this kind of improvement in the law makes it more likely that we can continue this good clean new industry of money management for Alaska. Thank you."

Number 1805

REPRESENTATIVE JAMES made a motion to adopt the proposed committee substitute for HB 196, Version B, Bannister, 3/4/98. There being no objection, the proposed committee substitute for HB 196 was before the committee.

Number 1817

JOHNNY GRAMES testified via teleconference from Anchorage. He said, "I am not here to talk about my own case. But as a parent, I'm -- that you're setting up Alaskans (indisc.) to get policed by predators operating under these laws that are set up by the judiciary branch of government and lobbied by these lying lawyers. And I don't know how else to warn the people what's happening. And Mr. Thwaites is a crook and he sold out my sons who are beneficiary to my mother's estate - our family estate which -- my father came here in 1915 and built up and now the lawyers and bankers are going to be able to steel the estate for the next 22 years. Now the reason you don't hear about this is because the court system is totally politicized and corrupted and I'm not able to appeal -- not able to file a due process appeal so I (indisc.) block from access to the court to petition the government for (indisc.) which is a constitutional right so that nobody knows about this. And you will not hear it with the Alaska Commission on Judicial Conduct with the probate master and the judges...."

CHAIRMAN GREEN interjected and asked Mr. Grames to conclude his testimony.

MR. GRAMES continued, "Also, Mr. Thwaites appointed a guardian ad litem over my son and I am the father and the trustee and he lives with me. And the court system went along with it. So a trustee has power over my son and we have no privacy and we are unable to protect him from the guardian and from court control and that's Mr. Thwaites that you're depending on."

Number 1954

RICHARD HOMPESCH, Attorney, testified via teleconference from Fairbanks. He said that Representative Croft asked about Section 15. Mr. Hompesch said, "The policy behind Section 15, which is the penalty provision, goes as follows: If I want to set up a trust, Section 15 clarifies that I can have a provision in the trust that says if any of my children who are beneficiaries of the trust sue the trustee, the trustee can deduct its attorneys fees from that child's share. And many times we have - estate planners have clients who have difficult children who are very prone to frivolous litigation. And as you know rule 82, which is our attorneys fee provision, rarely provides (indisc.) for a board of attorneys fees when litigation is filed that's frivolous. So this type of penalty provision would allow a person setting up a trust to charge their beneficiary, who filed the frivolous litigation, for the costs. Without such a provision, all the beneficiaries of the trust would have to share the legal fees for defending the frivolous litigation. And I figure it's good policy to allow such a clause under Alaska law because what the Community Property Act and other provisions of our new laws, this penalty provision is completely optional. If a person chooses to (indisc.) or include a penalty provision in their trust, they may. It's provided, it's allowed under Alaska law. Most people may choose not to. So as a matter of freedom of choice, I think it's a good policy for Alaska. Unless there are other questions, I'd like to thank you and urge you to pass House Bill 196."

REPRESENTATIVE CROFT said that he didn't see in Section 15 that the lawsuit had to be frivolous. It said, "even if probably cause

existed instituting the proceedings." He said these can valid but losing suits, not just frivolous suits.

MR. HOMPESCH stated, "Yes, the penalty provision merely says that if you want to provide a penalty provision, it could say that even if the beneficiary claim is meritcrrious that the penalty provision could still apply. Now I'm not here to say that such a penalty provision should be included. I think most of my clients would probably say -- you know they would prefer a penalty provision that would apply if the litigation was frivolous. But it's important to remember that most of the trusts that I think Mr. Thwaites, Mr. Manley, myself and other attorneys in Alaska are doing today have trust protector clauses. A trust protector clause allows someone - some trusted advisor in the family to remove the trustee without cause. So It would seem to me that this penalty provision would encourage the resolution of disputes through the trust protector and not through our court system."

CHAIRMAN GREEN thanked Mr. Hompesch for his testimony. He indicated the HB 196 would be held for further consideration.

HB

1999

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: April 21, 1997

FURTHER REFERRALS:

Date of Committee Action: 5/7/97

The JUDICIARY Committee considered:

HB 199

HOUSE BILL NO. 199

COMMUNITY PROPERTY

"An Act relating to the property, transactions, and obligations of spouses; relating to the augmented estate; amending Rule 301, Alaska Rules of Evidence; and providing for an effective date."

recommends it be replaced with the following committee substitute CSHB 199 (JUD) the same title a new title

additional referral to _____ Committee
 attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) _____ APPROVES PREVIOUS: (Dept/Date) _____

fiscal note(s) _____ fiscal note(s) _____

zero fiscal note(s) COURTS + zero fiscal note(s) _____

REVENUE + E.P.

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
<i>James S. Porter</i>	PORTER				
<i>Neil K. Kely</i>	RUKEBERG			✓	
<i>W. Croft</i>	CROFT	✓			
<i>Green</i>	GREEN			✓	
<i>James</i>	JAMES	✓			
<i>Bunde</i>	BUNDE			✓	
<i>Berkowitz</i>	BERKOWITZ			✓	

CHAIR'S SIGNATURE *[Signature]*

CS FOR HOUSE BILL NO. 199(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE RYAN, Therriault

A BILL
FOR AN ACT ENTITLED

1 "An Act relating to the property, transactions, and obligations of spouses; relating
2 to the augmented estate; amending Rule 301, Alaska Rules of Evidence; and
3 providing for an effective date."

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 * Section 1. AS 13.12.208 is amended by adding a new subsection to read:

6 (d) Notwithstanding the other provisions of this section, the value of
7 community property under AS 34.75 is not included in the augmented estate.

8 * Sec. 2. AS 25.15.010 is amended to read:

9 Sec. 25.15.010. Property of one spouse not subject to contracts or liabilities
10 of other. When property is owned by one spouse, the other has no interest that makes
11 the property liable for the contracts or liabilities of the spouse who is not the owner
12 of the property, except as provided in this chapter and AS 34.75.

13 * Sec. 3. AS 25.15.020 is amended to read:

14 Sec. 25.15.020. Actions between spouses respecting property. Subject to

1 AS 34.75, if [IF] one spouse obtains possession or control of property belonging to the
 2 other, either before or after marriage, the owner of the property may maintain an action
 3 for it, or for any right growing out of it, in the same manner and to the same extent
 4 as if they were unmarried.

5 * Sec. 4. AS 25.15.050 is amended to read:

6 **Sec. 25.15.050. Nonliability for premarital or separate debts of other.**
 7 Subject to AS 34.75, neither [NEITHER] spouse is liable for the debts or liabilities
 8 of the other incurred before marriage, and, except as otherwise provided, neither is
 9 liable for the separate debts of the other, nor is the rent or income of the property of
 10 one spouse liable for the separate debts of the other.

11 * Sec. 5. AS 25.15.060 is amended to read:

12 **Sec. 25.15.060. Control and liability of separate property of spouse.**
 13 Subject to AS 34.75, the [THE] property and pecuniary rights of a married person at
 14 the time of marriage or afterwards that are acquired by gift, devise, or inheritance are
 15 not subject to the debts or contracts of the other spouse, and a [. A] spouse may
 16 manage, sell, convey, or devise the property and pecuniary rights that by will are
 17 separate property of that spouse.

18 * Sec. 6. AS 25.24.160 is amended by adding a new subsection to read:

19 (d) When distributing property identified as community property under a
 20 community property agreement or trust under AS 34.75, unless the parties have
 21 provided in the agreement or trust for another disposition of the community property,
 22 the court shall make such disposition of the community property as shall appear just
 23 and equitable after considering all relevant factors, including

24 (1) the nature and extent of the community property;

25 (2) the nature and extent of the separate property;

26 (3) the duration of the marriage; and

27 (4) the economic circumstances of each spouse at the time the division
 28 of property is to become effective, including the desirability of awarding the family
 29 home or right to live in the family home for reasonable periods to a spouse with whom
 30 the children reside the majority of the time.

31 * Sec. 7. AS 25.24.200(a) is amended to read:

1 (a) A husband and wife together may petition the superior court for the
2 dissolution of their marriage under AS 25.24.200 - 25.24.260 if the following
3 conditions exist at the time of filing the petition:

4 (1) incompatibility of temperament has caused the irremediable
5 breakdown of the marriage;

6 (2) if there are unmarried children of the marriage under the age of 19
7 or the wife is pregnant, and the spouses have agreed on which spouse or third party
8 is to be awarded custody of each minor child of the marriage and the extent of
9 visitation, including visitation by grandparents and other persons if in the child's best
10 interests, and support to be provided on the children's behalf, whether the payments
11 are to be made through the child support enforcement agency and the tax consequences
12 of that agreement;

13 (3) the spouses have agreed as to the distribution of all real and
14 personal property that is jointly owned or community [REAL AND PERSONAL]
15 property under AS 34.75, including retirement benefits [,] and the payment of spousal
16 maintenance, if any, and the tax consequences resulting from these payments; the
17 agreement must be fair and just and take into consideration the factors listed in
18 AS 25.24.160(a)(2) and (4) so that the economic effect of dissolution is fairly
19 allocated; and

20 (4) the spouses have agreed as to the payment of all unpaid obligations
21 incurred by either or both of them [,] and as to payment of obligations incurred jointly
22 in the future.

23 * Sec. 8. AS 25.24.310(b) is amended to read:

24 (b) If custody, support, or visitation is at issue, the order for costs, fees, and
25 disbursements shall be made against either or both parents, except that, if one of the
26 parties responsible for the costs is indigent, the costs, fees, and disbursements for that
27 party shall be borne by the state. If the parents are only temporarily without funds,
28 the office of public advocacy shall provide legal representation or other services
29 required by the court. The attorney general is responsible for enforcing collections
30 owed the state. Repayment shall be made to the Department of Revenue under
31 AS 37.10.050 for deposit in the general fund. The court shall, if possible, avoid

1 assigning costs to only one party by ordering that costs of the minor's legal
 2 representation or other services be paid from proceeds derived from a sale of joint,
 3 community, or individual property of the [BELONGING JOINTLY OR
 4 INDIVIDUALLY TO BOTH] parties [,] before a division of property is made.

5 * Sec. 9. AS 34.15.110 is amended to read:

6 **Sec. 34.15.110. Conveyances construed as creating tenancy in common.**

7 (a) A conveyance or devise of land or an interest in land made to two or more
 8 persons, other than to executors and trustees, as such, shall be construed to create a
 9 tenancy in common in the estate, except as provided in (b) of this section and
 10 AS 34.75.100.

11 (b) A husband and wife who acquire title in real property hold the estate as
 12 tenants by the entirety, except as provided by AS 34.75.100 or unless it is expressly
 13 declared otherwise in the conveyance or devise. The conveyance shall recite the
 14 marital status of the parties acquiring title to the real property.

15 * Sec. 10. AS 34.15.130 is amended to read:

16 **Sec. 34.15.130. Joint tenancy abolished.** Joint tenancy, with the exception
 17 of interests in personalty and tenancy by the entirety, is abolished. Except as provided
 18 in AS 34.15.110(b) and AS 34.75.100, persons having an undivided interest in real
 19 property are considered tenants in common.

20 * Sec. 11. AS 34 is amended by adding a new chapter to read:

21 **Chapter 75. Community Property Act.**

22 **Sec. 34.75.010. Good faith requirement.** A spouse shall act in good faith
 23 with respect to the other spouse in matters involving community property. The
 24 obligation under this section may not be varied by a community property agreement
 25 or a community property trust.

26 **Sec. 34.75.020. Variation by marital property agreement.** Except as
 27 provided in AS 34.75.010, 34.75.070(h), 34.75.080(b), and 34.75.090(c), a community
 28 property agreement or a community property trust may vary the effect of this chapter.

29 **Sec. 34.75.030. Classification of property of spouses.** (a) Except for
 30 property that is classified otherwise in this chapter, property of spouses is community
 31 property under this chapter only to the extent provided in a community property

1 agreement or a community property trust.

2 (b) If a community property agreement provides that all property acquired by
3 either or both spouses during the marriage is community property, the property of the
4 spouses acquired during the marriage and after the determination date is presumed to
5 be community property.

6 (c) A spouse has a present undivided one-half interest in community property.

7 (d) If the community property agreement provides that all property acquired
8 by either or both spouses during the marriage is community property, income earned
9 or accrued by a spouse or attributable to property of a spouse during marriage and
10 after the determination date is community property.

11 (e) Community property transferred to a trust remains community property.

12 (f) Whether or not the community property agreement provides that all
13 property acquired by either or both spouses during the marriage is community
14 property, property that is owned by a spouse at the time of a marriage but before the
15 determination date is not community property except to the extent otherwise expressly
16 provided in the community property agreement.

17 (g) Whether or not the community property agreement provides that all
18 property acquired by either or both spouses during the marriage is community
19 property, and except to the extent otherwise expressly provided in the community
20 property agreement, property acquired by a spouse during marriage and after the
21 determination date is individual property if acquired

22 (1) by gift or a disposition at death made by a third person to the
23 spouse and not to both spouses;

24 (2) in exchange for or with the proceeds of other individual property
25 of the spouse;

26 (3) from appreciation or income of the spouse's individual property
27 except to the extent that the income or appreciation is classified as community property
28 under AS 34.75.130;

29 (4) by a decree, community property agreement, written consent, or
30 reclassification under AS 34.75.060(b) designating it as the individual property of the
31 spouse;

1 (5) as a recovery for damage to property under AS 34.75.140, except
 2 as specifically provided otherwise in a decree, community property agreement, or
 3 written consent; or

4 (6) as a recovery for personal injury, except for the amount of the
 5 recovery attributable to expenses paid or otherwise satisfied from community property.

6 (h) Appreciation and income of property transferred to a community property
 7 trust is community property if declared in the trust to be community property.

8 (i) Community property held by a community property trust or another trust
 9 remains community property of the spouses if distributed to the spouses.

10 (j) Except as provided otherwise in this chapter, this chapter does not alter the
 11 classification and ownership rights of property acquired before or during the marriage.

12 **Sec. 34.75.040. Management and control of property of spouses.** (a) A
 13 spouse acting alone may manage and control

14 (1) that spouse's property that is not community property;

15 (2) except as provided in (c) of this section, community property held
 16 in that spouse's name alone or not held in the name of either spouse;

17 (3) a policy of insurance if that spouse is designated as the owner on
 18 the records of the issuer of the policy;

19 (4) the rights of an employee under an arrangement for deferred
 20 employment benefits that accrue as a result of that spouse's employment;

21 (5) a claim for relief vested in that spouse by other law;

22 (6) community property held in the names of both spouses in the
 23 alternative, including using the names of both spouses with the word "or."

