Community Property
Here, there & everywhere

Summary

Practitioners who live in those nine – mostly western – states that adhere to the community property regime are familiar with the principle of what's mine is ours and understand the attendant tax consequences but are then baffled by the intricacies of tax treatment in separate property jurisdictions. This course will examine the history of community property, its application, and its benefits and detriments. And then the class will go one step further with a survey of international community property laws and their impact on US tax filing obligations.

The information contained herein is for educational use only and should not be construed as tax, financial, or legal advice. Each individual's situation is unique and may require specialized treatment. It is, therefore, imperative that you consult with tax and legal professionals prior to implementation of any strategies discussed.

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For additional information and clarifying examples, refer to the accompanying PowerPoint slides available on the Publications page of the author's website.

I. Community Property Defined

"Marriage is a partnership in which the spouses devote their particular talents, energies and resources to their mutual benefit."[1]

The concept of community property is based on the premise that spouses have formed a union in which all property and responsibilities will be shared equally. Modern-day Americans may hold this to be true. But common law – still prevalent throughout the United States – is based on the traditional notion that the husband is primarily responsible for the family's welfare and that the wife bears only secondary responsibility. Nevertheless, nine states have statutorily created a doctrine of Community Property which recognizes the joint-sharing arrangement many of us take for granted.

In community property jurisdictions, most property acquired during the marriage is deemed to be owned equally by each spouse. As a result, obligations arising from such ownership become the responsibility of each spouse who may be sued jointly or individually for failure to satisfy their obligations. Community property rules generally hold that income earned or received by either spouse during the marriage is also deemed to be allocable to each spouse equally.

In short, the old adage[2] of "what's yours is mine and what's mine is yours" applies. More correctly, it is all *ours*.

Common versus Civil Law

Community property is an outgrowth of civil law which is a codified body of regulations in constant flux as existing rules are constantly updated and new legislation is continuously enacted. In contrast, common law is generally uncodified and without a comprehensive compilation of legal statutes. Instead, common law is based upon published judicial opinions and often relies upon the principle of precedent, defined as "a court decision that is considered as authority for deciding subsequent cases involving identical or similar facts, or similar legal issues."[3]

No system is entirely exclusive. In jurisdictions governed under civil law, judicial opinions inevitably clarify and even modify statutes in dispute. Conversely, common law jurisdictions often codify rules initially established under case law. The roles of the judiciary vary under each system. In civil law jurisdictions, judges often act as investigators of fact, relegating trial attorneys to the lesser role of advising their clients on relevant points of law. Attorneys in common law jurisdictions, by contrast, are actively involved in the presentation of a case that is merely refereed by the presiding judge "who has somewhat greater flexibility than in a civil law system to fashion an appropriate remedy at the conclusion of the case."[4]

[1] Stimmel, Stimmel & Roeser, *Community Property – The Basics* [available at https://www.stimmel-law.com/en/articles/community-property-basics, last accessed June 11, 2021].

[2] The original quote held that "what's yours is mine and what's mine is my own" [*Ulysses*, published by Irish novelist James Joyce in 1922].

[3] Cornell Law School, *Legal Information Institute* [available at https://www.law.cornell.edu/wex/precedent, last accessed June 23, 2021].

[4] Washington University in St. Louis School of Law, *What is the Difference Between Common Law and Civil Law?* [available at https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/, last accessed June 23, 2021].

Common law traces its roots to the English monarchy which governed by proclamation. Courts of Equity were established to adjudicate complaints based on the observation of and the values intrinsic to human nature. As court decisions are amassed and published, they are used to guide future decisions, thereby ensuring that similar facts will yield similar and predictable outcomes.[5]

Civil law, on the other hand, originated with the code of laws compiled by the Byzantine Emperor Justinian I around 600 BCE.[6] Over time, tribes, countries, and local jurisdictions have adopted and adapted these laws to form independent bodies of law.

Today, roughly 150 countries rely primarily on civil law while 80 countries apply common law.

A. The States

Listed in alphabetical order, the nine states which have adopted community property are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Additionally, residents of Alaska,[7] South Dakota and Tennessee may opt-in to community property if both spouses agree.[8] **NOTE:** The US territories of Guam and Puerto Rico are also community property jurisdictions.

Although the nine listed states apply the principles of the community property, not all do so in exactly the same manner. For example, income earned by one spouse during the period of separation but prior to divorce may be deemed to be separate income (e.g., California) or continue to be classified as community income (e.g., Arizona). Therefore, each couple's situation must be evaluated based on the state of domicile when the property or income is acquired. However, once characterized under governing state law, property retains its character even if the property or its owners later move out of state[9] [see Appendix A].

[5] This doctrine of precedence is also known as stare decisis, which means "to stand in the-things-that-have-been-decided" (as translated from Latin).

[6] The Codex Justinianus was drafted by jurists charged with a review of all known and previously issued ordinances. Contradictory and obsolete regulations were eliminated while the remainder were adapted and codified into the 10-book Codex Constituitonum which was later supplemented with the Digesta (50 books of selected writings on critical legal points), Institutiones (a legal textbook designed for first-year law students), and Novellae Constitutiones Post Codicem (new ordinances issued by the emperor).

[7] A similar opt-in statute in Oklahoma is *not* recognized for federal tax reporting purposes [*Commissioner v. Harmon*, 323 U.S. 44 (1944)].

[8] IRS Publication 555 (Revised March 2020) explicitly states that it does not "address the federal tax treatment of income or property subject to the community property election under Alaska, Tennessee, and South Dakota state laws" [available at https://www.irs.gov/publications/p555#en_US_201901_publink100026043, last accessed June 11, 2021].

[9] *In re Marriage of Moore & Ferrie*, 14 Cal. App. 4th 1472 (Cal. App. 1st Dist. 1993).

Change of domicile does not affect <u>existing</u> community property interests.

Property *thereafter* acquired will, of course, once again be subject to governing state law based on the couple's domicile at the time of acquisition. Therefore, if a non-resident couple purchases property in a common law state with community property funds, the acquired property will retain its nature as community property.[10] If, on the other hand, the couple has left a community property state and moved into a common law state, new acquisitions – regardless of the source of funds – will no longer be characterized as community property. **NOTE:** Debts, including estate and inheritance taxes, that arise from community property may be collected from a surviving spouse that now resides in a common law state.[11]

<u>Domicile</u>

Since community property principles apply only to those couples who are deemed to domiciled in an applicable state, it becomes necessary to determine if one or the other or both spouses are domiciled in the state. Indeed, some states recognize that husband and wife may even have separate domiciles.

For example, "both spouses must be domiciled in Wisconsin before the marital property law applies to them."[12] Wisconsin clarifies that a person is not domiciled within its borders if (a) merely passing through enroute to another state or country, or (b) is in state for a brief vacation or to complete a transaction which requires the individual to be present for a short period of time. On the other hand, once established, domicile can only be forfeited if an individual satisfies all three of the following criteria:

- The person intends to abandon his Wisconsin domicile and takes actions consistent with such intent,
- The person intends to establish a new domicile elsewhere and takes actions consistent with such intent, and
- The person is physically present in his new domicile.

NOTE: It is often harder to forfeit or abandon domicile than it is to obtain it. In general, states which assess tax based on domicile attempt to tenaciously hang on to their taxpayers, even after they have moved out of state.

Residency is determined by where you *are*, requiring a physical presence within the state (typically for at least 183 days). Domicile, by contrast, is where you *want* to be and, thus, determined based on the rather subjective measure of personal intent. Domicile is the permanent home (state) to which the inhabitants intend to return.

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10 *Tomaier v. Tomaier*, 23 Cal. 2d 754 (Cal. 1944).

11 In California, for example, the community estate can be held liable for any debt incurred by either spouse prior to or during the course of the marriage, regardless of whether one or both spouses benefit from the debt [Ca Fam §910(a)].

12 Wisconsin Department of Revenue Publication 109 (12/20).

To determine if a taxpayer is in fact domiciled within its state, a tax authority may evaluate many factors, including but not limited to the individual's mailing and billing addresses, voter and driver registrations, home ownership, ties to the community, banking contacts, and the amount of time spent within the state.[13]

A taxpayer may have more than one place of residence, but only one place of domicile.

Military Personnel

Domicile becomes a critical issue for members of the military who commonly serve in locations outside of their home state and are often transferred to yet other locations. Domicile, therefore, is the place the service member thinks of as "home" and to which he intends to return after leaving the military; whereas the service member's residence is the place – often temporary – where the service member lives while serving in the military. **REMINDER:** Domicile (rather than residency) determines whether community property rules apply to a service member and his spouse, as well as the couple's tax filing obligations.

In general, active-duty military pay earned while domiciled in a community property state is community income, reportable to the state in which the service member is stationed. Each spouse is deemed to have earned one-half of the pay.[14]

However, the Servicemembers Civil Relief Act of 1940 (SCRA) allows a military member to retain his domicile even though military orders have resulted in a change of residence, as long as the service member does not take any action, such as changing his vehicle registration or claiming the homestead exemption, to give the impression of a change of domicile.[15]

Spouses were granted similar relief under the Military Spouses Residency Relief Act of 2009 (MSRRA) which allows a military spouse to keep the original state of domicile as long as it is the same state of domicile as the service member and the couple is living together as the direct result of military orders. For example, a military spouse who earned income in State A but was domiciled in State B with the service member, would be required to file a tax return only in State B. In 2018, the Veterans Benefits and Transition Act of 2018 (VBTA) further allowed that a non-military

[13] Based on a survey of government websites, the software company Patriot has compiled a list of states that assess tax based on residency rather than domicile including Georgia, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Mississippi, New Hampshire, South Carolina, Virginia, and West Virginia. 31 states use domicile as the basis to impose tax. Seven states do not assess any income tax [available at https://www.investopedia.com/tax-residency-rules-by-state-5114689, last accessed June 11, 2021].

[14] State community property laws also apply to military retirement pay. Retirement benefits will be deemed to be either separate or community property based on the marital status and domicile of the couple while the military member was on active duty. Retirement pay for services performed while domiciled in a community property will retain its character as community property income regardless of the retired member's domicile upon receipt of plan benefits.

