

# Community Property Here, there & everywhere

Presented by  
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YOURS,  
MINE  
& OURS

# Learning Objectives

- Understand that community property arises by operation of law
- Recognize that community property laws can protect the rights of women
- Distinguish between community and separate property
- Use the taxpayer's domicile to properly determine applicable community property regime
- Offer certain taxpayers relief from community property laws with special allocation rules (IRC §879)

For in-depth treatment of materials covered in this presentation, refer to the accompanying Student Text available on the [Publications](#) page of the author's website.

Let's start with the...

WHY

# The Premise

- Marriage is a partnership (a “community”)
  - Spouses share the fruits of each partner’s labor
  - 50-50 ownership of all assets (& liabilities)
- Based on civil law [*not* common law]
  - Codified body of regulations
  - Not based on judicial precedent
- 150 countries rely on civil law
  - Many (but not all) have community property





# 9 States

- **Mandatory**
  - Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington & Wisconsin\*
  - \* Adopted in 1986
- **Opt-in**
  - Alaska, South Dakota & Tennessee
- **US Territories**
  - Guam & Puerto Rico



# Former Spanish Territory

- Treaty of Guadalupe Hidalgo ended Mexican-American War (1846 – 1848)
  - Guaranteed property rights of former Mexican citizens now in US
- CA became first community property state
  - Ratified Constitution (1849)
  - Offered legal protections to wives
  - Intended to lure eligible & wealthy women to frontier
- AZ, ID, NV, NM & WA copied CA community property laws
  - TX influenced by Spanish civil law
  - LA influenced by French civil law



# Not all are alike

- CA: Income earned btw separation & divorce  $\neq$  community ppty
- ID, LA, TX & WI: Income from separate ppty during marriage is *deemed* to be community ppty
- OK: Opt-in community ppty not recognized for federal tax (but IRS accepts AK)
- WI: *Both* spouses must be domiciled in state to apply community ppty
- FL: enacted community ppty trust (8/2021)

See Appendix A for Chart of State Differences

Rules applied based on marital domicile





# Polling Question # 1

Community Property law is prevalent under:

- Common Law
- Civil Law

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# Domicile

- Residency req's physical presence
  - Where am I?
  - Can be measured objectively
- Domicile req's intent
  - Where do I want to be?
  - When absent, where to I want to come "home" to?
  - Must be evaluated subjectively based on objective facts



Residence ≠ Domicile

- Residence presumed to be domicile unless facts indicate otherwise
- Can have multiple residences but only ONE domicile

# Facts used to determine Domicile

- Mailing and billing addresses
- Voter and vehicle registrations
- Home ownership
- Location of family
- Religious & other ties to the community
- Banking, financial & accounting contacts
- Place of employment
- School attendance
- Burial plot
- Amount of time spent within the state



**TIE BREAKER:** If spouses have different domiciles, use law of the state with most significant relationship

# Domicile: Military Personnel

- Usually serve outside of home state
  - Intend to return to domiciliary state after service
- GENERAL RULE: Active duty pay in a community property state = community income
- EXCEPTIONS:
  - 1940: Service member may retain domicile in “home” state
  - 2009: Military spouse may also retain domicile in “home” state if:
    - Same as service member’s domicile
    - Couple lives together where service member is stationed

# Military Personnel: EXAMPLES

## Facts

- H & W domiciled in SC
- H is stationed in MD
- H & W live in VA



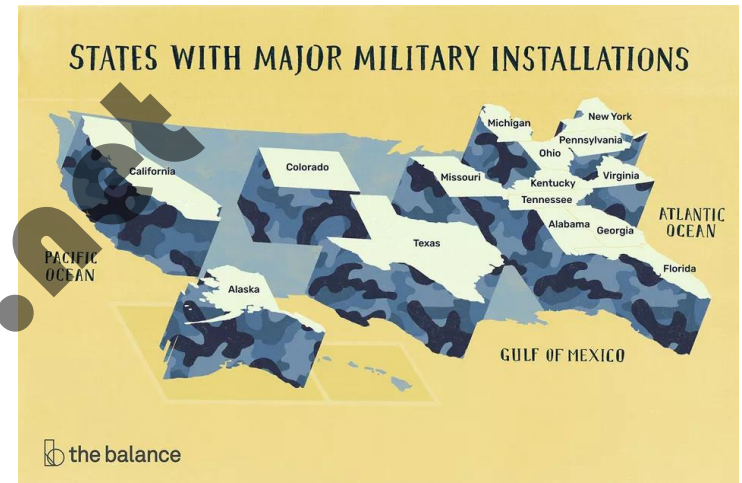
SITUATION # 1: H files in SC (no filings req'd for MD & VA)