24 (b) Spouses may not manage and control community property held in the
 25 names of both spouses other than in the alternative unless they act together.

26 (c) The right to manage and control community property that is transferred to
 27 a trust, including property that is community property under the trust, is determined
 28 by the terms of the trust.

29 (d) The right to manage and control community property does not determine
 30 the classification of property of the spouses and does not rebut the presumption of
 31 AS 34.75.030(b).

1 (e) The right to manage and control community property does not permit gifts
2 of the property, except to the extent provided in AS 34.75.050.

3 (f) Except to the extent otherwise expressly provided in a community property
4 agreement or a community property trust, the right to manage and control the property
5 of spouses is not affected by this chapter if the property is acquired before the
6 determination date.

7 (g) A court may appoint a conservator or guardian to exercise a disabled
8 spouse's right to manage and control community property.

9 **Sec. 34.75.050. Gifts of community property to third persons.** (a) A
10 spouse acting alone may not give to a third person community property that the spouse
11 has the right to manage and control unless the value of the community property given
12 to the third person does not aggregate more than \$1,000 in a calendar year, or a larger
13 amount if, when made, the gift is reasonable in amount considering the economic
14 position of the spouses.

15 (b) A gift of community property to a third person that is not allowed under
16 (a) of this section is subject to (d) of this section unless both spouses act together in
17 making the gift or the other spouse ratifies the gift.

18 (c) Reporting any part of a gift made by the other spouse on a United States
19 gift tax return under 26 U.S.C. 2501 - 2524 or consenting to the treatment of a gift
20 under 26 U.S.C. 2513 (Internal Revenue Code) by signing the consent on the other
21 spouse's United States gift tax return is treated as the spouses acting together in
22 making the gift.

23 (d) If a gift of community property by a spouse does not comply with (a) of
24 this section, the other spouse may bring the action against the donating spouse, the
25 recipient of the gift, or both. The action must be commenced within the earlier of one
26 year after the other spouse has notice of the gift or three years after the gift. If the
27 recovery occurs during marriage, it is community property. If the recovery occurs
28 after a dissolution or the death of either spouse, the recovery may not exceed one-half
29 of the value of the gift and is individual property.

30 **Sec. 34.75.060. Certain property transactions between spouses.** (a) While
31 both spouses are domiciled in this state, spouses may classify any or all of their

1 property as community property in a community property agreement.

2 (b) Whether or not both, one, or neither is domiciled in this state, spouses may
3 classify any or all of their property as community property by transferring property to
4 a community property trust and providing in the trust that the property is community
5 property.

6 **Sec. 34.75.070. Obligations of spouses.** (a) An obligation incurred by a
7 spouse during marriage, including an obligation attributable to an act or omission
8 during marriage, is presumed to be incurred in the interest of the marriage or the
9 family.

10 (b) After the determination date, a spouse's obligation to satisfy a duty of
11 support owed to the other spouse or to a child of the marriage may be satisfied only
12 from community property and the other property of the obligated spouse that is not
13 community property.

14 (c) After the determination date, an obligation incurred by a spouse in the
15 interest of the marriage or the family may be satisfied only from community property
16 and the other property of that spouse that is not community property.

17 (d) After the determination date, an obligation incurred by a spouse before or
18 during marriage that is attributable to an obligation arising before marriage or to an
19 act or omission occurring before marriage may be satisfied only from property of that
20 spouse that is not community property and from that part of community property that
21 would have been the property of that spouse but for the marriage and the classification
22 of the property as community property under this chapter.

23 (e) After the determination date, an obligation, except an obligation covered
24 by (b) - (d) of this section, that is incurred by a spouse during marriage, including an
25 obligation attributable to an act or omission during marriage, may be satisfied only
26 from property of that spouse that is not community property and from that spouse's
27 interest in community property.

28 (f) This chapter does not alter the relationship between spouses and their
29 creditors with respect to property or an obligation in existence before the determination
30 date.

31 (g) A writing that is signed by a creditor and that reduces a creditor's rights

1 under this section is binding on the creditor.

2 (h) A provision of a community property agreement or a community property
3 trust does not adversely affect the interest of a creditor unless the creditor has actual
4 knowledge of the provision when the obligation to the creditor is incurred. The effect
5 of this subsection may not be varied by a community property agreement or a
6 community property trust.

7 (i) This chapter does not affect an exemption provided under other law for the
8 property of spouses.

9 **Sec. 34.75.080. Protection of bona fide purchasers dealing with spouses.**

10 (a) Notice of the existence of a community property agreement, a community
11 property trust, a marriage, or the termination of a marriage does not affect the status
12 of a purchaser as a bona fide purchaser.

13 (b) Community property purchased by a bona fide purchaser from a spouse
14 having the right to manage and control the property under AS 34.75.040 is acquired
15 free of any claim of the other spouse. The effect of this subsection may not be varied
16 by a community property agreement or a community property trust.

17 (c) In this section,

18 (1) "bona fide purchaser" means a purchaser of property for value who
19 has not knowingly been a party to fraud or illegality affecting the interest of the
20 spouses or other parties to the transaction, does not have notice of an adverse claim
21 by a spouse, and has acted in the transaction in good faith; in this paragraph, a
22 purchaser gives "value" for property if the property is acquired

23 (A) in return for a binding commitment to extend credit;

24 (B) as security for or in total or partial satisfaction of a
25 preexisting claim;

26 (C) by accepting delivery under a preexisting contract for
27 purchase; or

28 (D) in return for other consideration sufficient to support a
29 contract;

30 (2) "purchaser" means a person who acquires property by sale, lease,
31 discount, negotiation, mortgage, pledge, or lien, or otherwise deals with property in a

1 voluntary transaction other than making a gift.

2 **Sec. 34.75.090. Community property agreement.** (a) A community property
3 agreement must be contained in a written document signed by both spouses and
4 classify some or all of the property of the spouses as community property. It is
5 enforceable without consideration.

6 (b) A community property agreement must contain the following language in
7 capital letters at the beginning of the agreement:

8 THE CONSEQUENCES OF THIS AGREEMENT MAY BE
9 VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO,
10 YOUR RIGHTS WITH RESPECT TO CREDITORS AND
11 OTHER THIRD PARTIES, AND YOUR RIGHTS WITH
12 YOUR SPOUSE BOTH DURING THE COURSE OF YOUR
13 MARRIAGE AND AT THE TIME OF A DIVORCE.
14 ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE
15 SIGNED AFTER CAREFUL CONSIDERATION. IF YOU
16 HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU
17 SHOULD SEEK COMPETENT ADVICE.

18 (c) A community property agreement may not adversely affect the right of a
19 child to support.

20 (d) Except as provided in AS 34.75.020, 34.75.070(h), 34.75.080(b), and (c)
21 of this section, in a community property agreement, spouses may agree

22 (1) on the rights and obligations in the property, notwithstanding when
23 and where the property is acquired and located;

24 (2) on the management and control of their property;

25 (3) on the disposition of their property on dissolution, death, or the
26 occurrence or nonoccurrence of another event;

27 (4) on making a will, trust, or other arrangement to carry out the
28 agreement;

29 (5) that, upon the death of either of them, any of their property,
30 including after-acquired property, passes without probate to a designated person, trust,
31 or other entity by nontestamentary disposition;

1 (6) on the choice of law governing the interpretation of the agreement;
2 and

3 (7) on any other matter that affects their property and does not violate
4 public policy or a statute imposing a criminal penalty.

5 (e) A community property agreement may not be amended or revoked unless
6 the agreement itself provides for revocation on a particular date or on the occurrence
7 of a particular event, or unless the agreement is amended or revoked by a later
8 community property agreement. To amend or revoke the agreement, the later
9 community property agreement is not required to declare any property of the spouses
10 as community property. The amended agreement or the revocation is enforceable
11 without consideration.

12 (f) Persons intending to marry each other may enter into a community property
13 agreement as if married, but the agreement does not become effective until the persons
14 are married.

15 (g) A community property agreement executed during marriage is not
16 enforceable if the spouse against whom enforcement is sought proves that

17 (1) the agreement was unconscionable when made;

18 (2) the spouse against whom enforcement is sought did not execute the
19 agreement voluntarily; or

20 (3) before execution of the agreement, the spouse against whom
21 enforcement is sought

22 (A) was not given a fair and reasonable disclosure of the
23 property and financial obligations of the other spouse;

24 (B) did not voluntarily sign a written consent expressly waiving
25 the right to disclosure of the property and financial obligations of the other
26 spouse beyond the disclosure provided; and

27 (C) did not have notice of the property or financial obligations
28 of the other spouse.

29 (h) A community property agreement executed before marriage is not
30 enforceable if the spouse against whom enforcement is sought proves that

31 (1) the spouse against whom enforcement is sought did not execute the

1 agreement voluntarily; or

2 (2) the agreement was unconscionable when made and, before
3 execution of the agreement, the spouse against whom enforcement is sought

4 (A) was not given a fair and reasonable disclosure of the
5 property and financial obligations of the other spouse;

6 (B) did not voluntarily sign a written consent expressly waiving
7 the right to disclosure of the property and financial obligations of the other
8 spouse beyond the disclosure provided; and

9 (C) did not have notice of the property or financial obligations
10 of the other spouse.

11 (i) Whether or not a community property agreement is unconscionable is
12 determined by a court as a matter of law.

13 **Sec. 34.75.100. Community property trust.** (a) An arrangement is a
14 community property trust if one or both spouses transfer property to a trust, the trust
15 expressly declares that some or all the property transferred is community property
16 under this chapter, and at least one trustee is a qualified person whose powers include
17 or are limited to maintaining records for the trust on an exclusive or a nonexclusive
18 basis and preparing or arranging for the preparation of, on an exclusive or a
19 nonexclusive basis, any income tax returns that must be filed by the trust. A
20 community property trust is enforceable without consideration. Both spouses or either
21 spouse may be a trustee. The trust must be signed by both spouses. In this
22 subsection, "qualified person" means

23 (1) an individual

24 (A) who, except for brief intervals, military service, attendance
25 at an educational or training institution, or absences for good cause shown,
26 resides in this state;

27 (B) whose true and permanent home is in this state;

28 (C) who does not have a present intention of moving from this
29 state; and

30 (D) who intends to return to this state when away;

31 (2) a trust company that is organized under AS 06.25 and that has its

1 principal place of business in this state; or

2 (3) a bank that is organized under AS 06.05 or a national banking
3 association that is organized under 12 U.S.C. 21 - 216d if the bank or national banking
4 association possesses and exercises trust powers and has its principal place of business
5 in this state.

6 (b) A community property trust must contain the following language in capital
7 letters at the beginning of the trust:

8 THE CONSEQUENCES OF THIS TRUST MAY BE VERY
9 EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR
10 RIGHTS WITH RESPECT TO CREDITORS AND OTHER
11 THIRD PARTIES, AND YOUR RIGHTS WITH YOUR
12 SPOUSE BOTH DURING THE COURSE OF YOUR
13 MARRIAGE AND AT THE TIME OF A DIVORCE.
14 ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE
15 SIGNED AFTER CAREFUL CONSIDERATION. IF YOU
16 HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU
17 SHOULD SEEK COMPETENT ADVICE.

18 (c) A community property trust may not adversely affect the right of a child
19 to support.

20 (d) Except as provided in AS 34.75.010, 34.75.070(h), 34.75.080(b), and in (c)
21 of this section, in a community property trust spouses may agree on

22 (1) the rights and obligations in the property transferred to the trust,
23 notwithstanding when and where the property is acquired or located;

24 (2) the management and control of the property transferred to the trust;

25 (3) the disposition of the property transferred to the trust on dissolution,
26 death, or the occurrence or nonoccurrence of another event;

27 (4) the choice of law governing the interpretation of the trust; and

28 (5) any other matter that affects the property transferred to the trust and
29 does not violate public policy or a statute imposing a criminal penalty.

30 (e) A community property trust may not be amended or revoked unless the
31 agreement itself provides for revocation on a particular date or on the occurrence of

1 a particular event or unless the agreement is amended or revoked by a later community
 2 property trust. To amend or revoke the trust, the later community property trust is not
 3 required to declare any property held by the trustee as community property. The
 4 amended trust or the revocation is enforceable without consideration.

5 (f) A community property trust executed during marriage is not enforceable
 6 if the spouse against whom enforcement is sought proves that

7 (1) trust was unconscionable when made; or

8 (2) the spouse against whom enforcement is sought did not execute the
 9 community property trust agreement voluntarily; or

10 (3) before execution of the community property trust agreement, the
 11 spouse against whom enforcement is sought

12 (A) was not given a fair and reasonable disclosure of the
 13 property and financial obligations of the other spouse;

14 (B) did not voluntarily sign a written waiver expressly waiving
 15 right to disclosure of the property and financial obligations of the other spouse
 16 beyond the disclosure provided; and

17 (C) did not have notice of the property or financial obligations
 18 of the other spouse.

19 (g) Whether or not a community property trust is unconscionable is determined
 20 by a court as a matter of law.

21 (h) The trustee of a community property trust shall maintain records that
 22 identify which property held by the trust is community property and which property
 23 held by the trust is not community property.

24 **Sec. 34.75.110. Forms of holding property.** (a) Spouses may hold
 25 community property in a form that designates the holders of it by the words "(name
 26 of one spouse) or (name of other spouse) as community property." Community
 27 property held in this form is subject to AS 34.75.040(a)(6).

28 (b) Spouses may hold community property in a form that designates the holder
 29 of it by the words "(name of one spouse) and (name of other spouse) as community
 30 property." Community property held in this form is subject to AS 34.75.040(b).

31 (c) A spouse may hold individual property in a form that designates the holder

1 of it by the words "(name of spouse) as individual property." Individual property held
2 in this form is subject to AS 34.75.040(a)(1).

3 (d) Spouses may hold property in any other form permitted by law, including
4 a concurrent form or a form that provides for survivorship ownership.

5 (e) If the words "survivorship community property" are used instead of the
6 words "community property" in the form described in (a) or (b) of this section, the
7 community property is survivorship community property. On the death of a spouse,
8 the ownership rights of that spouse in survivorship community property vest solely in
9 the surviving spouse by nontestamentary disposition at death. The first deceased
10 spouse does not have a right of disposition at death of any interest in survivorship
11 community property. Holding community property in a form described in (a) or (b)
12 of this section does not by itself establish survivorship ownership between the spouses
13 for the property held in that form.