[15] § 571(a)(1).

spouse could choose to use the service member's domiciliary state regardless of whether that spouse had ever resided there or not.[16]

EXAMPLE 1: A non-military spouse's income earned in California is not deemed to be California -source income if the spouse is in California to be with the service member and both have the same domicile in a state other than California. Of course, a California return must nevertheless be filed since the service member's pay must be reported; however, the service member will file a non-resident return with his spouse and declare his military pay as non-California source income taxable to the state of domicile.[17]

EXAMPLE 2: Service member Bob is domiciled in South Carolina (SC), stationed in Maryland (MD) and lives in Virginia (VA). Bob must file with SC (his state of domicile) to report his military pay; no filings are required with MD or VA. **NOTE:** State filing requirements vary. For instance, if Bob had been stationed in CA [as in EXAMPLE 1], he would have had a non-resident filing requirement but (still) no tax liability in CA.

EXAMPLE 3: Service member Bob also has a part-time job in VA. Since the SCRA only allocates military pay to the state of domicile, Bob will be taxed on his VA-sourced civilian income in VA and may – depending on state law – receive an Other State Credit from SC for taxes paid to VA on the civilian income that must also be reported to the state of domicile.

EXAMPLE 4: Bob's wife also has a job in VA. She would be required to file in VA unless she is eligible under the MSRRA to claim her husband's SC domicile as her own.

B. Separate Property

What is not community property, is separate property including:

- Property owned by one or the other spouse before entering into the marriage,
- Property acquired during the marriage by gift or inheritance,
- Property purchased with separate funds or exchanged for separate property during the marriage, or
- Property converted from community property as per a valid agreement under state law.

Generally, income earned from separate property retains its character as separate income even during marriage, except in Idaho, Louisiana, Texas, and Wisconsin.

<u>When Federal Law Trumps State Law</u>

Federal tax law generally recognizes the application of community property as accepted under state law. However, certain assets – including individuals retirement accounts (IRAs) and

[16] The VBTA allows this election to be made regardless of when the marriage occurred as long as (1) the service member is stationed outside of his resident state, (2) the spouse has joined the service member in that state solely to be able to live together, and (3) both spouses share the same resident state. If these conditions are satisfied, the spouse's income will be taxed only in the state of service member's domicile.

[17] **NOTE:** Although taxpayers must generally use the same filing status for federal and state returns, active-duty military may file separately in California even if filing a joint federal return [FTB Publication 1031 (2020)].

Coverdell education savings accounts[18] – are deemed to be separate property under federal law even when owned by taxpayers residing in a community property state.[19] Therefore, distributions from such accounts are taxed to the spouse named on the account.[20]

While community property rules, instituted at the time of statehood, dictate federal tax treatment, more recent adoption of legislation designed to give state residents an *option* to form a community property trust (CPT), have – as yet – not been accepted by the IRS. A CPT that satisfies local statutes can be used to hold separate spousal assets which, when contributed to the trust, are then treated as community property. Alaska legislated the creation of such trusts in 1998, Tennessee and South Dakota followed suit more recently in 2016.[21]

<u>Transmutation</u>

Separate property may under certain circumstances be converted into community property (and vice versa). The character of marital property can be changed by spousal agreement, re-titling of property, or commingling separate assets with community assets.

Transmutations may occur voluntarily – as when one spouse adds the other's name to the deed on a home acquired prior to the marriage – or involuntarily. Such involuntary recharacterizations often occur due to lack of knowledge of applicable law, carelessness, or improper professional advice. For example, one spouse may receive an inheritance that would normally be characterized as separate property and deposits those proceeds into a jointly titled account. In another instance, a contractor who (while married) devoted his time to the improvement of his separately held home, may have inadvertently forfeited a portion of his interest to his spouse. In that same vein, it could be argued that a professional investment advisor who spent time during the marriage to manage his separate stock portfolio, used marital assets (his expertise) to benefit his spouse who could now claim title to at least a portion of the newly converted community property. **NOTE:** Recharacterization rules may differ from state to state.

<u>Prenuptial Agreement</u>

A "prenup" can be used to override applicable community property rules and establish how marital property will be divided in the event of divorce. The agreement between prospective spouses must be made voluntarily and without duress and each party must have the opportunity to consult independent legal counsel. Post-nuptial agreements are made after the start (but before the end) of a marriage and can be used to accomplish many of the same objectives as a prenup.

[18] IRC § 408(g) and § 530(f).

[19] This also includes federal life insurance programs and US savings bonds. The case of *Wissner v Wissner*, 338 U.S. 655 (1950) reaffirmed the supremacy of federal law enacted under expressly delegated constitutional powers over state law.

[20] Earned income for the purposes of computing the Earned Income Credit (EIC) must also be calculated without regard to community property laws [IRC § 32(c)(2)(B)(i)].

[21] Alaska Stat. § 34.77.100; Tennessee Code Ann. Ch. 35 – 17; South Dakota C.L. Ch. 55 – 17.

Pre- and post-nuptial agreements are often bitterly contested upon the dissolution of marriage. Presuming, however, that state-mandated disclosures were made, and procedures followed at the time that the parties entered into the agreement, enforceable provisions of the agreement will be upheld in court. For instance, in California, an agreed-upon community property waiver was found to be separable from child and spousal support provisions also enumerated in the agreement. While the support provisions were deemed to be invalid, the court found that the property waiver could be independently upheld.[22]

Prenups are often used when spouses come into a marriage with different amounts of assets, business interests, earning capabilities, or debts. The agreements can be used to protect wealth from a perceived gold-digger or shield an innocent spouse from the liabilities of a scoundrel partner. And in community property states, these contracts can be used to define community versus separate property as well as income. Such characterizations then determine spousal filing obligations and amounts of income and deductions that must be reported on separate returns.

<u>Commingling</u>

Once separate assets are mixed with community assets, they lose their identity as separate assets and can no longer be traced or separated. Should a spouse wish to resegregate a commingled asset, the burden will fall upon that individual to clearly identify such property with sufficient records to satisfy a finder of fact. If unable to adequately trace the source of property, commingled propertied will be presumed to be community property. **TIP:** A separate property trust may be funded with separate assets and used to ensure the preservation of character.

C. Quasi-community Property

Defined as property acquired in a non-community property state by one or both spouses, quasi-community property would have been classified as community property in a state that adheres to the doctrine of community property. If the couple later moves to a community property state and one spouse leaves the marital union by death or divorce, the quasi-community asset will be treated like community property when determining spousal interests.

Quasi-community property may be treated differently from state to state and for the purposes of divorce and separation rather than death. California, for example, distinguishes between real estate assets located out-of-state versus real property held within the state. Community property treatment is granted to non-California property in divorce proceedings but not at death.[23]

Community property is property acquired by a married couple while living in California; quasi-community property is property acquired by a married couple while residing outside California.

Since quasi-community property appears, for the most part, to be treated as community property, this separate characterization hardly seems necessary. The distinction was created because marital liabilities were once treated differently than marital assets. Although community property

[22] *In re Marriage of Facter* (2013) 212 Cal. App. 4th.

[23] California Family Code § 125.

and quasi-community property assets acquired during marriage are shared equally by the spouses, liabilities associated with quasi-community property may be treated as separate property when establishing liability for those debts.[24]

NOTE: Quasi-community property is relevant for state purposes but not recognized for federal tax purposes.

D. Other Forms of Holding Title

Title to property verifies legal ownership and confers rights and obligations upon the title holder. Title can be claimed in a variety of ways, including but not limited to:

- Single (Unmarried) Man or Woman
- Single (Married) Man or Woman as Separate Property
- Domestic Partner as Separate Property
- Community Property
- Community Property with Right of Survivorship
- Joint Tenancy
- Joint Tenancy with Right of Survivorship
- Tenancy in Common
- Entity (e.g., corporation, partnership, limited liability company, trust, or estate)

Each form of title offers different benefits (i.e., entitlement to income and profits, probate avoidance, transfers at death, etc.) accompanied by different legal obligations. **TIP:** To ensure clear understanding under applicable state law, an attorney should be consulted before taking title to property.

But title is not character. Title to an asset refers to the registered account holder's or owner's name. In the case of real estate, it is verified by a deed. The character of an asset, by contrast, defines whether the asset belongs to one or the other spouse or the marital couple as a whole. The character is determined based on controlling statutes. In community property states, the presumption is that property acquired during marriage is, by default, community property (barring evidence to the contrary).

Title does not determine the character of property.

DISCLOSURE: Since title does not affect the community or separate characterization of property and because this author does not offer legal advice, further exploration of title is deemed to be outside the scope of this text.

[24] In 1998, California modified its rules to ensure that spouses have equal rights and responsibilities for both assets and financial obligations acquired during marriage [Hanson, Gorian, Bradford & Hanich, *Understanding Quasi-community Property*, September 30, 2019; available at https://www.hgblawyers.com/blog/2019/september/understanding-quasi-community-property/, last accessed June 12, 2021].

II. The Origin of Community Property

The American community property system is based on Spanish law adopted in those states that were a part of or greatly influenced by the Spanish Territory prior to its collapse in the early 19th century.[25]

The concept of community property was originally introduced as a part of the Visigothic Code developed during the fifth century by a tribe of Indo-Europeans who settled in Spain after the fall of the Roman Empire. The Code declared that "when persons of equal rank marry one another, [t]hey shall share in common the gains and losses" and also recognized – contrary to prevailing thought embodied in other legal systems – that "the wife [a]dministered her own property."[26]

Extraordinary as the principles of shared property and wifely separate property were, the concepts eventually arrived in the New World. Spain established the province of California in 1770. As the state emerged into its own, it adopted the community property system[27] with the ratification of its Constitution in 1849. As one convention delegate argued, common law provisions for marital property were introduced in an era when women held far inferior positions. It was time to recognize that a wife was entitled to legal protection of property. And so that rights of married women became constitutionally – not just statutorily – protected!