SITUATION # 2: H has PT job in VA → must now file in VA to report non-military wages but may claim Other State Credit in SC

SITUATION # 3: W has job in VA → if eligible to claim H's domicile in SC, no filing req'd in VA

# Largest Military Bases

- Georgia (Fort Benning)
- Kentucky (Fort Campbell)
- North Carolina (Fort Bragg)



## Community Property States

- Texas (Fort Hood)
- Washington (Joint Base Lewis-McChord)



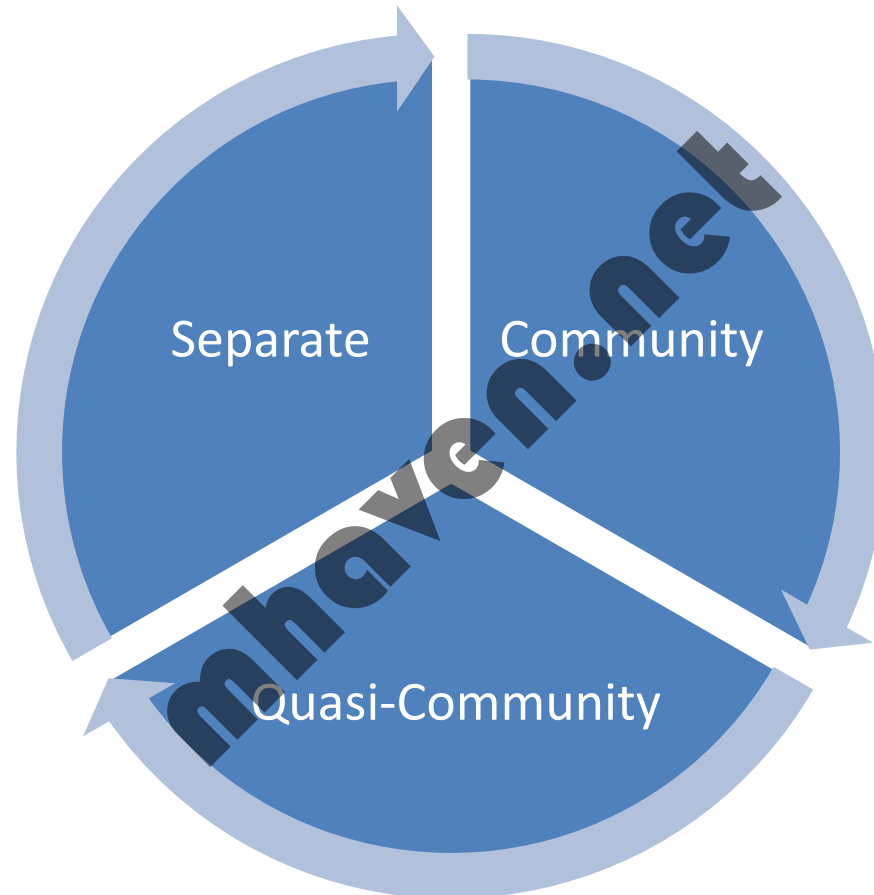
## Polling Question # 2

A couple will be subject to community property laws in their state of domicile.