14 **Sec. 34.75.120. Classification of life insurance policies and proceeds.** (a)
15 If a policy issuer makes payments or takes actions in accordance with the policy and
16 the issuer's records, the issuer is not liable because of the payments or actions unless,
17 at the time of the payments or actions, the issuer had actual knowledge of inconsistent
18 provisions of a community property agreement, a community property trust, a decree
19 relating to a community property agreement or a community property trust, or an
20 adverse claim that is brought by a spouse, former spouse, surviving spouse, or persons
21 claiming under a deceased spouse's disposition at death and that relates to a
22 community property agreement or a community property trust.

23 (b) Except as provided in (c) - (e) of this section,

24 (1) the ownership interest in and proceeds of a policy that insures the
25 life of one of the spouses and that has been classified by a community property
26 agreement or a community property trust as community property are community
27 property without regard to the classification of property used to pay premiums on the
28 policy;

29 (2) the ownership interest in and proceeds of a policy that is owned by
30 one spouse and that has not been classified by a community property agreement or a
31 community property trust as community property are mixed property if all or part of

1 a premium on the policy is paid from community property after the determination date;
2 the community property component of the ownership interest and proceeds is the part
3 resulting from multiplying the entire ownership interest and proceeds by a fraction that
4 consists of a numerator that is the sum of the net premiums and portions of net
5 premiums paid from community property and a denominator that is the sum of the net
6 premiums paid;

7 (3) the ownership interest in and proceeds of a policy issued during
8 marriage that designates the spouse of the insured as the owner are the individual
9 property of the owner without regard to the classification of property used to pay
10 premiums on the policy;

11 (4) the ownership interest in and proceeds of a policy that designates
12 a person other than either of the spouses as the owner are not affected by this chapter
13 if a premium on the policy is not paid from community property after the
14 determination date; if all or part of a premium on the policy is paid from community
15 property after the determination date, the ownership interest and proceeds of the policy
16 are in part property of the designated owner of the policy and in part community
17 property of the spouses without regard to the classification of property used to pay
18 premiums on the policy after the initial payment of a premium on the policy from
19 community property; the community property component of the ownership interest and
20 proceeds is the part resulting from multiplying the entire ownership interest and
21 proceeds by a fraction that consists of a numerator that is the sum of the net premiums
22 and portions of net premiums paid from community property and a denominator that
23 is the sum of the net premiums paid;

24 (5) written consent by a spouse to the designation of another person as
25 the beneficiary of the proceeds of a policy is effective to relinquish that spouse's
26 interest in the ownership interest and proceeds of the policy without regard to the
27 classification of property used by a spouse or another person to pay premiums on the
28 policy; a designation by either spouse of a parent or child of either of the spouses as
29 the beneficiary of the proceeds of a policy is presumed to have been made with the
30 consent of the other spouse;

31 (6) unless the spouses provide otherwise in a community property

1 agreement or community property trust, designation of a trust as the beneficiary of the
2 proceeds of a policy with a community property component does not reclassify the
3 component.

4 (c) This section does not affect a creditor's interest in the ownership interest
5 or proceeds of a policy assigned or made payable to the creditor as security.

6 (d) The interest of a person as owner or beneficiary of a policy acquired under
7 a decree or property settlement agreement incident to a prior marriage or parenthood
8 is not community property notwithstanding the classification of property used to pay
9 premiums on the policy.

10 (e) This section does not affect the ownership interest or proceeds of a policy
11 unless a spouse is designated as an owner in the policy or on the records of the policy
12 issuer and community property is used to pay a premium on the policy.

13 (f) In this section,

14 (1) "owner" means a person appearing on the records of a policy issuer
15 as the person having the ownership interest, or, if a person other than the insured does
16 not appear on the records as a person having the interest, "owner" means the insured;

17 (2) "ownership interest" means the rights of an owner under a policy;

18 (3) "policy" means an insurance policy insuring the life of a spouse and
19 providing for payment of death benefits at the spouse's death;

20 (4) "proceeds" means the death benefit from a policy and all other
21 economic benefits from the policy, whether the economic benefits accrue or become
22 payable as a result of the death of an insured person or upon the occurrence or
23 nonoccurrence of another event.

24 **Sec. 34.75.130. Mixed property.** (a) Except as provided otherwise in
25 AS 34.75.110, mixing community property with property having another classification
26 reclassifies the other property as community property unless the component of the
27 mixed property that is not community property can be traced.

28 (b) If a community property agreement provides that all property acquired by
29 either or both spouses during marriage is community property, application by one
30 spouse of substantial labor, effort, inventiveness, physical skill, intellectual skill,
31 creativity, or managerial activity on individual property of the other spouse creates

1 community property attributable to the application if

2 (1) reasonable compensation is not received for the application; and

3 (2) substantial appreciation of the individual property of the other
4 spouse results from the application.

5 **Sec. 34.75.140. Interspousal Remedies.** (a) A spouse has a claim against the
6 other spouse for breach of the good faith requirement under AS 34.75.010 resulting in
7 damage to the claimant spouse's present undivided one-half interest in community
8 property.

9 (b) If the spouses have signed a community property agreement or a
10 community property trust, a court may order an accounting of the property and
11 obligations of the spouses and may determine rights of ownership in, beneficial
12 enjoyment of, or access to marital property and the classification of all property of the
13 spouses.

14 (c) A court may order that the name of a spouse be added to community
15 property held in the name of the other spouse alone, except

16 (1) a partnership interest held by the other spouse as a general partner;

17 (2) an interest in a professional corporation, professional association,
18 or similar entity held by the other spouse as a stockholder or member;

19 (3) an asset of an unincorporated business if the other spouse is the
20 only spouse involved in operating ~~or~~ managing the business; or

21 (4) other property if the addition would adversely affect the rights of
22 a third person.

23 (d) Except as provided otherwise in AS 34.75.050(d), a spouse must begin an
24 action against the other spouse under (a) of this section within three years after
25 acquiring actual knowledge of the facts giving rise to the claim.

26 **Sec. 34.75.150. Treatment of certain property at death of spouse.** If a
27 community property agreement provides that all property acquired by either or both
28 spouses during marriage is community property, at the death of a spouse domiciled in
29 this state, property of the spouse that can be traced to property received by the spouse
30 after the determination date as a recovery for a loss of earning capacity during
31 marriage shall be treated as if it were community property.

1 **Sec. 34.75.160. Uniformity of application and construction.** This chapter
2 shall be applied and construed to effectuate its general purpose and to make uniform
3 the law with respect to the subject of this chapter among states enacting it.

4 **Sec. 34.75.900. Definitions.** In this chapter,

5 (1) "acquire" in relation to property includes obtaining reductions of
6 indebtedness on encumbered property and obtaining a lien on or a security interest in
7 property;

8 (2) "appreciation" means a realized or unrealized increase in the value
9 of property;

10 (3) "community property" means property owned jointly by both
11 spouses under a community property agreement or a community property trust;

12 (4) "community property agreement" means an agreement that complies
13 with AS 34.75.090;

14 (5) "community property trust" means an express trust that complies
15 with AS 34.75.100;

16 (6) "decree" means a judgment or other order of a court;

17 (7) "determination date" means the later of

18 (A) marriage;

19 (B) the effective date of a community property agreement or a
20 community property trust; or

21 (C) the effective date of this Act;

22 (8) "disposition at death" means the transfer of property by will,
23 intestate succession, nontestamentary transfer, or other means that take effect at the
24 transferor's death;

25 (9) "dissolution" means

26 (A) termination of a marriage by a decree of dissolution,
27 divorce, annulment, or declaration of invalidity; or

28 (B) entry of a decree of legal separation or separate
29 maintenance;

30 (10) "during marriage" means a period that begins at marriage and ends
31 at divorce, dissolution, or the death of a spouse;

1 (11) "held" means the registration, recordation, or filing by a person in
2 a public office in the name of the person of a document of title to property, or the
3 issuance in the person's name of a writing that customarily operates as a document of
4 title to the property;

5 (12) "income" means dividends, interest, and net rents and other net
6 returns attributable to investment, rental, licensing, or other use of property unless
7 attributable to a return of capital or to appreciation;

8 (13) "management and control" means the right to buy, sell, use,
9 transfer, exchange, abandon, lease, consume, expend, assign, create a security interest
10 in, mortgage, encumber, dispose of, institute or defend a civil action regarding, or
11 otherwise deal with property as if the property is the property of an unmarried person;

12 (14) "notice" of a fact means a knowledge of it, receipt of a notification
13 of it, or reason to know that it exists from the facts and circumstances known to the
14 person;

15 (15) "presume" or a "presumption" means the imposition on the person
16 against whom the presumption or presumed fact is directed of the burden of proving
17 that the nonexistence of the presumed fact is more probable than its existence;

18 (16) "property" means an interest, present or future, legal or equitable,
19 vested or contingent, in real or personal property;

20 (17) "written waiver" means a document signed by a person against
21 whose interests it is sought to be enforced.

22 **Sec. 34.75.995. Short Title.** This chapter may be cited as the "Alaska
23 Community Property Act."

24 * **Sec. 12. COURT RULE.** AS 34.75.900(15), enacted by sec. 11 of this Act, changes Rule
25 301, Alaska Rules of Evidence, by changing the effect of presumptions established under
26 AS 34.75.

27 * **Sec. 13.** AS 34.75.900(15), enacted by sec. 11 of this Act, takes effect only if sec. 12
28 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15,
29 Constitution of the State of Alaska.

30 * **Sec. 14.** Except as provided by sec. 13 of this Act, this Act takes effect immediately
31 under AS 01.10.070(c).

70788 TO
ANC

AMENDMENT

BY REPRESENTATIVE CROFT

OFFERED IN HOUSE JUDICIARY

TO: HB 199

Page 2, line 19, following (d):

Delete all material.

Insert "When distributing property identified as community property under a community property agreement or trust under 34.75, unless the parties have provided in the agreement or trust for another disposition of the community property, the court shall make such disposition of the community property as shall appear just and equitable after considering all relevant factors including, but not limited to

- (1) the nature and extent of the community property;
- (2) the nature and extent of the separate property;
- (3) the duration of the marriage; and
- (4) the economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time."

70788 ANC

AMENDMENT

BY REPRESENTATIVE CROFT

OFFERED IN HOUSE JUDICIARY

TO: HB 199

Page 4, line 22:

Delete "34.75.090(b)"

Insert "34.75.090(c)"

Page 9, following line 31:

Insert a new subsection to read:

"(b) A community property agreement must contain the following language in capital letters at the beginning of the agreement:

THE CONSEQUENCES OF THIS AGREEMENT MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE."

Reletter the following subsections accordingly.

Page 10, lines 3 - 4:

Delete "(b) of this section"

Insert "(c) of this section"

Page 12, following line 19:

Insert a new subsection to read:

"(b) A community property trust must contain the following language in capital letters at the beginning of the trust:

70788

ANC

THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE."

Reletter the following subsections accordingly.

Page 12, lines 22 - 23:

Delete "(b) of this section"

Insert "(c) of this section"

LAW OFFICES OF
DAVID G. SHAFTEL, PC
BANK OF AMERICA CENTER
550 WEST SEVENTH AVENUE, SUITE 706
ANCHORAGE, ALASKA 99501
(907) 276-6015
FAX (907) 278-6015

May 5, 1997

VIA FACSIMILE
(907) 465-4316

Representative Norm Rokeburg
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Rokeburg:

I urge you to vote favorably on House Bill No. 199, The Community Property Act. This Act would allow spouses to elect to have part or all of their property treated as community property. As a result, Alaska spouses would obtain an important income tax benefit which is presently available only to couples living in community property states. This benefit would allow the basis of both spouses' property to be adjusted to the fair market value of that property, at the date of death of the first spouse. As a result, the surviving spouse could sell property without having to pay income tax on the difference between the original basis and the fair market value at the date of the first spouses' death.

Since the benefits of this Act are elective, it could only affect those couples who choose to use it. I am not aware of any disadvantages in enacting this Act.

I appreciate very much your consideration in this matter.

Sincerely,



David G. Shaftel

DGS/lm

AMENDMENT

BY REPRESENTATIVE CROFT

OFFERED IN HOUSE JUDICIARY

TO: HB 199

Page 2, line 19, following (d):

Delete all material.

Insert "When distributing property identified as community property under a community property agreement or trust under 34.75, unless the parties have provided in the agreement or trust for another disposition of the community property, the court shall make such disposition of the community property as shall appear just and equitable after considering all relevant factors including, but not limited to —

- (1) the nature and extent of the community property;
- (2) the nature and extent of the separate property;
- (3) the duration of the marriage; and
- (4) the economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time."

HOMPESCH & ASSOCIATES

ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
DENALI FINANCIAL CENTER
119 N. CUSHMAN STREET, SUITE 400
FAIRBANKS, ALASKA 99701

FACSIMILE TRANSMITTAL

WARNING:

The information contained in this fax is confidential and/or privileged. This fax is intended to be reviewed initially by only the individual named below. If the reader of this transmittal page is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination or copying of this fax or the information contained herein is prohibited. If you have received this fax in error, please immediately notify the sender by telephone and return this fax to the sender at the above address. Thank you.

May 2, 1997

Time: 8:00 p.m.

Sent By: Rich Hompesch
Re: HB 199 /// McCollum v. U.S.

FROM:		TO:	
Name:	Richard W. Hompesch II	Name:	Joe Green
Company:	HOMPESCH & ASSOCIATES A PROFESSIONAL CORPORATION	Company:	State Representative
Phone:	(907) 452-1700	Fax:	(907) 465-4316
Fax:	(907) 456-5693		

Total Number of Pages: 6

Special Instructions or Additional Message:

Representative Green:

Here is a copy of the case that Dick Thwaites mentioned in his memo about HB 199. If you have any questions, please give me a call.

Original Documents to Follow via:

Mail

Other: _____

No Documents to Follow This Transaction.

determination, under local law, of a taxpayer's property rights is binding for Federal tax purposes, and it was the clear intent of the Oklahoma law that all married persons, who filed elections to come under it, hold their property from the date of their election as community property; (3) this being so, the property sold by the widow was acquired by her by bequest, devise or inheritance within the meaning of Sec. 113(a)(5).