Interestingly, California chose to adopt common law rather than civil law in all other areas of law except community property. Newcombe argues that this decision was made, in part, to protect the wives of speculators who headed oft-recklessly for California during the mid-century Gold Rush and even to entice women – particularly women of fortune – to head to the western frontier. The community property rule also better reflected the realities of pioneer life in which a wife labored alongside her husband to provide for the family's welfare.

California's community property laws soon became the model adopted by other states. In fact, the states of Arizona, Idaho, Nevada, New Mexico, and Washington have expressly stated that the source of their laws are based upon, patterned after, or copied from California statutes. Indeed, Idaho and Washington had never been governed by French or Spanish law and would have had no historical connection to community property but for the express adoption of the regime enacted in a neighboring state. Wisconsin only adopted community property with the enactment of its Uniform Marital Property Act in in 1986.[28]

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[25] The territory in its heyday included areas that later became the states of Arizona, California, Colorado, Nevada, New Mexico, Texas, and Utah.

[26] Excerpts of the Visigothic Code as cited by Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It and Why Community Property Principles Benefit Women*, University of Maryland Law Journal of Race, Religion, Gender and Class, Vol. 11, Issue 1 (2011) [available at https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1189&context=rrgc, last accessed June 27, 2021].

[27] The Treaty of Guadalupe Hidalgo ending the Mexican-American War (1846 – 1848) ensured, in part, that the community property rights of former Mexican subjects who chose to remain in the US would remain inviolate.

[28] Wisconsin Stat. Ann. §§ 766.01 – 97.

III. Tax Treatment of Community Property

Married taxpayers have the choice to file an income tax return jointly (MFJ) with or separately (MFS) from a spouse.[29] With rare exceptions, most states require that the filing status used on the state return must match that of the federal return.

A. MFJ versus MFS

Married couples often enjoy legal rights and protections not otherwise available to their unmarried counterparts, including but not limited to access to healthcare coverage and information, enhanced Social Security benefits, even public acceptance. Historically the federal tax code has promoted marriage by offering significant benefits to married taxpayers, such as the unlimited marital deduction for gifts and bequests between spouses and the portability of the decedent's unused lifetime exemption (DSUE).[30] Unfortunately, however, few benefits of any exist in the income tax arena where it is often more favorable to file as a single taxpayer than as a married one. As a result, some taxpayers choose not to marry.

<u>Marriage Penalty</u>

Until 1948, federal income tax was assessed on an individual basis, regardless of marital status. As a result, each taxpayer was required to file his own return and was assessed tax at the "Single" rate. Taxpayers domiciled in community property states could, as per state law, split community income evenly, report the resulting half on two *separate* returns, thereby remaining in lower marginal tax brackets.[31] Taxpayers in non-community property states did not have the option to split income, which typically resulted in a higher tax assessment.

In an attempt to rectify the inequity of taxes paid by couples who chose income-splitting in community and non-community property states, the Revenue Act of 1948,[32] allowed married couples to file joint returns and report joint income. The resulting tax was, therefore, simply double the amount that these couples would have paid had they continued to file individually. Unfortunately, single taxpayers were now at a disadvantage since they would be assessed tax at a considerably higher rate than a married couple with the same income.

The Tax Reform Act of 1969[33] created a new rate schedule for single filers and mandated that married couples could no longer elect to file as single, although they now had the option to use

[29] Married individuals may *not* file as "Single" and may only use the Head of Household (HOH) filing status if considered "unmarried" because the spouse did not live in the home for the last six months of the tax year and the taxpayer's home was the main home of the taxpayer's child for more than half the year [IRC § 7703(b)]. Under certain circumstances, a surviving spouse may use the Qualifying Widow(er) filing status [IRC § 2(a)].

[30] IRC §§ 2056(a) and 2010(c)(4).

[31] *Poe v. Seaborn*, US 101 (1930).

[32] Public Law No. 481 (enacted despite President Truman's veto).

[33] Public Law No. 91-172 (enacted under President Nixon).

the MFS filing status if they choose not to file jointly. While the code change eliminated the disparity between married and unmarried individuals, it created a new problem: The marriage penalty denied married couples the option to take advantage of the lower combined rates available to unmarried couples.

Tax laws once favored married taxpayers in community property states who could split income; then favored married taxpayers in all jurisdictions to the detriment of single taxpayers; and now favors single taxpayers with lower tax brackets.[34]

The chart below provides a side-by-side comparison of the impact of these law changes on different classes of taxpayers.[35]

	1947	1948	1969
General Rule	ALL taxpayers must file as single	Married taxpayers *may* choose to file as 2 singles or 1 couple with split income	Married taxpayers *must* file jointly or use MFS
Facts + Assumption #1	H: $100K inc. (taxed at 89%) W: $30K (taxed at 62%) ➔ Aggregate Tax = $107,600 in a non-community ppty state	H: $100K inc. (taxed at 89%) W: $30K (taxed at 62%) ➔ Aggregate Tax = $107,600 if filing single	H & W: $130K (taxed at 64%) ➔ Aggregate Tax = $83,200 if filing MFJ
Facts + Assumption #2	H: $65K inc. (taxed at 78%) W: $65K (taxed at 78%) ➔ Aggregate Tax = $101,400 in a community ppty state	H: $65K inc. (taxed at 78%) W: $65K (taxed at 78%) ➔ Aggregate Tax = $101,400 if splitting income btw spouses	H: $100K inc. (taxed at 70%) W: $30K (taxed at 53%) ➔ Aggregate Tax = $85,900 if filing MFS
Favored Taxpayers	Couples in community ppty states over non-community	Married over single taxpayers	Couples filing jointly rather than separately

Pros and Cons of MFS

To encourage the filing of joint returns, couples filing separately are denied numerous benefits, including the ability to exclude US savings bond interest, claim various credits, and enjoy higher threshold limitations on certain deductions.

[34] "In reviewing the evolution of the tax rates in section 1 of the Code, it appears that the pendulum at different times has swung to favor both married and single taxpayers, without ever quite reaching equilibrium." *Mapes v. United States*, 576 F.2d 896, 899 (Fed. Cir. 1978).

[35] While graduated rates were in effect in each of the applicable years, this chart will assume that a flat tax was charged at the maximum marginal bracket for illustration purposes.

On the other hand, the MFS filing status may prove favorable if:

- The spouses have disproportionate amounts of income or deductions,
- The spouses – while married – live apart and can qualify for the more favorable Head of Household filing status,
- One spouse does not want to accept full liability for taxes reported on a joint return,
- One spouse owes back taxes, child support payments, or unpaid student loans,[36] or
- The spouses have signed a separate property agreement.

For state tax purposes, the MFS filing status may allow each spouse to remain below the threshold for an applicable surtax or file as a non-resident if one of the spouses does not have state-source income.

B. Community Income

The IRS lists the following items of income earned by spouses and domestic partners in community property states as belonging to the community:[37]

1. Earned and self-employment income.

   NOTE: While one-half of self-employment income earned by one spouse must be allocated to the other spouse in a community property state for income tax reporting purposes, *all* of the self-employment income is allocated to the income-earner for purposes of the self-employment tax.[38]

   EXAMPLE: H and W live in a community property state. Only W is self-employed and has a net self-employment income of $50K (after deducting allowable business expenses). If H and W choose to file separately, each must include $25K of self-employment income on independently filed Schedules C, but only W must prepare Schedule SE and submit SE Tax based on earnings of $50K.[39]

2. Unemployment compensation

   As part of the government's effort to offer COVID-19 pandemic relief, the recently enacted American Rescue Plan Act[40] grants an income exclusion to certain eligible taxpayers who

[36] If the taxpayers are domiciled in a community property state, the IRS may nevertheless pursue the non-delinquent spouse for such debts.

[37] IRS Publication 555, Community Property (March 2020).

[38] IRC § 1402(a)(5).

[39] As per IRS instructions for Schedule SE: If filing separately, the earning spouse must include on Schedule SE, Line 3, the net profit or (loss) reported on the other spouse's Schedule C and note on dotted line to the left, "Community income taxed to spouse." The non-earning spouse, on the other hand, must enter "Exempt community income" on Schedule 2 (Form 1040), Line 4. **NOTE:** The non-earning spouse does not file Schedule SE (unless he has self-employment earnings from another business activity).

[40] P.L 117-2 (March 11, 2021).

have received unemployment compensation in 2020.[41] Unfortunately, legislative language did not clarify what was meant by "received" and whether spouses in community property states were deemed to have *each* received a portion of one spouse's unemployment compensation and would, therefore, each be entitled to the income exclusion. The IRS has since confirmed that spouses in community property states *must* split unemployment compensation received and may, as a result, exclude up to $20,400 in the aggregate, whether filing jointly or separately.

EXAMPLE: Married spouses in community property state file separate returns for 2020. Wife received $30K of unemployment compensation, of which one-half ($15K) must be allocated to the husband. Each spouse must include $15K on the separate returns filed. If the modified adjusted gross income (MAGI) on each return is less than $150,000, each spouse may exclude up to $10,200 of the allocated unemployment compensation (not to exceed the total unemployment compensation reported on Schedule 1, Line 7 of the return).[42] **NOTE:** If filing jointly, this couple could exclude up to $20,400 but only if the MAGI reported on the return is less than the threshold amount. If joint income exceeds $150K, the spouses may consider filing separately to ensure that MAGI on each MFS return remains below the mandated threshold.

3. Investment and rental income if derived from assets held as community property.

4. Tax exempt income retains its exempt status for both spouses.

5. Gains and losses (including casualties) if the underlying capital assets are held as community property.
6. Partnership income if the income from the partnership is attributable to the efforts of either spouse during the marriage or the partnership is held as community property.

7. Pension and annuity income[43] attribution depends on the marital status and domicile of the distributee at the time services were performed. If the distribution is comprised of both community and non-community income, it must be allocated and reported to reflect the characterization accrued during the pay-in phase.

   EXAMPLE: Henry retired after 30 years. He and Jane were domiciled in a community property state during the most recent 15 years. As a result, one-half of each payment received must be characterized as community income.