- True
- False

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# Character of Property



Title does not determine character



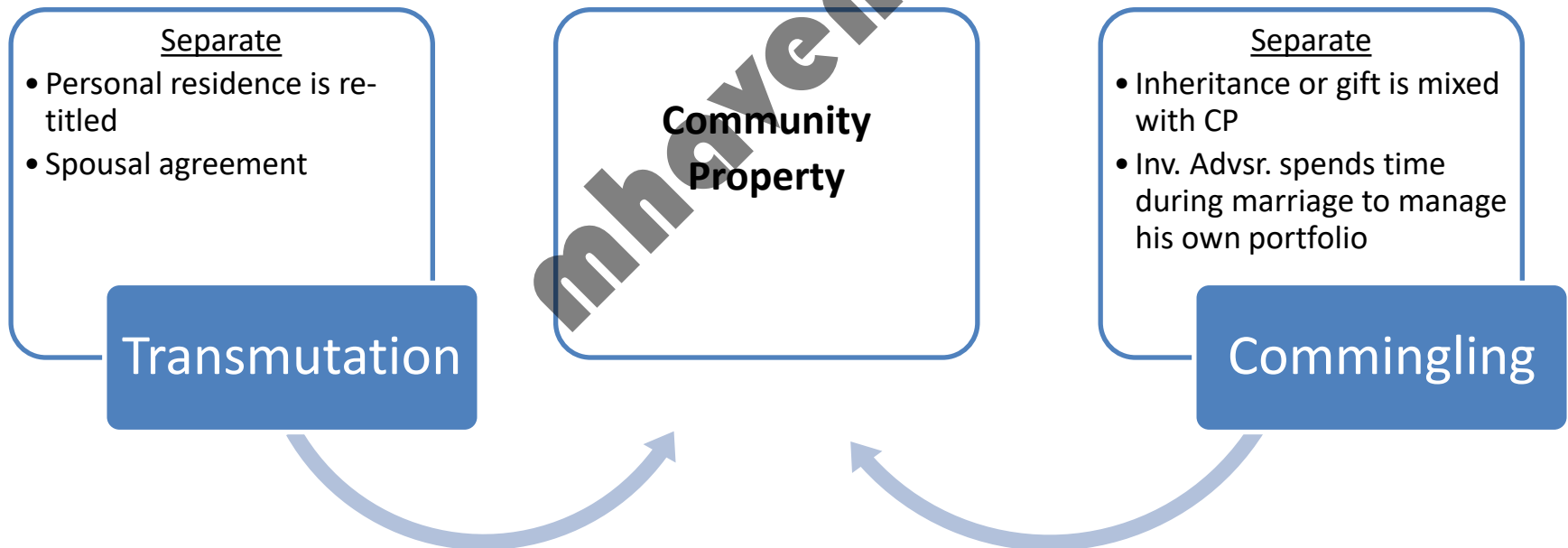
# Character Defined

- Community Property (CP)
  - acq'd during marriage
  - separate assets when contributed to CP trust
- Separate Property
  - owned before marriage
  - acq'd during marriage by gift/inheritance
  - purchased w/ separate funds during marriage
  - exchanged for separate ppty during marriage
  - converted from CP via valid agreement
  - certain assets defined as “separate” (e.g., IRAs & 529 plans)
- Quasi-community Property
  - out-of-state ppty acq'd during marriage that would have been CP if acq'd in domiciliary state
  - generally treated as CP (not recognized by federal govt.)

Change of domicile does not change character

# Recharacterizations

- Can be voluntary or accidental
- Due to lack of knowledge, bad advice, operation of state law
- Often cannot be undone



# Other Forms of Title

- 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)

Title does not determine character



# Geographic Income Tax Inequality

- Originally, taxpayers could only file “Single”
  - If CP state, income was split evenly & reported on 2 separate returns  
→ ADVANTAGE to CP couples

## EXAMPLE 1

H earned \$100K in 1930; W earned \$0 → H owed \$16,265 federal tax.

## EXAMPLE 2

In CP state, each spouse reported  $\frac{1}{2}$  of the income on separate returns → each spouse owed \$5,172.50, or \$10,345.00 together (= 36% less tax!)