References: 1958 P-H Fed. ¶ 10,449; 10,450.

Counsel

TopOfCase

Carl D. Hall, Jr., 2700 First Nat. Bldg., Oklahoma City 2, Okla. Atty. for Plaintiff.

Robert S. Rizley, U.S. Atty., 335 Federal Bldg., Tulsa, Deane E. McCormack, Jr., Asst.

Atty. Gen., Wash., D.C., for Defendant.

Opinion

TopOfCase

SAVAGE, District Judge:

Findings of Fact and Conclusions of Law

This cause having been carefully considered by the Court upon the pleadings, evidence presented by both Plaintiffs and Defendant, stipulations, answers to Requests for Admissions, and briefs of counsel, the Plaintiffs herein being represented by their attorneys, Mosteller, Fellers, Andrews & Loving, and Defendant being represented by its attorney, Deane E. McCormack, Jr., Attorney for the Tax Division, Department of Justice; the Court herewith enters its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This is an income tax case arising under the 1939 Internal Revenue Code, as amended.
2. Plaintiff, Irma McCollum, Executrix of the Estate of J. W. McCollum, Deceased, is the duly appointed Executrix of said estate, having been so appointed by the County Judge of Tulsa County, Oklahoma.
3. Irma McCollum is the surviving spouse of J. W. McCollum, Deceased.
4. Irma McCollum and J. W. McCollum were married in 1922.
5. In March of 1943 Irma McCollum and J. W. McCollum filed their election to come under the provisions of the Oklahoma Community Property Law as set forth in Title 32, Sections 51, 52 and 53, Oklahoma Statutes 1941.
6. On October 11, 1943, the following described real property was purchased by Irma McCollum and J. W. McCollum for consideration in excess of \$25,000.00, and was conveyed to them as joint tenants by H. P. Warfield and Ella Warfield:

The Northwest Quarter (NW/4) of the Northwest Quarter (NW/4) of Section Thirty-One (31), Township Nineteen (19) North, Range Thirteen (13) East in Tulsa County, State of Oklahoma.
7. On July 23, 1948, J. W. McCollum died.
8. On October 25, 1948, his surviving spouse, Irma McCollum, sold the above described

- real estate for \$75,000.00.
9. The fair market value of said above described property on the date of J. W. McCollum's death was \$75,000.00.
10. One-half (1/2) of the above figure, \$37,500.00, was included in J. W. McCollum's gross estate for Federal Estate Tax purposes.
11. On March 15, 1949, Plaintiffs filed in the office of the Collector of Internal Revenue for the District of Oklahoma, their Federal Income Tax Return for the calendar year 1948 and paid the taxes shown to be due thereon in the amount of \$2,462.98. In said Return, filed on March 15, 1949, Plaintiffs reported gain on the sale of the aforementioned described real property in the amount of \$20,777.20.
12. In computing said gain Plaintiffs deducted from the sales price the sum of \$37,500.00 as representing the alleged basis of the one-half (1/2) interest received by the Estate from J. W. McCollum, plus the sum of \$15,817.78, representing Irma McCollum's alleged basis in her one-half (1/2) interest in the property.
13. On March 28, 1949, Plaintiffs filed <pg 6172> an Amended Tax Return for the year 1948, alleging that Plaintiffs had overpaid their income tax for 1948 and claiming a refund of \$2,070.00. In the Amended Return Plaintiffs reported no gain on the sale of the above described real property, claiming as a basis for gain or loss of said property its entire fair market value on the date of J. W. McCollum's death.
14. On May 17, 1951, the Collector of Internal Revenue assessed additional income tax to Plaintiffs in the amount of \$3,274.66 for the calendar year 1948. Among the adjustments made was one relating to the increase of the capital gain on the sale of the property described in paragraph six (6) above.
15. Plaintiffs paid said deficiency on June 8, 1951.
16. On March 15, 1952, Plaintiffs filed a claim for refund in the office of the Collector of Internal Revenue for the District of Oklahoma for that part of the tax and tax deficiency paid for the year 1948 attributable to the increase in or any alleged capital gain from the sale of the property described in paragraph six (6) above.
17. Statutory notice of the disallowance of said claim, filed on March 15, 1952, was never given by the Commissioner of Internal Revenue. Plaintiffs' suit was brought solely on this claim.
18. The amount of tax alleged by Plaintiffs to have been illegally assessed and collected for the year 1948 results from the action of the Commissioner in adding on to the taxable income of Plaintiffs, an item of \$21,229.72, representing fifty (50%) per cent of the alleged capital gain of \$42,459.43, alleged by the Commissioner to have been realized by Plaintiffs on the sale of the real property described in paragraph six (6) above, in 1948.
19. For the calendar years 1943 through 1947, inclusive, Irma McCollum and J. W. McCollum filed Federal and Oklahoma Income Tax Returns reflecting a division of

income between them on the theory that taxpayers held their property as community property.

20. Plaintiffs intended to hold title to the real property sold in 1948 as community property under Oklahoma law.

21. The amount in controversy is \$5,326.30, plus interest as allowed by law.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter of the case.
2. Where a Federal Tax Statute expressly or impliedly describes the taxpayer's property rights as a test of taxability, the existence of that right must be discovered under the controlling local law (*Blair v. Comm.*, 300 U.S. 5 [18 AFTR 1132]; *Poe v. Seaborn*, 282 U.S. 101 [9 AFTR 576]).
3. Under Section 113(a)(5) of the Internal Revenue Code of 1939, the determination under local law of Plaintiffs' property rights is determinative for tax purposes.
4. The real property sold by Irma McCollum in 1948, after the death of J. W. McCollum, was community property under Oklahoma law on the date of J. W. McCollum's death. (Okla. Laws 1945, pp. 118-121, Sections 1-18).
5. It was the clear intent of Section 18 of Oklahoma Laws 1945, pp. 118-121, that all married couples who filed their election under the provisions of Section 2, Okla. Laws 1939, pp. 356-360, held their property as community property from the effective date of said election. Since J. W. McCollum died in 1948, no problem of retroactive application of the statute is involved.
6. The real property sold by Irma McCollum in 1948, after J. W. McCollum's death, was acquired by bequest, devise, or inheritance within the meaning of Section 113(a)(5) of the Internal Revenue Code of 1939.
7. Plaintiff's basis for computing gain or loss in the real property sold in 1948 was \$75,000.00. Therefore, no capital gain was realized by Plaintiffs when they sold said real property in 1948 for \$75,000.00. (Section 113(a)(5), Internal Revenue Code of 1939).
8. The conveyance of the real property to Irma McCollum and J. W. McCollum as joint tenants did not prevent same from being community property under Oklahoma law. (In *Re: Trimble's Estate*, 253 P.2d 805 (N. Mex. 1953); In *Re: Baldwin's Estate*, 71 P.2d 791 (Ariz. 1937).
9. *Comm. v. Harmon*, 323 U.S. 44 [32 AFTR 1411], is inapplicable to the present controversy since that case involved a statute enacted by the Oklahoma Legislature in 1939 and repealed in 1945.

10. The fact that the real property sold by Plaintiffs was handled by the County Judge in the probate proceeding as jointly held property is not sufficient to rebut the presumption that the property sold by the Plaintiffs was community property at the time of J. W. McCollum's death since such event took place subsequent to J. W. McCollum's death.

11. Both the Internal Revenue Service and the United States Tax Court recognized that the Community Property Law enacted by the Oklahoma Legislature in 1945 (Okla. Laws 1945, pp. 118-121, Sections 1-18) established a valid community property system in Oklahoma (I.T. 3782, C.B. 1946-1, 84; John M. Kane, 11 T.C. 74).

12. The Plaintiffs are entitled to judgment for a refund of \$5,326.30, plus interest as allowed by law.

TO: REPRESENTATIVE JOE GREEN

FROM: RICHARD THWAITES

SUBJECT: HB199 (COMMUNITY PROPERTY BILL)

THE FOLLOWING VERIFIES THAT ALASKANS WILL MOST CERTAINLY GET THE DOUBLE STEP UP IN BASIS INCOME TAX BENEFIT IF HB 199 IS ENACTED.

IN 1939, OKLAHOMA ENACTED A LAW WHICH ALLOWED ITS CITIZENS TO ELECT FOR THEIR PROPERTY TO BE COMMUNITY PROPERTY. THIS IS JUST WHAT HB 199 WOULD DO FOR ALASKANS.

SHORTLY AFTER THE LAW WENT INTO EFFECT, MR. AND MRS. MCCOLLUM ELECTED FOR THEIR LAND TO BE COMMUNITY PROPERTY. MR. MCCOLLUM DIED AROUND 1945. IN 1958, IN MCCOLLUM V. UNITED STATES, 58-2 USTC PARA. 9957 (ND OK 1958) THE FEDERAL COURT HELD THAT MRS. MCCOLLUM WAS ENTITLED TO THE DOUBLE STEP UP IN BASIS BECAUSE THE LAND HAD BEEN ELECTED TO BE TREATED AS COMMUNITY PROPERTY BY THE SPOUSES. THE OKLAHOMA LAW IS ATTACHED. RICH HOMPESCH FROM FAIRBANKS IS FAXING YOU A COPY OF THE CASE.

OKLAHOMA REPEALED THIS LAW AROUND 1948 WHEN THE INTERNAL REVENUE CODE FIRST BEGAN TO PERMIT SPOUSES TO FILE JOINT INCOME TAX RETURNS AND TO ALLOW THE ESTATE OF A DECEASED SPOUSE A 50% MARITAL DEDUCTION. THE INTERNAL REVENUE CODE CHANGE AGAIN PUT PEOPLE IN THE COMMUNITY PROPERTY AND NON-COMMUNITY PROPERTY STATES ON EQUAL FOOTING.

BUT IN 1982 THE UNLIMITED (RATHER THAN 50%) MARITAL DEDUCTION CAME INTO EFFECT AND ON ACCOUNT OF THE DOUBLE STEP UP IN BASIS AGAIN GAVE PEOPLE IN COMMUNITY PROPERTY STATES AN ADVANTAGE.

HB 1 WOULD GIVE ALASKANS THE SAME BENEFIT THAT PEOPLE IN THE NINE COMMUNITY PROPERTY STATES ENJOY. PLEASE SUPPORT IT.

ARTICLE 2.

Community Property.

HOUSE BILL NO. 644.

AN ACT making provisions for Community Property Law; providing that the Act shall apply to husbands and wives and their property subsequent to the first day of any month after the filing of an election to come under its terms; providing that the Act shall cease to apply to husbands and wives and their property upon the death of one of them or upon a decree of divorce being rendered; defining the separate property and the community property of the husband and wife; providing for the management, control and disposition thereof and the rights and remedies of creditors in relation thereto; providing that either spouse may give or convey his or her interest in community property to the other; providing for disposition of the community property on dissolution of the marriage; providing for the substitution of one spouse under certain conditions for the other through legal proceedings in the management, control and disposition of community property; providing for the administration and distribution of the interest of a deceased spouse in community property.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Husband and Wife—Election.

Section 1. This Act shall be available only to and apply only to husbands and wives and to their property for a period of time from the first day of the month in any year subsequent to their filing their written election to come under the terms of this Act until either an absolute decree of divorce is rendered dissolving their marriage, or until the death of one of them.

Written Election—Filing of Instrument.

Section 2. The written election to come under the terms of this Act, referred to in Section 1 of this Act, shall be a written instrument signed and acknowledged in duplicate by both husband and wife, stating in substance that they desire to avail themselves of the Act and have same apply to them and to their property on the first day of the next month in any year subsequent to the filing thereof in both the office of the county clerk and the Secretary of State as hereinafter provided. Acknowledgments shall be in the form, and may be taken before any officer now prescribed by law for acknowledgments to conveyances of real estate. One of the said written instruments shall be filed in the office of the county clerk of the county of the residence of the signers thereof, and one in the office of the Secretary of State. The county clerks and the Secretary of State shall cause all such instruments to be recorded in records kept for that purpose, and to be properly indexed.

Separate Property of Husband.

Section 3. All property, both real and personal, of the husband owned or claimed by him before the effective date of the election to come under the terms of the Act, as provided in Section 1 of this Act, and that acquired afterwards by gift, including gifts of the wife's interest in community property, by division of community property, by devise, or by descent, as also the increase of all lands thus owned or acquired, shall be his separate property. The separate property of the husband shall

not be subject to the debts contracted by the wife or liable for her torts, either before or after the effective date of said election, except as may be permitted by law as to his property prior to the enactment of this Act. The husband shall have the sole management, control and disposition of his separate property, both real and personal, to the extent permitted by law as to his property prior to the enactment of this Act.

Separate Property of Wife.

Section 4. All property, both real and personal, of the wife owned or claimed by her before the effective date of the election to come under the terms of the Act as provided in Section 1 of this Act, and that acquired afterwards by gift, including gifts of the husband's interest in community property, by division of community property, by devise, or by descent, as also the increase of all lands thus owned or acquired, shall be her separate property. The separate property of the wife shall not be subject to the debts contracted by the husband or liable for his torts, either before or after the effective date of said election, except as may be permitted by law as to her property prior to the enactment of this Act. The wife shall have the sole management, control and disposition of her separate property, both real and personal, to the extent permitted by law as to her property prior to the enactment of this Act.

Compensation for Personal Injuries.

Section 5. All property or moneys received as compensation for personal injuries sustained either by the husband or the wife shall be the separate property of the person sustaining such injuries.

Property Acquired After Effective Date of Act.

Section 6. All property acquired by the husband or the wife after the effective date of the election to come under the terms of the Act as provided in Section 1 of this Act, except that which is separate property of either one or the other, shall be deemed the community or common property of the husband and the wife and each, subject to the provisions of this Act, shall be vested with an undivided one-half interest therein. The wife shall have the management and control and may dispose of that portion of the community property consisting of her earnings, all rents, interest, dividends, incomes and other profits for her separate estate and all other community property the title to which stands in her name. The husband shall have the management and control and may dispose of all other community property, provided, however, that the homestead, if community property, shall not be sold, encumbered, or otherwise disposed of, except in the manner as is provided by law prior to the enactment of this Act, and further provided, that any funds on deposit in

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any bank or banking institution, whether in the name of the husband or the wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

Wife—Property of Subject to Her Debts.