[41] IRC § 85(c) allows a taxpayer with modified gross income of $150K to exclude from taxable income up to $10,200 of unemployment compensation received in 2020.

[42] IRS Frequently Asked Question # 4 [available at https://www.irs.gov/newsroom/2020-unemployment-compensation-exclusion-faqs-topic-a-eligibility, last accessed June 25, 2021].

[43] **REMINDER:** Payments received from Traditional, ROTH, SEP and SIMPLE IRAs are deemed to be separate property and wholly taxable to the spouse named on the account.

8. Alimony or separate maintenance payments made to a spouse *prior* to dissolution of the partnership (divorce) is taxable only to the receiving spouse to the extent that those payments exceed 50% of the community income from other sources.[44]

   EXAMPLE: Jennifer receives $20,000 of community income from which she pays her partner Sylvia $12,000 support. Sylvia has no other community income. Under applicable state law, earnings of partners living apart continue to be characterized as community property. Jennifer and Sylvia file separate returns and must each report $10,000 of the community income on their respective returns. In addition, Sylvia must include $2,000 as alimony received; while Jennifer may claim a $2,000 deduction for as alimony paid.

9. Income from separate property retains its character as separate income in Arizona, California, Nevada, New Mexico, and Washington, but is considered community income in Idaho, Louisiana, Texas, and Wisconsin.

C. Community Deductions

If filing separate returns, a couple will also have to distinguish between community and separate deductions:

- **Business and investment expenses** incurred to earn community income must be allocated equally to each spouse.
- Deductions for **IRA contributions** are reported separately and are not part of the community.
- **Personal expenses** paid from separate funds are deductible by the payer spouse. If paid from community funds, these expenses must be allocated equally to each spouse.

D. Credits, Taxes and Payments

Couples domiciled in community property states must allocate the following items when filing separately:

- Some **credits** (e.g., the Earned Income Credit) cannot be claimed if filing MFS. If married, living separately, and filing as HOH, spousal income – even if deemed to be community income – is not included when computing EIC.
- **Self-employment tax** is allocated to the spouse who is carrying on the trade or business, even if the activity is deemed to be community for purposes of income and deduction reporting. Self-employment tax attributable to a partner's distributive share of partnership income is attributable only to that partner, even if the partnership income or loss is otherwise deemed to be community for purposes of income and deduction reporting. **NOTE:** If both spouses are partners, the self-employment tax is allocated based on each spouse's distributive share.
- **Federal tax withholdings** are allocated in the same manner that the wage income is allocated.

[44] **REMINDER:** As per the Tax Cuts and Jobs Act of 2018, alimony payments pursuant to a divorce or separation agreement executed or modified after 2018 are not includible as income by the recipient (or deductible by the payer).

- **Estimated tax payments** if paid separately are allocated to the spouse who made the payment; if paid jointly but the spouses later elect to file separately, either spouse may claim all of the estimated tax paid or divide the payment between the spouses in an equitable manner.
- **Tax refunds** must be allocated based on applicable state law: If community property laws deem that premarital and separate debts become the liability of the community, the full joint tax overpayments may be used to offset the obligation. If, on the other hand, separate debts do not become a community obligation, then only a portion of the overpayment may be used to offset a liability and the remainder must be refunded to the unencumbered spouse.[45]

E. Allocating Income and Deductions (Form 8958)

Form 8958, Allocation of Tax Amounts Between Certain Individuals in Community Property States must be prepared by married spouses and registered domestic partners if filing separately. When completed properly, the form provides a concise summary of income and deductions allocated to each spouse based on the rules outlined above.

A copy of the completed form must be attached to each spouse's separately filed tax return.

F. Disregarded Community Property Laws

Although the treatment of community income generally follows the rules outlined herein, the general rule may not apply to an item of community income that was not treated as community income because (1) one spouse treated the item as though only he was entitled to the income and (2) that spouse did not notify his partner of the nature and amount of income by the due date (including extensions) of the tax return. Under these circumstances, reporting the item of income becomes the sole responsibility of only one spouse.

Spouses who live apart for the *entire* tax year must report allocated community income, including wages, self-employment, partnership, and Social Security income only to that spouse performing the services, conducting the trade or business, or receiving the benefits. All other income – including investment income and capital gains – must be allocated to each spouse under applicable community property laws in the state of domicile.

[45] **ALERT:** A taxpayer should consult a family law attorney to determine whether premarital and separate debts become a community obligation upon marriage in a community property state. In general, such debts remain the obligation of the spouse who originally incurred the liability, but there are exceptions!

EXAMPLE: George and Sharon, both domiciled in a community property state, did not live together during the tax year and plan to file separately. They received income from the following sources, *all* of which is deemed to be community income under applicable state law:

	George	Sharon
Wages	$ 20,000	$ 22,000
Business income [Sharon did not participate]	5,000	0
Partnership income	0	10,000
Dividends from separate property	1,000	2,000
Interest from community property	500	500
Totals	*$ 26,500*	*$ 34,500*

Ordinarily, each would report one-half of the total community income ($30,500 = 61,000 ÷ 2) on their respective returns but because they (1) lived apart all year, (2) did not file a joint return, (3) had earned income, *and* (4) did not transfer any of the earned income between themselves, they *must* disregard applicable community property rules and report their own share of earnings plus their allocable share of the community income on their respective returns. As a result, George must report $26,500 and Sharon must report $34,500.

G. Collections

Under the concept of joint and several liability, spouses who file jointly may be held collectively as well as individually liable for the entirety of a tax debt.[46] In a community property jurisdiction, joint and several liability may arise whether or not the couple has filed joint or separate tax returns. A spouse can only be shielded from this form of liability by dissolving the marital community.[47]

Historically, common law systems deemed a wife's property and debts to belong to the husband; as a result, when England adopted its first income tax system in 1799, the law required the husband to report and pay tax on the income of both spouses. With time, matrimonial laws evolved, allowing wives greater powers to manage and control their own property, as well as accept responsibility for their own tax liabilities. By the time the US adopted its system of income taxation in 1913, it had become commonly accepted that each spouse should be held accountable for his or her own tax debt; except…

…in community property states. Under federal law, each spouse was required to file a separate return and yet, spouses in community property states became liable for the debts of the other spouse. Had the US conformed to tax law in other community property countries throughout the world, it would have required spouses to file joint returns and held the husband primarily responsible for the resulting tax debt based on the premise that he was the administrator of the community estate [see Appendix B].

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[46] IRC § 6013(d)(3).

[47] Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, Vanderbilt Law Review (1990) [available at https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2508&context=vlr, last accessed June 26, 2021].

Joint and several liability for all taxpayers – even those in common law states – was not enacted until 1938 although the Bureau of Internal Revenue adopted the concept as early as 1923.[48] It seems that the Treasury simply "invented the doctrine out of whole cloth, without authority either in legislation or in the common law."[49]

<u>Settling a Debt</u>

Presuming then that the application of joint and several liability is one of settled law, it is important to examine how taxpayers in community property states are affected by various collection activities that the IRS may pursue against each spouse:

1. Offers in Compromise (OIC)

   The Internal Revenue Manual[50] addresses the following situations:

   - When only one spouse makes an offer to settle a <u>joint</u> liability, the IRS will look first to the offering spouse's separate property and separate income to settle the debt, followed by the offering spouse's share of community property and income. The IRS – if state law permits – will then look to the non-offering spouse's share of community property and income.
   - If the offering spouse attempts to settle a <u>separate</u> debt, the IRS will once again look to the offering spouse's separate property, as well as the offering spouse's share of community property. If allowed under state law, the IRS may still turn to the non-liable spouse's allocable share of community property.[51] **NOTE:** The IRS intends to prevent taxpayers in community property states to seek protection from collections and thereby maintain a luxurious or affluent lifestyle. However, the Service believes that any material and adverse impact its enforcement activities against the non-liable spouse may create, can be mitigated by allowing a reduction of the OIC amount for necessary living expenses.

2. Levies

   In a community property state, the IRS may serve a levy on a non-liable spouse's wages to satisfy a liable spouse's tax debt.[52] **NOTE:** But because the non-liable spouse is not the debtor taxpayer, such levies may not be continuous and must instead be issued separately on each wage payment. For the same reason, the non-liable spouse is not entitled to collection due process rights before a levy is issued.

[48] *Cole v. Commissioner of Internal Revenue*, 81 F.2d 485 (9th Cir. 1935).

[49] Beck (FN 47).

[50] IRM § 25.18.4.

[51] Treas. Reg. 301.7122-1(c)(2)(ii)(B).

[52] *Medaris v. U.S.*, 884 F.2d 832 (5th Cir. 1989).

Social Security payments are not community property and, therefore, cannot be levied to satisfy spousal debts.

3. Pre-marital tax debts

While the IRS may collect unpaid tax liabilities incurred prior to marriage from the separate property of the liable spouse, state law in community property jurisdictions will dictate how much of the non-liable spouse's share of community property can be attached (if any):

- California, Idaho, and Louisiana – known as 100% states – generally deem that *all* of the non-liable spouse's share of community property can be used to satisfy a liable spouse's debt, although CA protects the community income of the non-liable spouse if it is not commingled with the liable spouse and is held in an account from which the liable spouse cannot withdraw funds.[53]
- Nevada, New Mexico, and Washington – known as 50% states – allow the IRS to attach only *half* of the non-liable spouse's share of community property. Arizona, Texas, and Wisconsin are similarly 50% jurisdictions but also allow the IRS to collect from the liable spouse's contribution to community property (e.g., wage income) [see Appendix A].

4. Post-marital tax debts

Once again, the IRS may collect debts incurred after a couple has married from the separate property of the liable spouse, as well as from much of the couple's community property.

- California, Idaho, Louisiana, Nevada, and New Mexico allow creditors to collect all debts of either spouse from 100% of the community property.
- Arizona, Washington, and Wisconsin, on the other hand, characterize certain debts – even when incurred after marriage – as separate debts, which may only be satisfied from the liable spouse's half of the community property or income. However, community debts such as income tax liabilities may be satisfied from all community property.