# The race to the lowest tax bracket

- Numerous traditional common law states adopted voluntary community property, allowing married taxpayers to opt-in:
  - Oklahoma (1939)
  - Oregon (1943)
  - Hawaii (1945)
  - Michigan, Nebraska & Pennsylvania (1947)
- Then... Revenue Act of 1948
  - Designed to disincentivize adoption of CP
  - Equalize geographic treatment
  - All state acts repealed or declared unconstitutional



# Marriage Penalty

- 1948: *Optional* joint returns introduced
  - Married couples could now file jointly
  - Tax brackets doubled BUT couples could split income & file “Single”
  - ADVANTAGE to all couples



- 1969: Couples *must* file jointly; new rate schedule for singles
  - Couples cannot use lower “Single” rates
  - ADVANTAGE to singles (Marriage Penalty)
  - In CP state if filing separately, couples must include  $\frac{1}{2}$  of comm. Income
  - ADVANTAGE to couples filing jointly



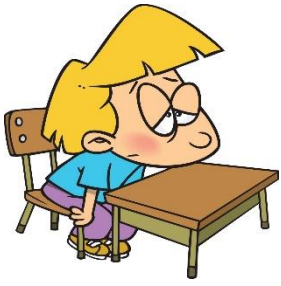
# Filing Status

Property rights & interest determined under laws of domiciliary state [*Morgan v Comm* (1940)]

File jointly (MFJ) or separately (MFS)

- MFS subject to higher thresholds for deductions & cannot claim certain credits but...
- MFS preferable when
  - Disproportionate spousal income or deductions
  - Able to use HOH filing status, if living apart
  - Limit liability for joint tax obligation, prior-year taxes, child support, student loans, etc.
  - Spouses have signed separate property agreement
  - Allow out-of-state spouse to file as non-resident (or not at all)
  - Fall below threshold for state surtax





# Polling Question # 3

All of the following statements about community property are correct EXCEPT:

- The character of CP property is determined under state law
- Separate property may be converted to community property
- Most opt-in community property acts were declared unconstitutional
- Spouses may file as “married” or “single”



# Community Income

- Earned during marriage or derived from CP
- Allocated 50/50 between spouses:
  - Earned Income
  - SE Income – 100% allocated to self-employed spouse for SE Tax
  - Partnership – if either spouse contributes effort OR if partnership is held as CP
  - Investment, rental income, cap gains (losses) if derived from CP property
  - Income from separate ppty (ID, LA, TX, WI)



See next 3 slides for special attribution rules...

NEW

# Unemployment Compensation

- Pandemic relief as per American Rescue Plan Act of 2021
  - Retroactive for TY'20
  - If MAGI < \$150K, each taxpayer may exclude up to \$10,200 of unemployment comp. (UI)
- In CP states, UI is split 50/50 [see IRS FAQ #4]
  - Each spouse may claim UI exclusion
  - MAGI exclusion is *not* doubled for joint filers

**TIP:** File MFS to stay below \$150K MAGI on one or both returns

# Pension & Annuity Income

- Attribution to spouse(s) depends on marital status & domicile when services performed
- Allocation of community income based on characterization during pay-in phase

## EXAMPLE

- retired after 30 years
- H & W domiciled in CP state in most recent 15 years



→ ½ of each payment characterized as community income

Payments from IRA, ROTH & SEP are separate property (not CP)

# Spousal Support

- Taxable to recipient unless agreement executed or modified after 2018 (TCJA)
- In CP states, alimony received *prior* to divorce is taxable only if alimony > 50% of community income

## EXAMPLE

- H earns \$20K wages (= community income)
- W receives \$12K support from H, but has no other income
- H & W file MFS



→ H & W each report \$10K wage income + W reports \$2K alimony [H may claim \$2K deduction for alimony paid]