Section 7. The separate property of the wife and that portion of community property, record title to which is in her name or which is under the management, control and disposition of the wife, shall be subject to debts contracted by the wife arising out of tort, or otherwise, but not to debts or liabilities of the husband. The separate property of the husband and that portion of the community property, record title to which is in his name or which is under the management, control and disposition of the husband shall be subject to debts contracted by the husband or liabilities of the husband arising out of tort or otherwise, but not the debts or liabilities of the wife. The husband and the wife, and each of them, shall be entitled to the exemptions to which they, or either of them, are now entitled under the laws existing prior to the enactment of this Act.

Creditors—Husband and Wife—Rights.

Section 8. No creditor shall have recourse to the community property for the payment of debts or liabilities created by either the husband or the wife, except as provided in Section 7 of this Act; provided, however, that any creditor may satisfy his claim or demand out of the community property which was under the management, control and disposition of the spouse incurring the indebtedness or liability at the time the debt or liability was contracted or created, and which has been subsequently conveyed or transferred to the other spouse and is under the management, control and disposition of said other spouse, without proof that said creditor relied upon said community property in advancing said credit, but without prejudice to the rights of the third party purchasers, incumbrancers, or other creditors or grantees; and provided further, that the husband or wife on paying community debts shall, as between themselves, charge the same against community property.

Deeds—Husband to Wife and Wife to Husband.

Section 9. The husband may give, grant, bargain, sell or convey directly to his wife, and a wife may give, grant, bargain, sell or convey directly to her husband, his or her community right, title, interest or estate in all or any property of their community real or personal property. Every deed and conveyance made from the husband to the wife or from the wife to the husband shall operate to divest the property therein described of every claim or

PROPERTY

Chap. 62

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demand as community property, and shall vest the same in the grantee as the separate property of the grantee; provided, however, that the deeds, conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift or encumbrance.

Divorce—Division of Property.

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Section 10. In the event of the dissolution of marriage by decree of any court of competent jurisdiction, community property shall be divided between the parties by the court granting the decree, in such proportions as such court, from the facts in the case, shall deem just and equitable, and such division shall be subject to revision on appeal in all respects including the exercise of discretion by the court below.

Insanity or Conviction of Felony—Rights of Spouse.

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Section 11. Whenever the husband or the wife is non compos mentis, or has been convicted of a felony or sentenced to imprisonment for a period of more than one year, or whenever the husband has abandoned his wife and family and left her and his family, if they have children, without support, or whenever the husband or the wife is an habitual drunkard, or for any other reason is incapacitated to manage, control, or dispose of the community property, the other spouse may present a petition, duly verified, to the district court of the county wherein they reside, or if they are nonresidents wherein any of the community property is located or situated, stating the name of the incapacitated spouse, a description of all community property, both real and personal, and the facts which render the other spouse incapacitated to manage, control or dispose of the community property, and praying that the spouse filing the petition be substituted for the incapacitated spouse as to the management, control or disposition of the community property then under the management, control and disposition of said spouse with the same power of managing, controlling and disposing of the community property as was vested in the incapacitated spouse.

Service of Process.

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Section 12. In all such cases service of process shall be had as in other civil actions, provided, however, that where it is alleged that the other spouse is non compos mentis, a guardian ad litem shall be appointed having such powers as in other civil actions.

Hearing on Petition.

Section 13. Upon the hearing of the petition so filed, the court shall render judgment therein either dismissing said petition or adjudging the spouse filing same to have such power of managing, controlling and disposing of the community property,

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Chap. 62 ACTS OF THE SEVENTEENTH LEGISLATURE

either real or personal, formerly under the management, control and disposition of the other spouse as to the court may appear to be just, proper, equitable, and to the best interests of said estate.

Judgments.

Section 14. All judgments rendered as in the preceding Section provided shall be recorded in the office of the county clerk of the county where any property affected thereby is situated and such judgment when so rendered shall be notice of the facts therein set out.

Death of Husband or Wife.

Section 15. Upon the death of the husband or the wife, the surviving spouse shall administer all community property in the same manner and with the same duties, privileges and authority as are vested in a surviving partner to administer and settle the affairs of a partnership upon the death of the other partner, as provided by Section 1197, Oklahoma Statutes, 1931; provided that the surviving husband or wife shall not be disqualified from acting as executor or administrator of the estate of the deceased husband or wife; and provided further, that the survivor of the husband or wife shall pay out of the community property, except the homestead and exempt property, all debts of the community, whether created by the husband or the wife; and provided further, that when all debts of the community shall have been fully satisfied the survivor shall transfer and convey to the administrator or executor of the deceased one-half of the community property remaining to be administered and distributed as other property of the estate either subject to the terms of the will of the deceased or under the laws of descent and distribution as the case may be, and thereafter all the interest of the surviving partner in said community property shall be that of a tenant in common; and provided further, that any interest in a homestead so conveyed shall not be subject to administration under the laws of this State, except in the manner provided by law at the time of the enactment of this Act.

Approved May 10, 1939.

FAX COVER TRANSMISSION SHEET

DATE: May 2, 1997

PAGES FOLLOWING: 6

FAXED TO:

FAX #: 465-4316

NAME: Lisa Kirsch

CASE NAME: _____

CASE #: _____

COMMENTS: Memorandum on HB 199

FAXED FROM:

LAW OFFICE OF MARYANN E. FOLEY
750 W. 2nd Avenue, Suite 203
ANCHORAGE, ALASKA 99501
(907) 279-0783 FAX#: (907) 279-0714

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Winegarden & Whitaker
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Kenai, Alaska 99611
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Charles A. Winegarden
William W. Whitaker

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DATE: April 28, 1997
FROM: Charles Winegarden
TOTAL NUMBER OF PAGES SENT: Just this one (Including this cover sheet)

SEND TO: House Judiciary Committee
Attn: Lisa Kirsch

FAX NO: 907/465-4316

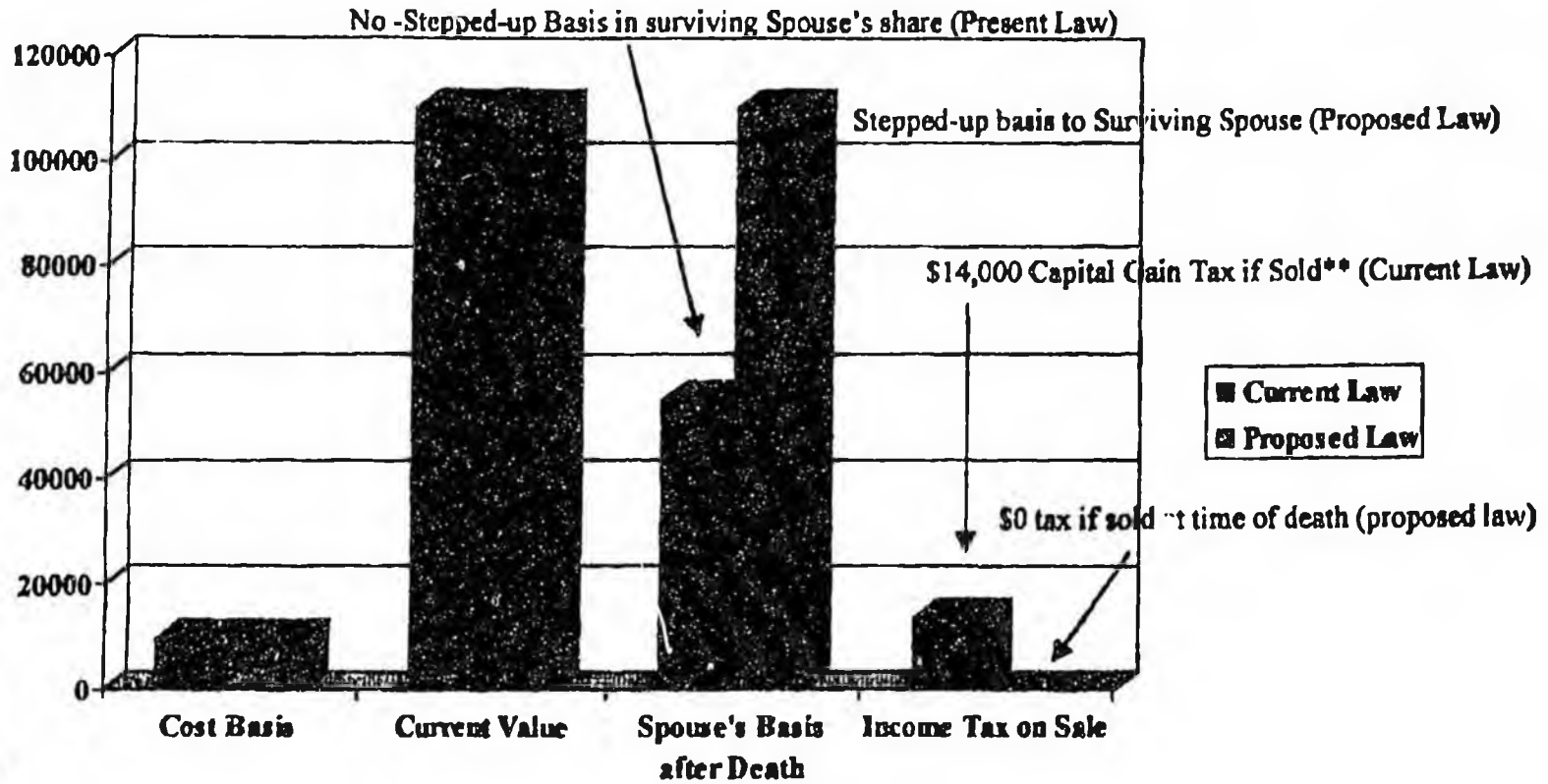
RE: House Bill 199 the "Alaska Community Property Act"

COMMENTS/NOTES: Ms. Kirsch: I have practiced family law for 14 years in Kodiak and now based in Kenai. Please fax me a copy of the above referenced House Bill so that I may include my comments with those of my colleagues

If all pages are not received, contact Jo-Carol at 907/283-5774

Post-it® Fax Note	7671	Date	4/24	# of pages	21
To	SHARON GLEASON	From	LISA KIRSCH		
Co./Dept.		Co.	HOUSE JUD.		
Phone #		Phone #	465 4990		
Fax #	277 0281	Fax #	4316		

Community Property (Proposed) Tax Effect at Death of Spouse



** Assume sale of property at time of death

8:30-10am
- Sharon Gleason
258 277 6017
Fax → 0281

Alaska State Legislature



House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

Date: April 23, 1997

To: Richard Wellman, University of Georgia Law School
(706) 542-5556

From: Lisa Kirsch,
Counsel House Judiciary Committee
ph: (907)465-4990 fax: (907) 465-4316

Subject: HB 199

Here is a copy of the bill drafted by Jonathan Blattmachr. He testified before our committee today. We also heard from Rich Hompesch and Mr. Thwaites, both apparently Alaska attorneys who practice probate law here. The committee appeared to accept the bill and they could easily move it out of committee Friday. If you have any comments, or would care to testify Friday, please let me know.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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
130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

March 25, 1997

SUBJECT: Sectional Summary of HB 199, the "community property" bill (Work Order No. 20-LS0522\E)

TO: Representative Joe Ryan
Attn: David Pree

FROM:  Theresa Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill. The descriptions of the sections necessarily contain some generalizations and simplifications. As a result, please keep in mind that the bill itself is the best statement of its contents.

Section 1. States that community property under the new chapter (AS 34.75) is not included in the augmented estate. "Augmented estate" is a term used in the state's Uniform Probate Code to refer to the pot of property from which a surviving spouse can elect to take a one-third share; the property in the estate is "augmented" by adding to it certain other property transferred to others by the decedent.

Section 2. Makes an amendment to AS 25.15.010 to show that its provisions are subject to the new community property chapter (AS 34.75).

Section 3. Makes an amendment to AS 25.15.020 to show that the section is subject to the new community property chapter (AS 34.75).

Section 4. Makes an amendment to AS 25.15.050 to show that the provisions of the section are subject to the new community property chapter (AS 34.75).

Section 5. Makes an amendment to AS 25.15.060 to show that the provisions of the section are subject to the new community property chapter (AS 34.75).

Section 6. Adds a subsection to AS 25.24.160 (dealing with court judgments in divorce actions). The new subsection directs the court to distribute the parties' property under AS 34.75 according to their community property agreement or community property trust

under AS 34.75, if they have one. Directs the court to award one-half of the value of the community property to each party, unless the parties have agreed otherwise in the community property agreement or trust.

Section 7. Amends AS 25.24.200(a) (relating to dissolution of marriages) to include community property under AS 34.75.

Section 8. Amends AS 25.24.310(b) (relating to the payment of attorney fees, costs, and other disbursements in a child custody, support, and visitation matters) to include community property in the property that can be used to pay for a minor's legal representation or for other services.

Section 9. Amends AS 34.15.110 to make its provisions subject to the section in the new community property chapter, AS 34.75, that addresses how spouses can hold property. (The citation should be corrected to read "AS 34.75.110" in both places.)

Section 10. makes an amendment to AS 34.15.130. States that the conclusion that persons are tenants in common if they have an undivided interest in real property is subject to the provisions of the section in the new chapter, AS 34.75, that addresses how spouses can hold property. (The citation should be corrected to read "AS 34.75.110.")

Section 11. Adds a new chapter related to the property of spouses.

AS 34.75.010. Requires spouses to act in good faith towards each other if the matter involves community property. Prohibits changing this obligation in a community property agreement or trust.

AS 34.75.020. Allows a community property agreement or trust to change this chapter's effect, except for certain listed provisions.

AS 34.75.030. Limits the classification of property as community property to what the spouses say in a community property agreement or trust, except where this chapter classifies property otherwise.

Establishes a presumption that the spouses' property acquired during marriage and after the determination date (see AS 34.75.900 for definition) is community property, if the spouses' community property agreement says that all their property acquired during marriage is community property.

Gives a spouse a one-half interest in community property.

States that if the community property agreement states that all property acquired during marriage is community property, the income on the property is community property.

States that even if community property is transferred to a trust, it still remains community property.

States that property is not community property if it is owned by a spouse at the time of the marriage but before the determination date (see AS 34.75.900 for definition). This occurs even if the spouses' community property agreement provides that all property acquired during marriage is community property. However, the community property agreement may expressly provide differently.

States that certain listed property is individual property if it is owned by a spouse at the time of the marriage but before the determination date (see AS 34.75.900 for definition). This occurs even if the spouses' community property agreement provides that all property acquired during marriage is community property. However, the community property agreement may expressly provide differently.