Non-liable spouses may be relieved of spousal tax obligations, even in community property states, if eligible for one of these relief programs:

1. Innocent Spouse Relief

Despite applicable community property laws, a spouse is not liable for an omitted item of community income if *all* of the following conditions are met: (1) a joint return was not filed; (2) the item of community income was not included in gross income; (3) the non-reporting spouse did not know and had no reason to know of the income; *and* (4) it would be unfair to include the income under the circumstances.[54] To request equitable relief, the taxpayer must file **Form 8857, Request for Innocent Spouse Relief**.

[53] CA Family Code § 911.

[54] General Innocent Spouse Relief provisions are detailed in IRC § 6015; however, provisions tailored to provide non-traditional relief related exclusively to community property issues are itemized in IRC § 66(c).

NOTE: The IRS also has the ability to grant equitable relief based on a "nonexclusive list of factors" to prevent the applicant spouse from suffering economic hardship.[55] In addition to the factors already considered [above], the IRS may weigh whether the applicant spouse had a legal obligation to pay the tax liability as stipulated in a divorce decree or separation agreement, received a significant economic benefit from the unreported income, was the victim of abuse, had health or mental difficulties, amongst other considerations.[56]

The effect of innocent spouse relief is to relieve one spouse of the liability for a particular tax. While it removes or prevents the assessment of tax against the non-liable spouse personally, the IRS may nevertheless pursue collection remedies against the non-liable spouse's share of community property.[57]

The amount of community property that may be used to satisfy tax and other obligations will vary based on applicable state law. For a sampling of some rules, refer to Appendix B.

2. Injured Spouse Relief

Where innocent spouse relief relieves a non-liable spouse of joint and several liability for taxes owed, injured spouse relief allows a joint tax refund to be allocated and returned to the non-liable spouse rather than used as an offset against tax and certain other debts such as child support, federal agency obligations, and state income taxes.[58]

When allocating income to determine the protected portion of a spousal refund, the IRS will assume that all items on a joint return are community property unless the taxpayers can prove otherwise.[59] If all of the items on the return are deemed to be community property, each spouse will be entitled to one-half of the over-payment.

IV. Other Marriages

A. Registered Domestic Partners (RDP)

In most states, domestic partners are individuals of the same sex who have registered with state authorities to obtain legal benefits that normally inure to married spouses only, such as the ability

[55] Rev. Proc. 2003-61.

[56] IRM § 25.15.3.9.4.2.

[57] *Hegg v. IRS*, 28 P. 3d 1004 (Idaho 2001).

[58] IRC § 6402.

[59] Rev. Rul. 85-70.

to add a partner to a health insurance policy, to receive a deceased partner's retirement benefits, and to share in community property. **NOTE:** In California, certain heterosexual couples may also register as domestic partners.[60]

Registered domestic partners are not married for federal tax purposes. Nevertheless, domestic partners domiciled in community property states that recognize domestic partnerships must generally treat income, deductions, and assets as if married. Therefore, partners in Nevada, Washington, or California must report half the combined community income on each partner's tax return.[61]

NOTE: The community property states of Arizona, Idaho, Louisiana, New Mexico, and Texas do not recognize domestic partnerships [see Appendix A].

B. Same-sex Marriage

In 2015, the US Supreme Court held that:

- State laws that exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples are invalid, and
- All states must recognize same-sex marriages performed in other states.[62]

As a result, same-sex married couples receive the same state and federal benefits and burdens as opposite-sex married couples. Additionally, same-sex couples who are domiciled in a community property state, are subject to community property rules in the same manner as opposite-sex married couples.

C. Common Law Marriage[63]

Some states[64] recognize common law marriages, although none mandate that such marriages are recognized based on the time that the couple has been together. Instead, states look at varying factors to determine the couple's intent and whether they have held themselves out to be "married."

[60] California SB 30 (2019).

[61] Cal. Fam. Code § 297.5(a); Nev. Rev. Stat. § 122A200; Wash. Rev. Code § 26.16.030.

[62] *Oberfell v. Hodges*, 135 S.Ct. 2584 (2015).

[63] *Meister v. Moore*, 96 U.S. 76 (1877) held that a non-ceremonial marriage was a valid and enforceable marriage, unless prohibited by state statute.

[64] Alabama (if pre-2017), Colorado, Florida (if pre- 1968), Georgia (if pre-1997), Idaho (if pre-1996), Indiana (if pre-1958), Iowa, Kansas, Montana, New Hampshire (for estate purposes only), Ohio (if pre-1991), Oklahoma, Pennsylvania (if pre-2005), Rhode Island, South Carolina, Texas, Utah, and Washington, DC [Spidell, *Unmarried Couples: Tax, Legal and Insurance Issues* (2020)]. **CAVEAT:** State laws may be amended. The reader is advised to check with a family attorney in each jurisdiction for updates.

NOTE: While California does not itself recognize common law marriages for couples who cohabitate, the state does accept such marriages if valid in another state[65] [see Appendix A].

D. Non-resident Aliens

A non-resident alien (NRA) is an individual who has not been granted lawful permanent residency through the issuance of a Green Card and has not been physically present in the US to satisfy the Substantial Presence Test.[66] Such individuals must report US source income to the IRS on **Form 1040-NR, US Non-resident Alien Income Tax Return**.

NRAs must generally file individual returns and are allowed to claim only Single (S), Married Filing Separately (MFS) or Qualifying Widower (QW) filing statuses unless married to a US Citizen or resident alien and the couple jointly claims the Marriage Election.[67]

<u>Disregarding Community Property Rules (The 879 Override)</u>

Presuming that at least one of the spouses lives in a community property jurisdiction, income and deductions must be allocated and reported on separate returns as follows:

1. **Earned income** is allocated in its entirety to the earning spouse.[68]

   Such income is defined as wages, salaries, professional fees, and personal service compensation for services actually provided[69] and is allocated to the spouse who earned it, regardless of community property laws.

   EXAMPLE 1: A US citizen, Jim, is married to an NRA. Jim lives and works abroad. Jim is the sole breadwinner. Under local law, Jim's earnings are deemed to be community property that must be allocated equally between husband and wife. But for US tax purposes, Jim must file Form 1040 using the MFS filing status and reports his earnings in full.

   EXAMPLE 2: If the situation were reversed and Jim's NRA wife were the sole wage earner in the family, Jim would amazingly not be required to report even one-half the earnings attributed to him under local community property rules since IRC § 879 allocates all income to the earning spouse for US reporting purposes.

[65] The full faith and credit clause of the US Constitution, Article IV, Section 1 ensures that states honor the laws of other states.

[66] IRC §7701(b)(1).

[67] IRC §§ 6013(g) or (h). **NOTE:** If an election is made, worldwide income must be reported on the US return and the provisions of IRC § 879 cannot be used to override income allocated to each spouse under local community property rules.

[68] IRC § 879(a)(1).

[69] IRC § 911(d)(2)(A).

2. **Trade or business income** – along with associated deductions – is allocated in its entirety to the spouse who did the work.[70] If both spouses actively contribute to the business, income must be allocated based on the respective distributive share of the gross income and deductions of each spouse. Again, local community property allocations are ignored when applying IRC § 879.

3. Similarly, the spouse who is the partner, will claim the entire amount of the **distributive partnership income** regardless of any community property allocations in the local jurisdiction.[71] If both spouses are members of the same partnership, each spouse's distributive share will be treated as the income of the respective spouse.

4. **Income from separate property** belongs to the spouse who owns the separate property, even if local community property rules split the income between the spouses.[72] Separate property will be characterized under the applicable jurisdiction in which the spouses are domiciled or in the case of real property, the jurisdiction in which the real property is located.

5. Income derived from **other property not itemized** in #s 1 – 4 [above] will be characterized and reported on the US tax return of the citizen spouse in accordance with applicable local community property laws.

TIP: In some countries, spouses may enter into valid agreements that override the otherwise prevailing application of local community property laws. In this fashion, spouses may have the opportunity to convert the character of community property into separate property. Since IRC § 879 requires that only community property be allocated to the citizen spouse based on the rules [above], income derived from the separate property of the NRA or non-citizen spouse can escape taxation on the citizen's US return.

CAVEAT: IRC § 879 attribution rules cannot be used to determine the identity of a trust grantor.

EXAMPLE: If a couple uses community property assets to fund a trust, the US spouse may be liable for tax on one-half of the trust's worldwide income, even if all income would otherwise be allocable to the foreign spouse for federal income tax purposes. As a result, the transfer of community assets into a trust cannot eliminate the US spouse's taint as a grantor, nor his liability for tax on one-half of the trust's income.

In general, IRC § 879 rules trump local community property rules.

[70] IRC § 1402(a)(5).

[71] Treas. Reg. § 1.879-1(a)(4).

[72] IRC § 879 (a)(3).

E. International Marriages

Foreign marriages are recognized for US tax purposes if the marriage is deemed to be legally valid in the place it occurred and would be recognized by at least one US state, territory, or possession, regardless of the couple's domicile.[73] This rule requires couples who have married abroad to not only comply with foreign law, but to verify that the marriage is also compliant with regulations in at least one US jurisdiction, whether or not the couple lives in that jurisdiction.

EXAMPLE: While Sharia law recognizes up to four polygamous marriages, no US jurisdiction would allow for a relationship with more than one spouse. As a result, only one of the Sharia-compliant marriages could be recognized for federal tax purposes.[74]

In a world with ever-expanding mobility, marriages between individuals of different nationalities are becoming more common. As a result, a brief survey of international community laws is warranted.