# Deductions, Credits & Payments

## Split 50/50

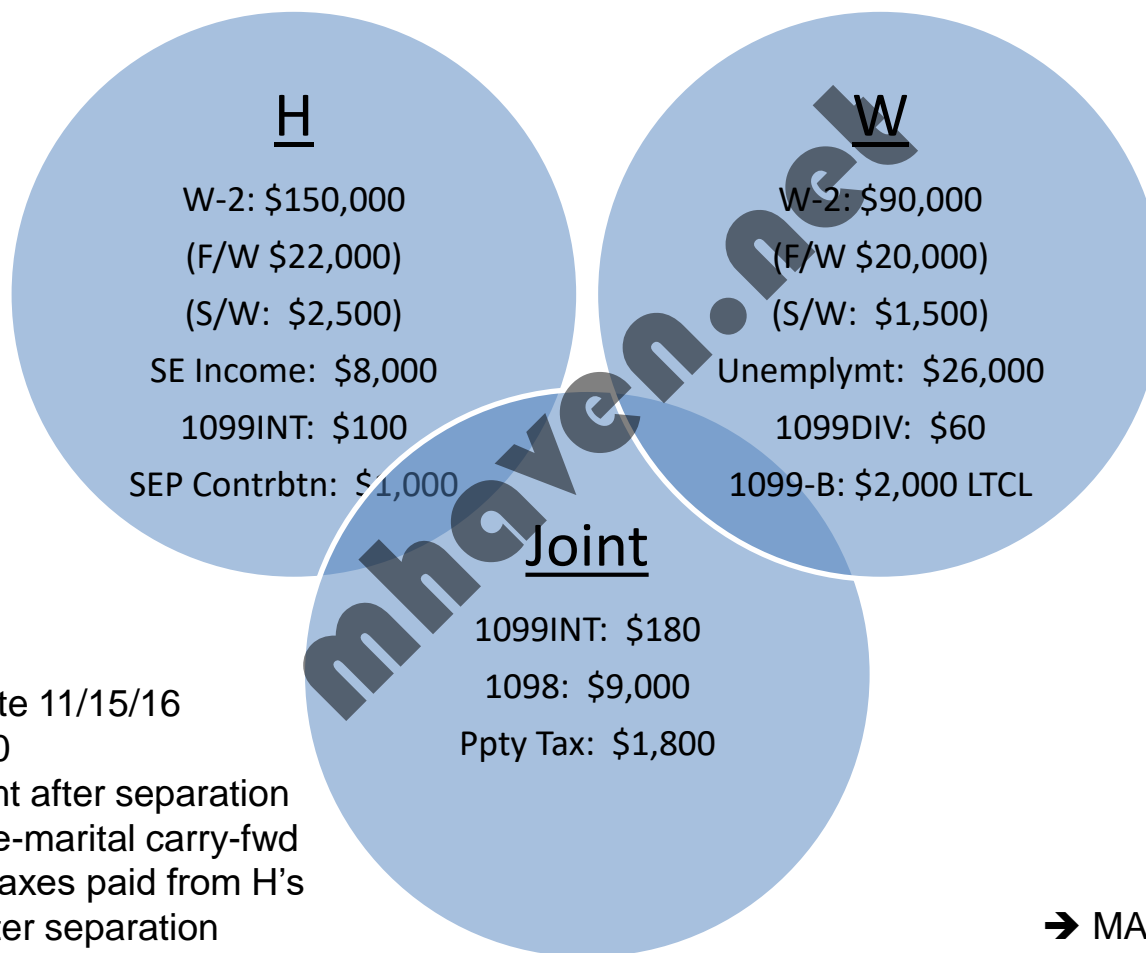
- Biz & investment expenses related to community income
- Federal tax withholdings
- ES payments if paid jointly, can be allocated (un)equally

## Separate

- IRA contributions
- Personal expenses paid from separate funds
- SE Tax (even if trade/biz/partnership is CP)
- ES payments if paid from separate funds

Tax refunds must be allocated based on state law

# Form 8958: EXAMPLE



- Married in CP State 11/15/16
- Separated 6/30/20
- W rcv'd unemplymt after separation
- W's LTCL from pre-marital carry-fwd
- Mortgage & ppty taxes paid from H's separate funds after separation



Form **8958**  
(Rev. November 2019)  
Department of the Treasury  
Internal Revenue Service (99)

### Allocation of Tax Amounts Between Certain Individuals in Community Property States

▶ Attach to Form 1040, 1040-SR, or 1040-NR.  
▶ Go to [www.irs.gov/Form8958](http://www.irs.gov/Form8958) for the latest information.