States that appreciation and income of property transferred to a community property trust are community property if the trust says they are.

States that community property held in a trust remains community property when distributed to the spouses.

States that this chapter doesn't change property classification and ownership rights for property acquired before or during marriage, except as otherwise provided in this chapter.

AS 34.75.040. Identifies what property one spouse may manage and control alone.

Requires spouses to act together when managing and controlling community property that is held in both of their names (unless held in the alternative--"or").

States that the trust terms determine the management and control rights of community property transferred to a trust.

States that management and control rights for community property don't determine the classification of the property and don't rebut the presumption in AS 34.75.030(b).

States that management and control rights to community property do not permit gifts, except as provided in AS 34.75.050.

States that management and control rights are not affected by this chapter if the property is acquired before the determination date (see AS 34.75.900 for definition). Makes an exception to the extent provided otherwise in a community property agreement or trust.

Allows a court to appoint a conservator or guardian to handle the management and control rights of a disabled spouse.

AS 34.75.050. Prohibits one spouse acting alone from giving to a third party community property that the spouse manages and that is over \$1,000 (in one calendar year), or is a larger amount unless the amount is reasonable considering the economic conditions of the spouses.

Subjects a gift not allowed under (a) of this section to a court action allowed under (d) unless both spouses act jointly or the gift is ratified by the other spouse.

Considers that the spouses have acted together when one spouse makes a gift, if either of certain U.S. gift tax activities occur.

Allows one spouse to bring a court action against a spouse making a gift that doesn't satisfy (a), or against the recipient of the gift, or both. Requires the action to be begun within a certain time. Characterizes a recovery during marriage as community property. Limits a recovery after dissolution or death of one spouse to one-half of the value of the gift and makes this recovery individual property.

AS 34.75.060. Allows spouses living in this state to classify all or part of their property as community property by using a community property agreement.

Allows spouses, even if not living in this state, to classify all or part of their property as community property by transferring the property to a community property trust that states that the property is community property.

AS 34.75.070. Establishes a presumption that an obligation incurred by a spouse during marriage is incurred in the interest of the marriage or family.

Restricts the satisfaction of a duty of support owed to the other spouse or child of the marriage to community property and the spouses's non-community property.

Restricts the satisfaction of an obligation incurred by a spouse in the interest of the marriage or family to community property and the non-community property of the spouse.

Restricts the satisfaction of certain obligations attributable to obligations, acts, or omissions before marriage to the non-community property of the spouse and certain community property.

Restricts the satisfaction of certain other obligation incurred by a spouse during marriage to the spouse's non-community property and the spouse's interest in community property.

States that this chapter doesn't change the spouses' relationship with their creditors with regard to property or obligations existing before the determination date (see AS 34.75.900 for definition).

Makes binding on a creditor a writing signed by the creditor that reduces the creditor's rights under this section.

States that creditor rights are not affected by a community property agreement or trust, unless the creditor knows about the effect when the obligation to the creditor is incurred. Prohibits changing the effect of this subsection by a community property agreement or trust.

States that this chapter doesn't affect a property exemption available under another law.

Sec. 34.75.080. Protects persons who are bona fide purchasers (in general, good faith purchasers for value without notice of a problem or adverse condition) in their transactions with spouses. States that notice of a community property agreement or trust, a marriage, or a marriage termination doesn't change the purchaser's status as a bona fide purchaser. Provides that certain community property purchased from one spouse by a bona fide purchaser is purchased free of any claim of the other spouse: prohibits changing this provision in a community property agreement or trust.

Sec. 34.75.090. Establishes certain requirements for and features of community property agreements. An agreement must be in writing, be signed, and make some property community property. Consideration (each spouse receiving something, usually money) is not needed for the agreement to be effective.

States that the agreement may not adversely affect a child's right to support.

Identifies various items that the spouses may agree on in the agreement.

Provides for the amendment or revocation of the agreement.

Allows persons who are not yet married to enter into an agreement, but prevents the agreement from becoming effective until they are married.

Establishes when community property agreements are unenforceable.

Provides that a court is the entity that determines whether an agreement is unconscionable (grossly unfair to one spouse).

Sec. 34.75.100. Establishes certain requirements for and features of community property trusts. To be a trust, it must be signed and state that some of the property transferred to the trust is community property, and one trustee must meet the qualifications given under the

section. Consideration (each spouse receiving something, usually money) is not needed for the trust to be effective.

States that the trust may not adversely affect a child's right to support.

Lists various items that the spouses may agree on in the trust.

Provides for the amendment or revocation of the agreement.

Establishes when community property trusts are unenforceable.

Provides that a court is the entity that determines whether a trust is unconscionable (grossly unfair to one spouse).

Requires the trustee to maintain certain records.

Sec. 34.75.110. Establishes how spouses may hold their property. Includes some new methods, e.g. holding separately or together as community property or holding as "survivorship community property" (where surviving spouse receives the other spouse's community property interest automatically). Provides for holding property as individual property.

Sec. 34.75.120. Prevents the issuer of an insurance policy from being liable because it makes payments or takes other actions on the policy, unless the issuer actually knew that the payments or actions were inconsistent with a community property agreement or trust or certain adverse claims.

Establishes some rules for how to classify the ownership of life insurance policies and proceeds.

States that this section does not affect a creditor's interest in a policy (or its proceeds) that is transferred or made payable to the creditor as security for an obligation.

States that this section does not affect the ownership interest or proceeds of a policy unless a spouse is listed as an owner and community property is used to pay a premium on the policy.

Sec. 34.75.130. Provides that other property becomes community property if it is mixed with community property and if it can't be traced (or except as provided in AS 34.75.110).

Provides that under certain conditions the individual property of one spouse is changed to community property if the other spouse contributes effort, skill, activity, etc. to the separate property.

Representative Joe Ryan

March 25, 1997

Page 7

Sec. 34.75.140. Gives a spouse a claim against the other spouse for failing to act in good faith, if the failure damages the claimant's community property interest.

Allows a court to order an accounting of the spouses' property and obligations. Allows a court to make certain listed determinations about the spouses' property.

Allows a court to order the addition of a spouse's name to the title of community property held in the name of only one spouse, except for certain listed property.

Requires a spouse to bring a court action against the other spouse under (a) within three years.

Sec. 34.75.150. After the death of a spouse living in this state and under certain circumstances, treats as community property the property that can be traced to certain recoveries of the decedent for a loss of earning capacity.

Sec. 34.75.160. Directs that this chapter is to be applied and construed uniformly with the laws on this same subject in other states and to be applied and construed to achieve its general purpose.

Sec. 34.75.900. Defines the terms in the chapter.

Sec. 34.75.995. Gives the chapter the title "Alaska Community Property Act."

Section 12. Describes how a section in the new chapter changes an Alaska Rule of Evidence.

Section 13. States that the provision in this bill that amends court rules only takes effect if the section describing how it amends the rule receives the necessary super-majority vote.

Section 14. Gives the bill an immediate effective date.

If I may be of further assistance, please advise.

TLB:jdr
97-218.jdr

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 199

Revision Date: _____
 Title: AK Community Property Act

Department: Commerce and Economic Development
 BRU: Banking, Securities & Corporations
 Component: Banking, Securities & Corporations

Sponsor: Rep. Ryan
 Requestor: House Labor and Commerce Committee

COMPONENT SERIAL NO. 1233

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 97) cost: \$ 0.0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Willis F. Kirkpatrick, Director
 Division: Banking, Securities and Corporations
 Approved by Commissioner: William L. Hensley
 Agency: Commerce and Economic Development

Phone: 465-2521
 Date: 3-28-97
 Date: 4-1-97

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TIME 9:20 A.M.
P.M.

FOR USA
M Harriet Glendon, Attorney
OF Family Law
PHONE (1 277-6017) EXT. ()

FAX MOBILE PAGER ()

MESSAGE Re: NB 199,
She is pretty familiar
with the bill & would
like to talk to you about
it.

- URGENT
- PHONED
- RETURNED YOUR CALL
- PLEASE CALL BACK
- WILL CALL AGAIN
- WAS IN
- WANT TO SEE YOU



SIGNED _____

Alaska State Legislature

House of Representatives

COMMITTEE ASSIGNMENTS

LABOR & COMMERCE
MILITARY & VETERANS AFFAIRS
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Representative Joe Ryan

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House Bill 199

Sponsor Statement

This Sponsor statement provides a summary of the income tax advantage of community property and a short overview of the Community Property bill. The bill is designed, among other things, to allow married Alaskans to obtain the income tax advantage available to residents of community property states and to produce business in Alaska.

Income tax advantage of community property

A person who owns assets with his or her spouse as community property in one of the nine community property states (Louisiana, Texas, New Mexico, Arizona, California, Nevada, Washington, Idaho, and Wisconsin) has a major income tax advantage over a married person who owns assets with his or her spouse but that are not community property. This advantage results from the incongruous operation of the step-up in basis rule. This rule is one of the few, if only, income tax advantages that a person's estate receives upon his or her death.

The best way to explain the step-up in basis rule is to start with an example of a single person in Alaska on her death bed who twenty years ago paid \$10,000 for a homestead that is presently worth \$110,000. If the person sold the homestead before she died, she would realize a long-term capital gain of \$100,000. The gain would be subject to a maximum capital gains tax of 28%, or \$28,000. On the other hand, if the person decided not to sell the homestead and died the next day, the \$100,000 profit would be forgiven. This means that her heirs could sell the homestead for \$110,000 and pay no income taxes! This is because the original cost basis of \$10,000 is "stepped-

up" to \$110,000, the fair market value of the homestead at death. If the homestead is sold for \$110,000 with its new basis of \$110,000, there is no gain and no income taxes will be owed.

The step-up in basis rule gets more complicated when a married couple is involved. If we assume that a married couple in Alaska bought the homestead twenty years ago for \$10,000 and held title as husband and wife, then each would own one-half of the homestead. If the husband was on his death bed and the couple sold the homestead before the husband died for its current fair market value of \$110,000, the couple would realize a \$100,000 long-term capital gain just like the single person did. However, if the husband died and the wife inherited his half of the homestead and then sold it, she would only realize only a \$50,000 long-term capital gain. This is because the profit in the husband's half of the homestead would be forgiven by the step-up in basis rule. The husband's half of the homestead would get a "step-up" in basis to \$55,000. When the husband's half was sold for \$55,000 there would be no gain. However, the wife would have a gain on the sale of her half of the homestead. Her half of the homestead would have a basis of \$5,000 (one-half of the original cost basis of \$10,000). When this half was sold for \$55,000, the wife would realize a \$50,000 long-term capital gain and would pay a maximum of \$14,000 of income taxes (28% of \$50,000).

If, on the other hand, the couple lived in a community property state like Washington, the income tax savings would be even greater. If the homestead was community property under Washington law, for example, the wife would get a step-up in basis in both halves of the homestead to \$110,000. After her husband's death when she sold the homestead for \$110,000 she would pay no income taxes! In contrast, in the prior example of the married couple in Alaska who owned the homestead that was not community property, the wife who sold the homestead after her husband died would pay \$14,000 of income taxes. In this way the income tax laws favor spouses in community property states who own assets as community property over spouses in non-community property states like Alaska who as a general rule cannot own assets as community property.

Overview of HB 196

This bill will allow married Alaskans to execute a written agreement to recharacterize their assets as community property. Unlike other

states which have a community property form of ownership for married persons, Alaskans would have their assets treated as community property only to the extent they execute a written agreement and elect into a community property system under Alaska law. In contrast, community property states mandate the married couple's assets to be community property unless the spouses elect out.

The bill not only allows Alaskan couples to enter into an agreement to have some or all of their assets treated as community property, but it also permits married persons who do not reside in Alaska to have their assets treated as community property under Alaska law by executing an Alaskan Community Property Trust. Such a trust must have an Alaskan trustee. It is anticipated that many married persons who reside outside of Alaska will wish to label a portion, or all, of their assets as community property because they believe that it is a more appropriate method of owning their assets and they wish to obtain the income tax advantages which are available to community property upon the death of the first spouse.

Some believe that community property represents a more fair and rational system of sharing the ownership of property during marriage because it essentially treats the marriage like a partnership; as assets are earned during the marriage, they are treated as owned 50/50 by the two partners (the husband and wife). Others believe community property is not a fair or rational system. Regardless of one's beliefs, it seems appropriate to allow Alaskans, and residents of other states, the freedom to choose the arrangement that is most appropriate for them.

It should be emphasized that no asset would be labeled as community property under the bill. Rather, the bill merely authorizes married persons to execute a written agreement or trust in which they expressly elect to treat some or all of their assets as community property under Alaska law.

HUGHES THORSNESS POWELL
HUDDLESTON & BAUMAN LLC

EST. 1977

Facsimile Cover Sheet

To: Joe Ryan**Company:****Phone:** 1-800-922-3875**Fax:** 1-907-465-4588**From:** Robert L. Manley**Company:** Hughes Thorsness Powell

Huddleston & Bauman LLC

Phone: 907/263-8251**Fax:** 907/263-8320**Date:** April 14, 1997**Re:** IRC Sec. 1014 & HB 199**Your Reference No.****Client/Matter:** 8-18**Pages including this****cover page:** 4**Original to follow?:** no**Via:****Comments:**

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Ryan testifies
this is statute

2. *Community Property -- Step-up In Basis for Surviving Spouse's One-half Share of Community Property*

→ Both the decedent's and the surviving spouse's half interests in community property receive a new basis, if at least half of the community property was includible in the decedent's gross estate.¹⁴²

¹⁴² Section 1014(b)(6); Regs. Section 1.1014-2(a)(5). For special rules applicable to the surviving spouse's interest in community property of a decedent dying after Oct. 21, 1942, and before 1948, see Regs. Section 1.1014-2(c)(2).

Only community property qualifies for this step-up in basis for both halves. Other forms of joint ownership do not qualify¹⁴³ unless, under applicable local law, they are regarded as community property as well.¹⁴⁴ Some courts have recognized that if title to realty is held in joint tenancy or tenancy in common, but the spouses intend to hold the realty as community property, both halves of the property qualify for a new basis.¹⁴⁵

¹⁴³ Rev. Rul. 68-80, 1968-1 C.B. 348 (no new basis step-up on wife's interest in Virginia realty held in co-tenancy, despite community property source of purchase money); *Murphy v. Comr.*, 342 F.2d 356 (9th Cir. 1965) (no basis step-up for surviving spouse's interest in California realty originally held as community property, converted before death to co-tenancy).