Typically, countries operating under common law (e.g., Australia, Canada, and England) do not have any form of community property, whereas countries operating under civil law often apply the doctrine of community property. Community property regimes are prevalent throughout South America (Argentina, Brazil, Chile, Columbia, Costa Rica, and Venezuela), in certain continental European countries (Denmark, France, Italy, Netherlands, Russia, Spain, Sweden, Switzerland, and Ukraine), as well as in a few geographically scattered countries (e.g., China, Mexico, Philippines, and South Africa)

While the general principle of equal spousal ownership under community property rules applies throughout the world, countries often tweak the basic premise to create a dizzying variety of specific laws. These regimes can be grouped into one of three broad categories:

- Under a universal regime *all* spousal assets – whether acquired before or during the marriage – automatically become community property. This principle of universality stems from the French civil code; as a result, couples in France may elect universal community in lieu of the default régime légal de communauté réduite aux acquêts under which only assets purchased during (but not before) the marriage become community property.
- In some jurisdictions (e.g., Costa Rica), spousal assets do not become community property until after divorce or death of the first spouse. Until that occurs, each spouse is freely able to control assets as though held separately.
- Most countries (e.g., Argentina, Brazil, Columbia, and Venezuela) do not apply such rigorous rules and instead only deem property acquired after marriage to be an asset of the community, although gifts and inheritances received during the marriage remain separate property. **NOTE:** While these assets are considered separate, some countries may nevertheless consider the income generated from gifted or inherited property to be communal.

[73] Treas. Reg. § 301.7701-18(b)(2).

[74] Virginia La Torre Jeker, *The Foreigner and the Taxman: Are You "Married" for US Income Tax Purposes?*, blog post April 11, 2019 [available at https://us-tax.org/2019/04/11/the-foreigner-and-the-taxman-are-you-married-for-us-income-tax-purposes/, last accessed June 23, 2021].

Individuals subject to US tax law must further determine if the foreign community property regime provides each spouse with a vested, undivided half-interest in community assets, income, or debts.[75] To determine if a vested interest exists, courts look to see whether (a) the non-managing spouse can be held liable for the other's torts or can contractually obligate the community; (b) the managing spouse can use community assets to discharge separate debt, or (c) the managing spouse must provide a full accounting to the non-managing spouse and all community property must be divided equally in the event of divorce. Courts have held that a vested interest cannot be established if any of these factors is found to be specifically missing.[76]

If vested interest cannot be established, community property rules will not be applied for US tax purposes.

Migrating Couples

As before, domicile is determinative. When couples are married and continue to reside in the country in which they were married, marital domicile is easily established. But if the couple married while on vacation, moved to another country after marriage, or hailed from different countries prior to the marriage, determining marital domicile becomes challenging. Even after marital domicile is determined for the outset of marriage, circumstances may lead to a later change of domicile. Life happens; things get complicated!

Couples on the move will, therefore, have to determine if the applicable jurisdiction adheres to the doctrines of mutability, immutability, or a combination of both. If mutable, marital property acquired after a change of domicile is governed by the law of domicile at the time of property acquisition. If immutable, property acquired by a married couple remains subject to the regime of the original domicile. Some jurisdictions do not apply an either/or rule and instead deem property acquired before a move to remain subject to the rules of the original domicile, while property acquired after a move will be governed by the new domicile.[77]

In a part-mutable/part-immutable jurisdiction, community property will remain community property even if the new domicile is not a community property jurisdiction.

Situs (not domicile)

To complicate matters further, the application of community property rules may depend on the location of the marital asset. **REMINDER:** In the US, the character – whether community or separate – of real property is determined based on applicable state law in the state in which the property is located, rather than by the domiciliary state of the marital couple. Thus, an Arizona

[75] *EXAMPLE:* If one spouse in South Africa is declared insolvent (bankrupt) during the marriage, the other spouse is automatically deemed to be insolvent as well [Matrimonial Property Act of 1984; Insolvency Amendment Act of 1993].

[76] *Angerhofer v. Commissioner of Internal Revenue*, 87 T.C. 814 (U.S.T.C. 1986).

[77] Virginia La Torre Jeker, *US Tax Perils of International Community Property*, blog post July 23, 2018 [available at https://www.angloinfo.com/blogs/global/us-tax/us-tax-perils-of-international-community-property/, last accessed June 23, 2021].

vacation home purchased by snowbirds from New York will still be characterized as community property.

While the character of personal property in most states is governed by domicile rather than situs, some states may nevertheless control the disposition of certain property even if the owners are domiciled out of state. As a result, such property may be converted from community property to separate property simply based on the location of the assets. For example, most bank accounts in Florida are governed by the laws of Florida rather than by the laws of the account holder's domicile.[78]

Similarly, situs (not domicile) may dictate the character of marital assets held in foreign jurisdictions.

Our Closest Neighbors

Due to frequent cross-border mobility to the north and south, it is important to become at least tangentially familiar with community property laws in:

1. Canada

While the US tax regime is citizenship-based, Canada's regime is based on residency. Individuals who permanently reside in Canada – whether or not they have Canadian citizenship – are subject to tax on worldwide income.[79] **NOTE:** Because combined federal and state tax rates in the US are generally lower than the combined federal and provincial rates in Canada, taxpayers often attempt to give up their Canadian residency if circumstances allow.

Canadian couples may not file joint returns but must nevertheless indicate their marital status as either "married," "living common law," or "separated" on their individual returns. Living common law means that two unmarried individuals live together for at least twelve months and share a conjugal relationship. Separated individuals live apart from a spouse or common law partner for at least 90 days and have not reconciled with one another.[80]

Community property is not recognized in Canada and is indeed a foreign concept to Canadians who may have US filing obligations.

EXAMPLE: In the instance where one or both Canadian spouses live in California, the community property regime will apply only if either spouse is domiciled in-state. **NOTE:**

[78] Jennifer Wioncek, *Impact of Foreign Community Property Laws on U.S. Estate Tax Planning* (2011) [available at https://www.epcmiami.org/assets/Councils/GreaterMiami-FL/library/MIADMS-376409-v1-Community%20Property%20Presentation%20for%20GMEPC.pdf, last accessed June 23, 2021].

[79] Canada also taxes residents who leave Canada for only temporary periods but who intend to return to Canada and non-residents who visit and stay in Canada for more than 183 days in a calendar year.

[80] Government of Canada [https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/personal-address-information/marital-status.html, last accessed June 24, 2021].

California operates on the rebuttable presumption that someone living in the state for at least nine months is presumed to be domiciled in-state, while someone who lives in-state for less than six months during the calendar year is presumed domiciled elsewhere.

Generally, a Canadian in California on a temporary work visa, will not be subject to the state's community property regime. However, a Canadian who obtains a Green Card or moves into the state on a more permanent basis, will be subject to the state's community property rules. As a result, the individual will be required to file a California return that includes one-half of the non-resident spouse's Canadian income. **EXCEPTION:** While community property income reported on a state return must generally be included on the federal return as well, a part-year resident filing a dual-status return[81] does not have to include the community income on the *federal* return for the period of residency.[82]

ALERT: The US-Canada border is currently closed to non-essential travel due to the COVID-19 pandemic.[83]

2. Mexico

Couples in Mexico have the choice to be married under a system of joint or non-joint ownership of property. Under joint ownership (sociedad conyugal), one-half of all assets acquired prior to or during the marriage become spousal property in the event of divorce or death and both partners are held liable for any debts incurred during the marriage. If non-joint ownership (separación de bienes) is elected, each spouse remains the owner of separately purchased assets and is liable only for his own debt. If the couple does not specify which matrimonial regime should apply, all property will be considered separate property by default.

EXCEPTION: Since non-citizens may not directly hold title to real property in restricted zones (e.g., within 50 km from the coast or 100 km from the border), married couples often purchase such property in the name of the Mexican citizen spouse. However, even in the event of death or divorce, the non-citizen spouse may still not take direct title to the property. **NOTE:** Non-Mexican spouses cannot inherit property built on state-owned land used for communal agriculture.[84]

[81] A dual-status return is filed by an individual for the year in which his federal residency status changed from non-resident to resident alien (or vice versa).

[82] PLR 9104001. **NOTE:** Although Private Letter Rulings are generally not binding, this ruling appears to have been drafted in a very confident tone.

[83] Canada's ban on tourist travel has been extended to August 9, 2021, for fully vaccinated citizens and permanent residents of the US. By contrast, the US will not immediately reciprocate. The Department of Homeland Security has announced that the ban on non-essential travel into the US from Canada and Mexico will be extended at least until August 21st despite the fact that 70% of Canada's population has received at least one dose of COVID vaccine and 52% are fully vaccinated (compared to 56% and 48% in the US, respectively). [https://www.washingtonpost.com/world/2021/07/21/canada-us-border-closed-biden/, last accessed July 23, 2021].

[84] An Ejido (propiedad comunal) is an area of communal land used mainly for agriculture, although today many Ejido properties are abandoned, and no farming activity takes place. The owner has rights of possession but does not have a deed. To acquire Ejido land, an owner may apply for privatization, a process that is costly, time-consuming, and without any

Same-sex marriages, as well as foreign marriages, are recognized in Mexico. If a Mexican and non-Mexican marry, the marriage must be registered with the Civil Registry in the couple's town of residence. The marital domicile is where the spouses live together for more than six months, whereas an individual's legal domicile is where the person resides and exercises his rights and duties, even if not physically present.

Pre- and post-nuptial agreements are binding if they form part of the marriage license. A foreign divorce or annulment is deemed to be valid in Mexico if done by rogatory letter[85] or the foreign venue which granted the dissolution of marriage belongs to the Inter-American Convention of Letters Rogatory or the Hague Service Convention.[86]

And one more warning…

US persons – including US citizens, resident aliens, and those NRAs who have elected to be treated as residents – may have additional filing requirements mandated under the Bank Secrecy Act of 1970 and/or the Foreign Tax Account Compliance Act of 2010. These acts require reporting of foreign bank accounts and specified foreign assets that exceed certain threshold amounts.[87] Additional reporting may be required for foreign trusts (**Form 3520**), passive foreign investment companies (**Form 8621**), owners of foreign corporations and partnerships, amongst many others.[88]

guarantee of success [more information is available at https://mexlaw.ca/ejido-mexican-concept-misunderstood-foreigners/, last accessed June 24, 2021].

[85] Letters rogatory are used to obtain judicial assistance from overseas in the absence of a treaty or other agreement. Such letters are sent from the courts in one country to the courts of another country requesting the performance of an act which, if done without the sanction of the foreign court, could constitute a violation of that country's sovereignty.