OMB No. 1545-0074

Attachment  
Sequence No. **63**

| Your first name and initial  | Your last name                  | Your social security number                                      |  |
|--|---------------------------------|--|--|
| HUSBAND  |                                 | Spouse's or partner's social security number                     |  |
| Spouse's or partner's first name and initial                         | Spouse's or partner's last name | Spouse's or partner's social security number                     |  |
| WIFE   |                                 | Spouse's or partner's social security number                     |  |
|  | A<br>Total Amount               | B<br>Allocated to Spouse<br>or RDP<br>SSN <u>HHH - HH - HHHH</u> | C<br>Allocated to Spouse<br>or RDP<br>SSN <u>WWW - WW - WWWW</u> |
| <b>1</b> Wages (each employer)                                       |                                 |  |  |
| H's Employer [1/2 is CP thru 6/30]                                   | 150,000                         | 112,500  | 37,500   |
| W's Employer [1/2 is CP thru 6/30]                                   | 90,000                          | 22,500   | 67,500   |
| ENTER W-2 as issued on 1040, Line 7                                  |                                 | Total Wages = 135,000  | Total Wages = 105,000  |
| ENTER "CP Adjustment" as Other Income (Sched 1)                      |                                 | -15,000  | +15,000  |
| <b>2</b> Interest income (each payer)                                |                                 |  |  |
| Bank Interest (joint account)  | 180                             | 90   | 90   |
| Bank Interest (H's pre-marital acct)                                 | 100                             | 100  | 0  |
| ENTER each acct on Sched B w/ xpltn for CP allctn                    |                                 |  |  |
| <b>3</b> Dividends (each payer)                                      |                                 |  |  |
| XYZ Stock (W's inherited shares)                                     | 60                              | 0  | 60   |
| ENTER on W's Sched B   |                                 |  |  |
| <b>4</b> State Income Tax Refund                                     |                                 |  |  |
| <b>5</b> Self-Employment Income (See instructions)                   |                                 |  |  |
| H's SE Income [1/2 is CP thru 6/30]                                  | 8,000                           | 6,000  | 2,000  |
| PREPARE Sched C for each spouse w/ "CP Allocation" in Other Expenses |                                 |  |  |
| <b>6</b> Capital Gains and Losses                                    |                                 |  |  |
| LTCL (W's pre-marital carry-forward)                                 | (2,000)                         | 0  | (2,000)  |
| ENTER on W's Sched D   |                                 |  |  |
| <b>7</b> Pension Income  |                                 |  |  |

|   | A<br>Total Amount | B<br>Allocated to Spouse<br>or RDP<br><small>SSN H H H - H H - H H H H</small> | C<br>Allocated to Spouse<br>or RDP<br><small>SSN W W W W - W W - W W W W</small> |
|---|-------------------|--|--|
| <b>9</b> Deductible part of Self-Employment Tax (See instructions)  |                   |  |  |
| H's SE Tax (1/2 of # 10 below)  | 612               | 612  | 0  |
| <span style="border: 1px solid black; padding: 2px;">CALCULATED from H's Sched SE</span>                            |                   |  |  |
| <b>10</b> Self-Employment Tax (See instructions)  |                   |  |  |
| H's SE Tax (15.3%)  | 1,224             | 1,224  | 0  |
| <span style="border: 1px solid black; padding: 2px;">ENTER "Community income taxed to spouse" on Line 3</span>      |                   |  |  |
| <span style="border: 1px solid black; padding: 2px;">ENTER "Exempt community income" on W's Sched 2</span>          |                   |  |  |
| <b>11</b> Taxes Withheld  |                   |  |  |
| H's Federl [1/2 is CP thru 6/30] -- <span style="border: 1px solid black; padding: 2px;">ENTER 1040 w/ xpltn</span> | 22,000            | 16,500   | 5,500  |
| W's Federl [1/2 is CP thru 6/30] -- <span style="border: 1px solid black; padding: 2px;">ENTER 1040 w/ xpltn</span> | 20,000            | 5,000  | 15,000   |
| H's State [1/2 is CP thru 6/30] --> <span style="border: 1px solid black; padding: 2px;">ENTER Sched A</span>       | 2,500             | 1,875  | 625  |
| W's State [1/2 is CP thru 6/30] --> <span style="border: 1px solid black; padding: 2px;">ENTER Sched A</span>       | 1,500             | 375  | 1,125  |
| <b>12</b> Other items such as: Social Security Benefits, Unemployment Compensation, Deductions, Credits, etc.       |                   |  |  |
| W's Unemployment Compensation [after divorce]   | 26,000            | 0  | 26,000   |
| Mortgage Int [pd by H >6/30; on each <span style="border: 1px solid black; padding: 2px;">Sched A w/ xpltr</span> ] | 9,000             | 6,750  | 2,250  |
| Property Tax [pd by H >6/30; on each <span style="border: 1px solid black; padding: 2px;">Sched A w/ xpltr</span> ] | 1,800             | 1,350  | 450  |
| H's SEP Contribution [not CP]   | 1,000             | 1,000  | 0  |