¹⁴⁴ See Rev. Rul. 87-98, 1987-2 C.B. 206; WASH. REV. CODE Section 64.28.040 (interests held jointly by husband and wife presumed to be community property).

→ ¹⁴⁵ *McCollum v. U.S.*, 58-2 USTC Para.9957 (N.D. Okla. 1958) (where spouses filed election to come under Oklahoma community property law, then took title to realty in joint tenancy while intending to hold as community property, both halves qualify for basis step-up); *Bordenave v. U.S.*, 150 F. Supp. 820 (N.D. Cal. 1957) (presumption created by joint tenancy or co-tenancy record title in California realty can be overcome by evidence of mutual intention, understanding or agreement that realty was held as community property; court holding presumption of joint tenancy record title not overcome for purpose of basis step-up in both halves). *McCollum* and *Bordenave* were decided under the predecessor of Section 1014 - 1939 Code Section 113(a)(5). See also *U.S. v. Pierotti*, 154 F.2d 758 (9th Cir. 1946) (although the deed to California realty stated that said property was held in joint tenancy, nevertheless the court held that evidence was admissible to show that the spouses had an agreement that said property was held as community property and that the agreement prevailed over the form of the deed); and Rev. Rul. 87-98, 1987-2 C.B. 206 (where spouses bought property with community funds, took title as joint tenants with right of survivorship, and declared, in joint wills, that the property was community property, each half interest received step-up in basis since property was considered community property under state law).

The step-up in basis produces immediate tax results in the case of oil and gas property owned as community property. In Rev. Rul. 92-37,¹⁴⁶ a surviving spouse filed a joint return with the executor of her late husband covering the short tax year ending with her husband's death and her normal tax year. The Service ruled that she was entitled to use the date-of-death value in calculating her depletion deduction in respect of their oil and gas properties.

¹⁴⁶ 92-1 C.B. 195.

The surviving spouse's interest in U.S. Treasury Bonds, which can be redeemed at par in payment of federal estate tax ("flower bonds"), held as community property receives a new basis equal to the fair market value of the bonds at the date of death or alternate valuation dates, not their par value.¹⁴⁷ Both halves of partnership interests held as community property qualify for the new basis if the Section 754 election has been made.¹⁴⁸

¹⁴⁷ *Neuhoff v. Comr.*, 75 T.C. 36 (1980), aff'd, 669 F.2d 291 (5th Cir. 1982) (Texas); Rev. Rul. 76-68, 1976-1 C.B. 216.

Sec. 1014. Basis Of Property Acquired From A Decedent



(a) In General

Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be--

- (1) the fair market value of the property at the date of the decedent's death, or
- (2) in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections, or
- (3) in the case of an election under section 2032A, its value determined under such section.

(b) Property Acquired From The Decedent

For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

- (1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;
- (2) Property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent, with the right reserved to the decedent at all times before his death to revoke the trust;
- (3) In the case of decedents dying after December 31, 1951, property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent with the right reserved to the decedent at all times before his death to make any change in the enjoyment thereof through the exercise of a power to alter, amend, or terminate the trust,
- (4) Property passing without full and adequate consideration under a general power of appointment exercised by the decedent by will;
- (5) In the case of decedents dying after August 26, 1937, property acquired by bequest, devise, or inheritance or by the decedent's estate from the decedent, if the property consists of stock or securities of a foreign corporation, which with respect to its taxable year next preceding the date of the decedent's death was, under the law applicable to such year, a foreign personal holding company. In such case, the basis shall be the fair market value of such property at the date of the decedent's death or the basis in the hands of the decedent, whichever is lower;

→ (6) In the case of decedents dying after December 31, 1947, property which represents the surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate under chapter 11 of subtitle B (section 2001 and following, relating to estate tax) or section 811 of the Internal Revenue Code of 1939;

(7) In the case of decedents dying after October 21, 1942, and on or before December 31, 1947, such part of any property, representing the surviving spouse's one-half share of property held by a decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country, as was included in determining the value of the gross estate of the decedent, if a tax under chapter 3 of the Internal Revenue Code of 1939 was payable on the transfer of the net estate of the decedent. In such case, nothing in this paragraph shall reduce the basis below that which would exist if the Revenue Act of 1948 had not been enacted;

(8) In the case of decedents dying after December 31, 1950, and before January 1, 1954, property which represents the survivor's interest in a joint and survivor's annuity if the value of any part of such interest was required to be included in determining the value of decedent's gross estate under section 811 of the Internal Revenue Code of 1939;

(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required to be included in determining the value of the decedent's gross estate under chapter 11 of subtitle B or under the Internal Revenue Code of 1939. In such case, if the property is acquired before the death of the decedent, the basis shall be the amount determined under subsection (a) reduced by the amount allowed to the taxpayer as deductions in computing taxable income under this subtitle or prior income tax laws for exhaustion, wear and tear, obsolescence, amortization, and depletion on such property before the death of the decedent. Such basis shall be applicable to the property commencing on the death of the decedent. This paragraph shall not apply to—

(A) annuities described in section 72;

(B) property to which paragraph (5) would apply if the property had been acquired by bequest; and

(C) property described in any other paragraph of this subsection.

(10) Property includible in the gross estate of the decedent under section 2044 (relating to certain property for which marital deduction was previously allowed). In any such case, the last 3 sentences of paragraph (9) shall apply as if such property were described in the first sentence of paragraph (9).

(c) Property Representing Income In Respect Of A Decedent

This section shall not apply to property which constitutes a right to receive an item of income in respect of a decedent under section 691.

(d) Special Rule With Respect To DISC Stock

If stock owned by a decedent in a DISC or former DISC (as defined in section 992(a))

Ten Years of WUMPA

by Gregg Herman



Gregg Herman

On New Year's Day, Wisconsin will celebrate(?) ten years of the distinction of being the only state in the country to adopt the Uniform Marital Property Act. Part of the reason no other state has followed suit is Wisconsin's dismal experience with this legislation. Rarely has any law caused so much harm for so little apparent good.

Cynics have referred to WUMPA as the "Divorce Lawyers and Tax Accountants Relief and Pension Fund Act." The main effect of WUMPA has been to protect creditors and to create havoc for determining taxable income the year of divorce. The benefit to society of either of these is difficult to imagine.

First, let us examine the creditor issue. Prior to WUMPA, the typical first order in divorce restrained both parties from incurring any new debt against the credit of the other party. This order was designed to protect spouses against incurrence of debt by the other party during the pendency of divorce and was valuable because there is no incentive to save money in a divorce, but plenty of incentive to run up debts.¹ Today, under WUMPA, this order is of greatly diminished value. WUMPA serves primarily as a creditor protection statute. Although the divorce court can order a spouse held harmless, because the community under WUMPA continues until the divorce the creditor has the right to seek collection from all marital property, including that awarded in a divorce to an innocent party.²

If the creditor protection aspects harm primarily women, the tax complications harm both men and women while benefiting no one, including the tax authorities. As WUMPA continues until the date of divorce, all income is community and must be equally reported. Absent an opt-out agreement, community property treatment of income during the year of divorce creates additional cost and aggravation to divorcing parties.³ The transfer of income reporting from one party to the other usually does not create any greater tax liability. In fact, it can frequently result in less tax revenue.⁴ Although the taxing authorities thus lose under WUMPA, the aggravation and accounting costs to the parties in attempting to figure out their taxes in the year of divorce make up for any savings.

The great irony is that WUMPA was primarily trumpeted as a woman's protection statute. Wives certainly are capable of running up debt during a divorce, but most family law practitioners would agree that it is more likely to be the husband who runs up debt and disappears. Then, when the creditor sees the wife under WUMPA, there is no husband available to hold the wife harmless. Further, in my experience, it is more likely the husband who has the accountant on retainer to assist with the messy issue of community property income reporting. In sum, what was supposed to be a law to protect women has become a law that, more often than not, hurts women.

If WUMPA causes these problems, what are the advantages? Certainly it is not in property division. Wisconsin was an equitable division property state long before January 1, 1986, and WUMPA has no effect on divorce property division (a concept clients frequently have difficulty understanding).⁵ Also, WUMPA does not affect payment of child or spousal support.⁶

Certainly WUMPA is a windfall to creditors. It may be a good thing in probate. For parties going through a divorce, however, especially women, it creates no additional rights, but imposes greater costs and responsibilities.

These remarks are not old sour

grapes. When WUMPA was still in its formative stages, the Family Law Section board of directors met with the legislator proposing the law and expressed these concerns. We were told that none of this is a problem because women can always sit down at the kitchen table with their husbands and negotiate a marital agreement to opt out of WUMPA. I wish there were not so many ketchup stains on all those agreements we see informally negotiated.

The truth is that when a marriage is fragile, it is really not a good time to sit down at the kitchen table and discuss marital property law. Besides, marital property agreements, to be enforceable, should be drafted by attorneys, which of course costs money. To the extent there is a greater financial ability to hire a lawyer, again the woman suffers.

A couple of years ago, this writer was contacted by a legislator and asked how to correct these problems. I suggested a two sentence "rider bill" which would correct all of the above. Sentence one would be: "Chapter 766 is repealed." Sentence two: "Apologies to all." And do not bother with sentence one without sentence two.

ENDNOTES

- ¹ Weiss v. Weiss, 122 Wis. 2d 588, 365 N.W.2d 608 (Ct. App. 1985)
- ² St. Marys Hospital Med. Center v. Brody, 186 Wis. 2d 100, 519 N.W.2d 706 (Ct. App. 1994). See also Daniel L. Furrh, *New Treatment of Debt at Divorce Under the Marital Property Act*, 5 Wis. J. Fam. L. 64 (1986).
- ³ Karen Case, *Taxes and Marital Property: Things Mother Never Told Us*, 66 Wis. Law. 10 (1993); Dan Dauga, *Marital Property Law and Income Tax Reporting*, 13 Wis. J. Fam. L. 76 (1993); Lawrence M. Phillips, *Federal Tax Problems Under WUMPA*, 6 Wis. J. Fam. L. 37 (1986).
- ⁴ See Barbara J. Becker & Margaret H. Scholz, *How to Save Income Taxes in Divorce Cases*, 12 Wis. J. Fam. L. 41 (1993).
- ⁵ Kuhlman v. Kuhlman, 146 Wis. 2d 588, 432 N.W.2d 295 (Ct. App. 1988).
- ⁶ Abitz v. Abitz, 155 Wis. 2d 161, 405 N.W.2d 609 (1990)

Gregg Herman practices family law with the firm of Loeb, Herman & Drew, S.C., in Milwaukee.

ALASKA CIVIL LIBERTIES UNION

An Affiliate of the American Civil Liberties Union

P. O. Box 201811 Anchorage, AK 99520-1811

Phone: 907-258-0044 Fax: 907-258-0288 E-Mail: akclu@alaska.net

April 22, 1997

The Honorable Joe Green, Chair
House Judiciary Committee
Alaska State House of Representatives
Juneau, Alaska

Re: House Bill 234 - GRM Assistance for Abortions

Dear Chairman Green and members of the Committee:

Thank you for an opportunity to comment on House Bill 234, which would have the effect of depriving women who are otherwise eligible for General Relief Medical assistance from obtaining an abortion under that program. The Alaska Civil Liberties Union opposes HB 234 because it would violate the Alaska Constitution's right to privacy; its guarantee of equal protection under the law; and its guarantee of freedom from discrimination based on sex.

In 1993 the Department of Health and Social Services under Commissioner Ted Mala promulgated regulations which attempted to deprive poor women of access to abortion. The AkCLU on behalf of seven other organizations and ten individuals successfully brought suit and in 1994 reached a final settlement which specified that a physician determine, based on his or her professional judgment, whether a particular abortion is medically necessary.

Any further efforts to deprive poor women of reproductive autonomy are nothing more than using the government to police a private position against abortion. As we have seen in recent weeks in this Legislature, it matters not to those who would outlaw abortion if a woman's life or her health is at stake. It matters not whether she is considering a "morning after" pill because the condom leaked or is seeking a first trimester abortion

because her birth control pills failed, she was raped, or she didn't know she could get pregnant the first time.

Nothing in HB 234's deletion of abortion indicates a similar change in the State's commitment to fund childbirth and pre- and postnatal expenses if a woman seeks to carry her pregnancy to term. In fact, the discriminatory funding scheme will prevent low-income Alaskan women from obtaining safe abortions and coerce them into continuing their pregnancies to term even when this decision is adverse to the interests of the women and their families. Women choose abortions for compelling reasons that profoundly affect their own and their families' futures. Unable to pay for her own health care, a poor woman will have little recourse but to accept the State's determination that she should carry her pregnancy to term.

Some will try to tell you that promoting childbirth while denying abortion is "pro-family." But it's not their family that will be affected and it should not be their decision. Please signal your recognition that a poor woman's decision can be as moral as anyone else's and reject HB 234.

Sincerely yours,

ALASKA CIVIL LIBERTIES UNION

Theda Pittman
Interim Executive Director

cc: The Honorable Tony Knowles

Abortion: Male coercion and irresponsibility

Consider this: By vesting all reproductive responsibility in the woman, a pro-choice male creates a situation in which men can easily rationalize their responsibility toward women who choose not to abort. Plausible? Read on.

As Daniel Callahan puts it, "If legal abortion has given women more choice, it has also given men more choice as well. They now have a potent new weapon in the old business of manipulating and abandoning women." Given that 80 percent of all abortions are sought by single women (according to the Alan Guttmacher Institute) the advent of reproductive rights has created a situation in which a man can coerce a woman to have an abortion by denying his responsibility towards her, or even abandoning her when she gets pregnant and "chooses" to carry the pregnancy to term.

According to feminist legal scholar Catharine MacKinnon, "Sexual liberation in this sense does not free women, it frees male sexual aggression. The availability of abortion thus removes the one remaining legitimized reason that women had for refusing sex besides the headache."

The anecdotal evidence for this interpretation is compelling.

Empirical studies have also demonstrated that male coercion and pressure play a sizable role in many women's abortion decisions. A survey from the Medical College of Ohio, for example, examined 150 women who "identified themselves as having poorly assimilated the abortion experience." Of the 81 women who responded, more than one-third felt they had been coerced into having an abortion. Fewer than one-third initially considered the abortion themselves.