[86] Ana Maria Kudisch Castelló, *Family Law in Mexico: Overview* [available at https://content.next.westlaw.com/2-567-2525?__lrTS=20201226091352937&transitionType=Default&contextData=(sc.Default)&firstPage=true, last accessed June 24, 2021].

[87] The FBAR (**FinCEN 114**) must be filed if a US person has a financial interest in or signatory authority over foreign financial account(s) with an aggregate value greater than $10,000. A US taxpayer must submit **Form 8938** with his income tax return if the aggregate value of specified foreign assets exceeds $50K at year-end or $75K at any time during the year (domestic single filer) or $200K at year-end or $300K at any time during the year (foreign single filer). **NOTE:** Increased thresholds apply for domestic and foreign filers if submitting a joint return.

[88] The IRS provides forms and instructions for FATCA-mandated forms on its website at https://www.irs.gov/businesses/corporations/fatca-related-forms (last accessed June 24, 2021).

V. Gift and Estate Tax Issues[89]

US citizens are subject to US estate and gift tax, regardless of where they reside.[90] The imposition of gift and estate taxes on non-citizens will depend on the individual's domicile, regardless of the individual's residence at death or at the time a gift is made. Domicile is once again subjectively determined but the criteria for determining domicile for income tax purposes differ from those required for gift and estate tax purposes. As previously outlined, numerous objective facts (e.g., vehicle and voter registrations, community ties, employment, and banking) can be used to establish domicile for income tax purposes, but a far lesser standard may be applied to establish domicile for gift and estate tax purposes. A person must merely live in the US, even if only briefly, and have no definitive intention of moving away.[91] As a result, a taxpayer may be considered domiciled for one type of tax and not the other, or both.

US citizens and domiciliaries are subject to federal estate tax on the value of worldwide assets held at death and gift tax on the value of assets transferred during lifetime. Non-domiciliaries, on the other hand, are subject to estate taxes based only on the value of those assets sited in the US. Such assets generally include real estate and tangible personal property – including cash – that is located in the US, as well as stock in US corporations regardless of where the stock certificates are held.[92] **NOTE:** Publicly traded US bonds, deposit accounts and certain life insurance policies are expressly exempt from estate taxation[93] and *all* intangible assets are exempt from gift taxation.[94]

A decedent's gross estate must include the value of all property held by the decedent at the time of death.[95] **NOTE:** For decedents domiciled in community property states, only one-half of the value of community assets must be included in the decedent's estate.

Non-US citizens or domiciliaries are subject to estate and gift taxes on US-sited assets only. The IRC § 879 override can*not* be used to allocate community assets to the non-US spouse.

A. Basis

Under the community property regime, a surviving spouse is entitled to a full step-up in basis for assets included in the deceased spouse's estate,[96] thereby eliminating capital gains that surviving

[89] Haven, *Form 706 Estate Tax Return* and *Form 709 Gift Tax Return* [available at http://mhaven.net/Publications.php, last accessed June 26, 2021].

[90] IRC § 2001(a).

[91] Treas. Reg. § 25.2501-1(b).

[92] Summary chart of US-sited assets for NRAs available at http://mhaven.net/Docs/Estate%20&%20Gift%20Assets%20for%20NRAs.pdf (last accessed July 2, 2021).

[93] Treas. Reg. §20.2104-1.

[94] IRC § 2501(a)(2).

[95] IRC § 2033.

[96] IRC § 1014(b)(6).

spouses in non-community property states must otherwise recognize when selling assets shortly after inheriting them.

Basis step-up was introduced with the enactment of the estate tax regime[97] to ease the duties of executors, heirs, and taxing authorities who would otherwise have to trace a decedent's income tax basis. At the time, the basis adjustment applied only to the decedent spouse's share of assets and not the surviving spouse's portion.[98] As a result, surviving spouses in community property states received a lesser step-up than surviving spouses in common law states.

EXAMPLE: If, in a common law state, a husband held sole title to a property valued at $500,000 (with a basis of $100,000) and bequeathed the entire property to his surviving spouse, his wife would be entitled to a new basis equal to the full fair market value of the property when the husband died. In a community property state, by contrast, the wife would already be deemed to own one-half of the property. When her husband died, she would inherit his half with a stepped-up basis ($250,000) and still have her half of the property with its original basis ($50,000). Thus, the aggregate basis in a community property state would total only $300,000, far less than the $500,000 basis under a common law regime.

By introducing the double step-up in basis with a law change in 1948, Congress hoped to put surviving spouses across the country on equal footing. And yet, tax planners quickly found ways to exploit the new rules in favor of community property spouses by (a) preserving the character of community property when a couple moved from a community property to a common law state, or (b) converting separate property to community property when moving from a common law to a community property state.

Seeking to offer taxpayers the advantage of the double basis step-up rule that the federal government had inadvertently bestowed on community property spouses, Wisconsin adopted a community property regime; as did Alaska in 1998.[99] While Wisconsin made its system mandatory, Alaska offered residents – and even non-residents – the option to elect community property treatment by spousal agreement or the creation of a community property trust. Tennessee followed suit in 2010, permitting resident and non-resident spouses to establish a community property trust,[100] followed by South Dakota in 2016.[101] Other states (e.g., New Hampshire, Ohio, and Utah) have also considered enacting laws modeled on Alaska's system to take advantage of the double step-up rule but have not (yet) done so.

[97] The Revenue Act of 1916.

[98] IRC § 113 [repealed 1990].

[99] Community Property Act (Alaska Stat. § 34.77).

[100] Tenn. Code Ann. § 35-17.

[101] S.D. Codified Laws § 55-17.

The IRS is, of course, not pleased but has so far not actively pursued the double step-up issue in court or clarified an opposing stance by promulgating formal rulings. In fact, experts are left to wonder if the IRS has, in fact, simply acquiesced.[102]

If at least one-half the value of a community asset is included in a decedent's gross estate – whether or not an estate tax return is filed – the surviving spouse in a community property state is entitled to a full basis step-up.

Life Insurance

Generally, the full value of life insurance proceeds is includible in a decedent's gross estate if the decedent possessed any incidents of ownership in the policy at death. However, if the policy was purchased with community assets, the decedent is deemed to own only one-half of the policy.[103]

B. How to Report

Estate Tax Return

Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return is used to determine the value of a decedent's gross estate and compute the estate tax due (if any).[104] Part 5 – Recapitulation must be completed to calculate the taxable estate. Schedules A through O must be completed (as appropriate) to detail the decedent's assets and liabilities (e.g., real estate holdings are entered on Schedule A; stocks and bonds on Schedule B; etc.). Each asset must be valued on the decedent's date of death (DOD) or the alternate valuation date (AVD).[105] The total of all assets listed on each schedule must then be transferred to the Recapitulation. Once totaled in the recapitulation, the sums of assets and liabilities are then transferred to the front of **Form 706** and used to compute the estate tax liability.

It should be noted that while Schedule E is entitled "Jointly Owned Property," this schedule should *not* be used to list community property assets. Indeed, IRS form instructions for this schedule specifically state that "community property held by the decedent and spouse should be reported on the appropriate Schedules A through I." The preparer may use one of two methods to make the appropriate line entries:

- Under the Gross Method, the full value of the property is entered in the value column. The surviving spouse's community interest is then subtracted from the total as a final entry on Schedule A.

[102] Durst, *Geographic Income Tax Marriage Equality: A Proposal to Expand the Double Basis Step-Up* [available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3818875, last accessed June 25, 2021].

[103] Treas. Reg. § 20.2042-1(c)(5).

[104] **REMINDER:** The lifetime exemption currently available to each decedent is $11.7 million (in 2021). Therefore, no federal estate tax will be due if the decedent's taxable estate falls below this threshold amount [IRC § 2032].

[105] The decedent's fiduciary may elect to use the AVD in lieu of the DOD by checking "Yes" on Form 706, Part 3, Line 1. If elected, *all* assets must be valued on the AVD (six months after the DOD). **NOTE:** The AVD may only be elected if the gross estate (and, thus, the net tax liability) is less than it would otherwise have been if using asset values on the DOD.

- Under the Net Method, the full value of the property (including the surviving spouse's community interest) is entered in the description section, with only the net value representing the decedent's community interest carried to the value column.

Regardless of the reporting method selected, the aggregate value of all assets detailed in the schedules should reflect only the decedent's portion of any community property held.

NOTE: Schedule M is used to claim the marital deduction. An unlimited value may be transferred from a decedent to his surviving spouse as long as the transferred amount is included when determining the value of the decedent's gross estate.[106] Since the survivor's share of the community estate is not included in the value of the decedent's gross estate, it would logically follow that the marital deduction could only be funded with the decedent's community interest. Therefore, be careful to include no more than one-half of all community assets on Schedule M.

<u>Gift Tax Return</u>

Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return must be filed to report transfers during life and used to calculate the gift tax due (if any). The form may only be filed by individual taxpayers (not couples). Therefore, if a gift of community property is made, one-half of the value is automatically deemed to have been made by each spouse who must then each file a separate gift tax return.

EXAMPLE 1: H and W live in a community property state. H gifts $100K to their son from community property. W does not need to provide consent since one-half of the gift will automatically have been deemed made by each spouse. Both H and W must file **Form 709** to each report a gift of $50K given to the son.

EXAMPLE 2: Presuming the same facts as in Example 1, but this time H gifts $100K from separate property. If W consents, H and W can split the gift so that $50K will be treated as gifts made by each H and W.[107] In this instance, the couple must each file **Form 709** and each spouse must sign the other's return on Line 18 indicating consent to the gift-split.

VI. Termination of the Community Estate

The marital community can be terminated by death, divorce or legal separation, physical separation, or change of domicile.

Just as the marital community is created at a particular instant, so, too, is it ended although time may lapse between the first and final steps taken to end the marital estate.

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[106] IRC § 2056(a).

[107] IRC § 2513(a).

EXAMPLE 1: H and W have filed for divorce but continue to live together. H gets a new credit card and runs up a debt of $5K. When the community estate is later split during the divorce proceedings, one-half of the debt is assigned to W.