In cases where women initially chose to bear the child, their male partners were opposed to the decision by a margin of eight to one. In all of these cases, the man withdrew his support for his partner "thereby eliminating that alternative."

Even in Carol Gilligan's famous study In a Different Voice, not all of the women's abortion decisions she recounts were independent. Male

coercion played an important role in about one-third of the cases cited. The men in the women's lives were unwilling to provide their partners with the moral and material support for pregnancy, childbirth, and child rearing. As one of Gilligan's respondents noted, ``He made me feel I had one choice to make and that it was to have an abortion and I could always have children another time, and he made me feel if I didn't it would drive us apart.``

In all these cases, the logic goes something like this: since the man was willing to pay for an abortion, and since the woman had a constitutional right to get one even if he wished to prevent it, by her failure to obtain an abortion she took sole responsibility for the child. Therefore, the reasoning concludes, the man should not be liable for any child support.

Permissive abortion policy has created a climate where men can enjoy sexual relations with little or no concern for their consequences. Abortion is often misrepresented as solely a women's issue; clearly, however, it is a men's issue as well as long as men are interested in protecting their sexual liberty.

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Women and Children First - a different kind of pro-life newsletter

<http://www.prolife.org/ultimate/wcfpromo.html>

Alaskan Students Reflect on Peer Attitudes About Sexual Assault Prevention, Tolerance and Respect

by John Lyle, School Counselor

MAR 24 1997

At Woodriver Elementary, as in many elementary schools across the country, we've developed a series of connected lessons for fifth and sixth grade students addressing the issues of personal safety, human growth development, physical sexual assault prevention and HIV AIDS. In 1989, the first year I started giving personal safety presentations, I asked four classes of sixth grade students to anonymously respond to a "Male Access Quiz" developed by Dr. E. Mahoney (McGraw Hill, 1984). I was curious how the 100 students perceived sexual assault *before* I started the lesson. Students read the following statement and marked "yes" or "no" after ten situations which, in their opinion, did or did not make the statement appropriate. The statement read:

**"It 's OK for a man to hold down a woman and physically force her
to have sex for the following reasons":**

- 1. He has spent a lot of money on her.**
- 2. He's so excited that he can't stop.**
- 3. He's drunk and can't control himself.**
- 4. She's had sexual relations with others.**
- 5. She's drunk or high on drugs.**
- 6. She lets him touch her above her waist.**
- 7. She gets him sexually excited.**
- 8. She was going to have sex with him and then decides not to.**
- 9. They have been dating for a long time.**
- 10. They are married.**

When I tabulated the results of the quiz in 1989, I was shocked and dismayed. Fifty percent of the students (52% of boys and 48% of girls) considered rape to be acceptable in certain circumstances, most typically if the man and woman were married or if they have dated a long time. One thing was obvious: many students had great misunderstandings about what is appropriate behavior, and what is dangerous and illegal behavior.

The following day I went back into the classes and shared results of the access quiz with the students, who didn't seem too surprised by the figures. I asked them to anonymously respond on paper to three questions: "Why did some students feel that sexual assault was acceptable? What might account for different response rates of boys and girls? What could be done to teach students that sexual assault is not an acceptable behavior?" Their answers were powerful. Student responses to these three questions gathered over several years include the following:

- "People see this on TV or in movies. It seems normal, the way people should act."**
- "It's not OK for women to be wild but it's almost expected that men are wild."**
- "People who drink or use drugs might not think they're responsible for their actions."**
- "Males are more controlling, they have more power. They are in charge."**
- "Males may be stronger and more aggressive, but it's still not OK to do this."**
- "Men aren't usually the ones getting raped, so they don't know what it's like."**
- "A lot of men probably don't really think about it."**
- "Some men think women are dolls to play with and do whatever they want with."**
- "They may see or hear about other men doing it so they think it's OK."**
- "I'm a male and I don't think it's OK for anyone to force another person to have sex for any reason, period."**
- "I have no idea why this is, but it's wrong."**

In discussing with parents and teachers the results of classroom presentations and the access quiz, it was apparent to us that we needed to become more effective in reaching students about this critical human issue. Many myths and misconceptions needed to be corrected. I contacted several local community agencies which work with prevention and intervention of physical and sexual assault, and asked them for facts and figures that specifically pertained to Alaska. I began collecting articles from the local paper which described real life incidents which could be used in class presentations. I made lists of common misconceptions about assault that could be used either as a true false quiz or a large-group oral discussion tool.

Since 1989, I've asked over 800 sixth grade students (100 students year) to respond to the "Male Access Quiz", and have charted the differences in responses each year. There have been some interesting trends that in turn pose interesting questions. In 1991 the number of sixth grade boys and girls who thought it was appropriate in certain situations for men to rape women dropped to 23% (27% of boys, 20% of girls), and continued to drop for the next three years to a low of 9% of boys and girls in 1994 (10% of boys, 8% of girls). A disturbing reversal occurred during the next two years, with overall percentages climbing back up to 20% in 1995 (28% of boys, 12% of girls), and dropping slightly to 17% in 1996 (27% of boys, 6% of girls). This backsliding and widening gender gap causes concern, and provides incentive to continue improving the quality and delivery of the information.

Over the years these connected lessons have generated respectful and insightful class discussions about different facts, myths, misconceptions and scenarios pertaining to physical sexual assault. I am careful that males are not labeled as uncaring, aggressive monsters. Both boys and girls have wanted and needed to discuss how to prevent potentially dangerous situations, how to be assertive (knowing what "no" means), and how to successfully refuse the tremendous peer and media pressures placed upon them.

Recently, the Alaska Department of Health and Social Service's Adolescent Health Advisory Committee released information concerning the influence of television programming and advertising on young people. The following are a few significant findings from several of the 1,000 studies that correlate excessive television viewing and unhealthy behavior:

- * **80% of MTV videos show sexual imagery and violence against women**
- * **Many children see 200,000 violent acts on television by age 18**
- * **US television contains more violence than anywhere else in the world**
- * **Media violence contributes up to 15% of real-life violence**
- * **More kids recognize Joe Camel than Mickey Mouse**
- * **Arcade and video games target kids with violent messages**
- * **Display of sex on prime-time television doubled from 1975-1988**
- * **94% of sexual activity on soap operas is between unmarried people**
- * **Women are frequently depicted in the media as weak, submissive and as victims**
- * **100% of made-for-television movies in 1986 showed drinking**
- * **97% of the 10,000 television food commercials kids will see are for unhealthy foods**
- * **360,000 commercials will be seen by the average child by age 18**

In our society, many decisions that adults make on behalf of children are not, in fact, made in the best interests of children. Powerful economic factors influence media programming and advertising content. Given that the main role of media is to deliver consumers to the corporations that pay for the programming to sell their products, most people agree that much of what children see in the media is questionable. Clearly, one of our main tasks as parents and teachers is to help children learn to make good decisions. To do this they need factual information from us, as well as encouragement, trust, and our ability to listen. Good adult examples are also extremely important.

Commenting on the rise in numbers of students who condoned sexual assault in the 1995-96 samples, one educator stressed that an important question that parents and educators should be continually asking is, "What specific examples can adults provide to children that would translate into healthier attitudes of sexual respect, and increasingly lower percentages of students who thought that physical sexual assault was justified?" Each day in our own lives we have opportunities to question behavior that crosses the line of acceptability. The behavior can manifest itself in casual conversations, consumer products on store shelves, or messages that permeate the media. As with many things, to be silent in the face of abusive or disrespectful behavior may implicitly condone it.

The results of the Male Access Quiz provides to us a window onto beliefs and perceptions of young people. Opening up classroom discussions to include real issues increases awareness of social problems that all students will confront at some time in their lives. The interconnected issues of safety and respect need to be taught starting in kindergarten and continuing throughout high school. Truthfully, we never outgrow the need for reinforcement of these critical lessons.

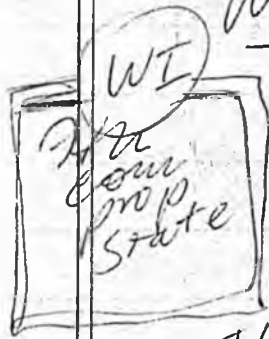
We hope increasing numbers of children will be successful in differentiating between *appropriate* tolerance (ie: gender differences, cultural diversity, learning styles, disabilities) and behavior that should *not* be tolerated, such as physical and sexual assault. Obviously our goal is eventually to have 100% of male and female students asserting that sexual assault is unacceptable for any reason, by any person. We'll surely celebrate that day; however in the meantime we'll celebrate the process, and continue to ask the questions.

by John Lyle

Box 83715 Fairbanks, Alaska 99708
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HB 199

Wellman



Opt out of comm prop if don't then default rule

community prop benefit
JB - schemes to entice wealthy

Only uniform - UMPA
unpopular uniform act

Comm prop states

it ten - rt survivorship
could not - forgo to comm prop

"Comm prop - full step up in basis
joint ten." rt of survivorship
retained

- explain how it has worked etc where
- What guarantees
- Analogies that don't work
- Confusion this generates
- Not uniform
- Not proved model
- tax gimmick

Mortgage deduction - fed rates climbed comm prop, didn't have this prob, bec 50% to other

pre 48

Feds then enacted marital deduction
Feds will

'82 → Unlimited marital deduction —
used to be 1/2 ^{estate} < now 100% deducted
get ~~income~~ ^{estate & gift} tax when 2d dies

marital deduction -

intention of step up in basis
both have unlimited marital ded.

→ Not how it works in reality
All came from CA probate sys
100% subject to probate
even though 1/2 belong to spouse
Whole community liable for
decedent's death

Call it "community" & still
joint tenancy
CL states have diff history
only assets of 1 spouse subject
to probate

⚡ Tax basis step up
trying to bring into CL State

[HB 199]

AK Sep prop juris
continental code - Spanish
based CA TX LA
9 states - WA ID WI
1930 Seamans Filed tax return
1 million - filed on 50K hub
Wife 50K - Sep filing 35% bracket
IRS says, yes, that prop auto
vests to spouse
We will allow to file married
filing sep.

Affected estate & gift tax
no advantage until 1982
Est & Co. Est situation -
stepped up basis for income
tax

[EX] Homestead pt. \$0
profit on sale - cap. gains
income tax

Death convey to kids \$1 million
value get through estate
@ 1 million get stepped up
their basis \$1 million - no tax

Hub & wife in AK Family
business \$1.2 million originally
intended 200K

If dad dies mom gets
stepped up on his 1/2

Unlimited marital deduction
Comm p Mom gets stepped up on whole thing

Albertson Foods - lived in Idaho
2 billion gain - Ms. Albertson
she gets stepped up basis

→ step up only based on sale

When WI adopted Comm Prop law 1985 took Uniform Marital Prop. imposed retro - allowed people to opt out.

— We propose to reverse - option to opt into

IRC law of any State allow for or stand - Uniform act used as basis - May do it for all or part of their prop.

█ Residents of other states, may bring AK comm prop trust.
Fed.

CA
[trust is owner of property
limited liability company,
asset will be real property.

HB101

Terri Banister

Jumped off from Uniform Act
→ create opt in program



→ Case litigated tax ct decision

~~Blattmach~~ =

Mary Ellen Beardsley

269-5100



FACSIMILE TRANSMISSION COVER SHEET

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DATE: 4-22-97 TIME: _____

TO: Lisa Kirsch FAX: (907) 465-4316

House Judiciary

FROM: MARY ELLEN BEARDSLEY

ASSISTANT ATTORNEY GENERAL

NUMBER OF PAGES INCLUDING THIS SHEET: 8

MESSAGE: Documents from Jonathan Blattmachr re HB 199

Jamie Reep or _____

Mary Ellen Beardsley _____

Not uniform law _____

Violates Medical Prof Act _____

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January 29, 1997

Via Fax and Federal Express

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Dear Rich, Bob and Dick:

I know each of you deals regularly with community property because so many Alaskans migrate from community property states (e.g., Washington, Idaho and California).

Regardless of whether one views a community property regime as more or less rational, fair or consistent than other rules dealing with property belonging to one or both spouses (e.g., elective share rights at death and equitable distribution interests at divorce), I think all agree that community property has one major advantage over other forms of ownership by the spouses: The income tax free change in basis to estate tax value for both halves of the community property in most cases (IRC §§1014 (a), 1014(b)(6)).

Richard Hompesch, Esq.
Robert Manley, Esq.
Richard Thwaites, Esq.

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January 29, 1997

As you may be aware, lawyers in some non-community property states have tried to devise ways to get the "double" step-up in basis at the death of the first spouse to die. I do not think any I have seen work or are acceptable to most of my married clients, including those in extremely stable, long-term marriages. Based on discussion with them, I think a community property regime would be quite acceptable to them.

It may well be that spouses in a non-community property state could enter an agreement in which they classify their property as community property under the law of another state (e.g., under California law) even if neither spouse has ever been there), which would be respected under IRC §1014. I think this result is even more likely in those states (like Alaska) which have adopted the Uniform Disposition of Community Property at Death Act.

In any event, the enclosed Act, which I have entitled the "Alaska Community Property Act", would permit married Alaskan domiciliaries to enter into a signed, written agreement to classify all or any part of their assets (or assets of either of them) as community property. It would permit any spouses (whether neither, one or both are domiciled in Alaska) to transfer assets to a signed, written trust agreement (a "community property trust") and have all or any part of those assets constitute community property under the Act. I wish to emphasize that there will be no community property after the Act which was not community property before the Act except to the extent expressly provided in a signed and written community property agreement or community property trust.

I derived this draft from the Uniform Marital Property Act which is being sent to you by Federal Express. Wisconsin adopted the Act and the IRS has held that what is called "marital property" under Wisconsin law is community property under IRC §1014(b)(6). (I have used the term "community property" rather than "marital property" in the draft to emphasize that it is community property.) However, the big changes are that under the Alaska Act the couple elects into community property and may do so by trust as well as a more traditional property agreement. In the Wisconsin Act, the couple elect "out" of community property. I do not believe I can overstate the potential significance of this concept. I request that you immediately review it and give me your comments. I very much hope we can get it enacted into law this year.

Richard Hompesch, Esq.
Robert Manley, Esq.
Richard Thwaites, Esq.

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January 29, 1997

A summary of the Act also is enclosed.

Sincerely yours,

Jonathan
Jonathan G. Blattmachr

JGB:tt

Enc.

cc: Mr. Douglas J. Blattmachr