EXAMPLE 2: Assume the same scenario, except that H has moved out while divorce proceedings are pending. In this situation, W will not be liable for H's debt (but also will not share in H's lottery winnings if he bought his ticket after his move-out date).

While death – and sometimes divorce – seemingly offer a definitive date on which to split community property interests, it must first be established whether each spouse does in fact have an interest in the property just prior to the termination event. Once interest is established, marital assets can be divided according to applicable state law, a court decree, or the terms of a governing instrument (e.g., will, trust or marital agreement). In some cases, a court may purposefully postpone the determination of each spouse's interest in the community estate until sufficient time has passed to allow certain realization events to occur (e.g., pension payouts subject to vesting restrictions).[108]

Each jurisdiction may apply different rules to establish the date and method of termination. For example, the majority of community property states deem that the dissolution of a marriage only occurs upon issuance of a final court decree. California and Washington, on the other hand, hold that the community property estate is terminated when spouses physically separate and both spouses intend to permanently end the marriage. This mutual intent must be established through the actions and conduct of the spouses.[109]

As per the Internal Revenue Manual, the nine community property states recognize the termination of the marital community in the following ways:

Arizona	California	Idaho	Louisiana	Nevada
• Change of domicile • Death • Divorce or separation decree ALSO: Property acquired after petition for dissolution, separation, annulment is separate property, if petition results in final decree	• Change of domicile • Death • Physical separation	• Change of domicile • Death • Divorce decree	• Change of domicile • Death • Divorce or separate property decree	• Change of domicile • Death • Divorce or separation decree .

[108] Taggart, *Characterization of Property in California When Period of Acquisition Overlaps Creation or Termination of Marital Community*, Hastings Law Journal (1966) [available at https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1897&context=hastings_law_journal, last accessed June 26, 2021].

[109] IRM § 25.18.1.3.4(5)

New Mexico	Texas	Washington	Wisconsin
• Change of domicile • Death • Divorce or separation decree ALSO: Separating spouses may petition for division of property, which may affect subsequently acquired property	• Change of domicile • Death • Divorce or separation decree • Annulment	• Change of domicile • Death • Permanent separation	• Change of domicile • Death • Divorce, separation, or separate maintenance decree

NOTE: If a marriage is annulled, it is legally deemed to have never occurred; thus, a marital community was never formed, and community property rules do not apply.[110]

VII. Summing up

Community property rules clearly have consequences that can reach far beyond geographic borders and can influence all aspects of a couple's financial affairs, from ownership rights to debt repayment, in life and after death. While community property regimes in most jurisdictions can be traced to a common historic origin, the evolution of localized legislation has led to a myriad of divergent rules. Yet, the prevailing precept – the guiding light – of community property is to bestow a measure of economic equality upon women, who throughout the eras have been disenfranchised as a matter of law.

The doctrine of community property rests on the principles of (1) separate legal identity, (2) partnership, and (3) ownership but not title. The system recognizes a married couple as an economic unit from which its two members benefit *equally*. Due to these tenets, women have achieved remarkable benefits, including:

- Rewarding a married woman for work done in the home on the theory that wealth acquired during the marriage resulted from the joint efforts of both spouses,
- Granting a distinct legal personality to the married woman separate from her husband's identity, thereby allowing her to enter into contracts (even with her husband),
- Permitting a married woman to maintain or establish separate property that could be protected from the "midnight frolics by a drunken or gambling husband"[111] and his creditors,
- Allowing a less fortunate woman who has entered a marriage without property to share in her husband's wealth, and
- In the event of divorce, offering a married woman property that is not divided based on title but rather on the principles of equitable distribution.[112]

[110] *Barr v. Commissioner*, 10 T.C. 1288 (1948).

[111] Quoting a delegate to the Texas Constitutional Convention of 1845.

[112] Newcombe (FN 26).

"Development of the community property law… has gone hand in hand with the general emancipation of women from the economic bonds which have so long burdened them."[113]

Of course, the doctrine of community property in America's western states was not in fact adopted to unshackle women from the yoke of traditional subservience, but rather to lure the fairer sex to the frontier. But let us not look a gift horse in the mouth and instead celebrate women's legal triumphs, regardless of legislative intent.

But community property laws have also created inequities. For example, due to joint and several liability, tax obligations are often disproportionately shifted from husbands to wives. It is estimated that the majority of collections from the non-liable spouse is directed at women, simply because it is easier.[114]

The global legal gender gap, while slowly narrowing, has not yet been eliminated: The World Bank Group has found that 112 economies no longer restrict women's property rights, while 75 others limit women's rights to manage assets and nine economies still grant administrative rights over marital assets exclusively to husbands. Europe and Central Asia appear to be at the forefront; while the Middle East, North Africa and South Asia are regions with the most restrictive laws. Ranking countries that place women on equal legal footing with men using a 100-point scale – with Belgium, Denmark, France, Latvia and Luxembourg scoring a perfect 100 and Saudi Arabia at the other end of the spectrum scoring a mere 25.63 – the US scored 83.75, well above the average global score of 74.71.[115]

Women "have come a long way, baby"[116] (but not yet far enough)

[113] *Cosper v. the Valley Bank*, 28 Ariz. 373, (1925).

[114] Beck (FN 47).

[115] *Women, Business and the Law 2019*, The World Bank [available at https://thedocs.worldbank.org/en/doc/702301554216687135-0050022019/original/WBLDECADEOFREFORM2019WEB0401.pdf, last accessed June 26, 2021].

[116] Paraphrasing the advertising slogan for Virginia Slims cigarettes (1968).

APPENDIX A
Comparison of State Law Differences in Community Property States
(Excerpted from IRM Exhibit 25.18.1-1)

	Arizona	California	Idaho	Louisiana	Nevada	New Mexico	Texas	Washington	Wisconsin*
Does state recognize common law marriage?	No, unless legally established elsewhere	No, unless legally established elsewhere	No, but recognizes marriages established in Idaho before 1/1/96 or legally established elsewhere	No, unless legally established elsewhere	No, unless legally established elsewhere	No, unless legally established elsewhere	Yes	No, unless legally established elsewhere	No, unless legally established elsewhere
Does state recognize domestic partnership?	No	Yes	No	No	Yes	No	No	Yes	Yes
How is marital income that is generated from separate property characterized?	Separate, unless a portion is derived from community time, effort, & skills → then, allocate	Separate, unless a portion is derived from community time, effort, & skills → then, allocate	Community	Community	Separate, unless a portion is derived from community time, effort, & skills → then, allocate	Separate, unless a portion is derived from community time, effort, & skills → then, allocate	Community	Separate, unless a portion is derived from community time, effort, & skills → then, allocate.	Community
What property can satisfy a premarital federal tax liability assessed against only one spouse?	All separate ppty + 100% of CP traceable to liable spouse + 50% of CP	100% of CP + all separate ppty of liable spouse	100% of CP + all separate ppty of liable spouse	100% of CP + all separate ppty of liable spouse	50% of CP + all separate ppty of liable spouse	50% of CP + all separate ppty of liable spouse	All separate ppty of liable spouse + 100% of joint management CP + 100% of liable spouse's sole management CP + 50% of non-liable spouse's sole management CP	50% of CP + all separate ppty of liable spouse	All separate ppty of liable spouse + 50% of CP + all CP that would have been liable spouse's separate ppty but for marriage

*Wisconsin law refers to community property as "marital" property and separate property as "individual" property.

APPENDIX B
Amount of Tax Refund Available to Satisfy a Tax or Other Debt
(Excerpted from IRM Exhibit 25.18.5-1)

	Arizona	California	Idaho	Louisiana	Nevada	New Mexico	Texas	Washington	Wisconsin
Non-tax Debt (e.g., child support, state inc tax, fed agency debt)	50% of the CP portion refund + any separate ppty of liable spouse	50% of the CP portion refund + any separate ppty of liable spouse	50% of the CP portion refund + any separate ppty of liable spouse	50% of the CP portion refund + any separate ppty of liable spouse	50% of the CP portion refund + any separate ppty of liable spouse	50% of the CP portion refund + any separate ppty of liable spouse	50% of the CP portion refund + any separate ppty of liable spouse	50% of the CP portion refund + any separate ppty of liable spouse	50% of the CP portion refund + any separate ppty of liable spouse.
Federal tax debts incurred BEFORE marriage	100% of refund that is CP traceable to liable spouse + 50% of any part of refund attributable to other CP + all of refund that is separate ppty of liable spouse	100% of CP portion of refund + all of refund that is separate ppty of liable spouse	100% of CP portion of refund + all of refund that is separate ppty of liable spouse	100% of CP portion of refund + all of refund that is separate ppty of liable spouse	50% of CP portion of refund + all of refund that is separate ppty of liable spouse	50% of CP portion of refund + all of refund that is separate ppty of liable spouse	100% of liable spouse's sole management CP + injured spouse's sole management CP + 100% of refund attributable to liable spouse's separate ppty	50% of CP portion of refund + all of refund that is separate ppty of liable spouse	Predetermination date tax debts may be satisfied from 100% of the CP portion of the refund that would have been the liable spouse's but for the Marital Ppty Act + 50% of other CP + 100% of refund attributable to liable spouse's separate ppty
Federal tax debts incurred AFTER marriage	100% of the CP portion + 100% attributable to separate ppty of liable spouse	100% of CP portion + 100% attributable to separate ppty of liable spouse	100% of CP portion + 100% attributable to separate ppty of liable spouse	100% of CP portion + 100% attributable to separate ppty of liable spouse	100% of CP portion + 100% attributable to separate ppty of liable spouse	100% of CP portion + 100% attributable to separate ppty of liable spouse	100% of liable spouse's sole management CP + 50% of injured spouse's sole management CP + 100% attributable to separate ppty of liable spouse	100% of the CP portion + 100% attributable to separate ppty of liable spouse (If no intent to benefit community, only 50% of CP portion useable)	100% of the CP portion + 100% attributable to separate ppty of liable spouse (If no intent to benefit community, only 50% of CP portion useable)