# Polling Question # 4

Community income is earned during marriage & must be allocated if filing separately in a CP state.

- Correct
- Incorrect

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# CP Disregarded if...

Failure to Notify: If 1<sup>st</sup> spouse treats income item as his own & does not notify 2<sup>nd</sup> spouse of nature/amount of income by due date (+ extensions)

Live Apart for *entire* year: Allocate wages, SE & partnership income, Social Security to earning spouse only; allocate investment income & capital gains as per state CP rules

|  | H         | W         |
|--|-----------|-----------|
| Wages                                      | \$ 20,000 | \$ 22,000 |
| Business income [only H]                   | 5,000     | 0         |
| Partnership income [only W]                | 0         | 10,000    |
| Dividends from separate property           | 1,000     | 2,000     |
| Interest (\$1,000) from community property | 500       | 500       |
| MFS income if living APART in CP state     | \$ 26,500 | \$ 34,500 |
| If living TOGETHER in CP state             | \$ 30,500 | \$ 30,500 |



# Joint & Several Liability

- Historically, wife's property & debts belonged to husband
  - Husband liable for tax (England @ 1799)
  - Laws eventually recognized that wives should also be held accountable
- US adopted common law (1913)
  - Assigned liability to each spouse for his/her own obligations EXCEPT...
  - In CP states, each spouse must file separately BUT liable for other's debts  
(In CP countries, spouses file jointly BUT husband has 1° liability)
- Joint & several liability adopted by Treasury (1923); enacted 1938
  - In CP state, liability may arise whether filing jointly or separately
  - Spouses shielded only if marriage dissolved

# Collections in CP States

## Pre-marital Debts

- 100% states (CA, ID, LA): liable & non-liable spousal share of CP available
- 50% states (NV, NM, WA): only liable spousal share of CP available
  - AZ, TX, WI: 50% of CP + 100% of liable spouse's community income

## EXAMPLE

H offers to settle separate liability

- IRS will attach H's separate ppty, then H's share of CP...  
...then W's share of CP (if CA, ID or LA)



## Post-marital Debts

- CA, ID, LA, NV, NM: 100% states [TX: 100% of CP + 100% community income]
- AZ, WA, WI: Some debts are separate BUT tax liabilities are always joint

# Relief: Innocent Spouse

- Non-reporting spouse (S2) not liable for omitted community income if:
  1. No joint return filed,
  2. Reported gross income did not include community income,
  3. S2 did not know (had no reason to know) of income, AND
  4. It would be unfair to include income
- IRS may grant equitable relief if:
  - Spousal abuse or mental disability
  - Separation agreement or divorce decree
  - Prevent economic hardship

Innocent spouse relieved of personal liability BUT  
S2's share of CP still available to IRS





# Relief: Injured Spouse

- Federal tax refunds can be used to satisfy taxpayer's debts (e.g., child support, fed. agency obligations, state tax liabilities, etc.)
- Non-liable spouse (S2) can request that joint tax refund be allocated & returned
  - If all items on joint return are CP, then S2 entitled to 50% of refund
  - If S2 can prove separate ppty reported on tax return, then allocated refund may be larger



# Polling Question # 5

When collecting a tax liability resulting from a jointly filed return, the IRS may:

- A. collect the full amount due from either spouse.
- B. collect only half of the amount due from each spouse.
- C. grant equitable relief to the innocent spouse.
- D. return a portion of a tax refund to an injured spouse.

- A and B
- A, B and C
- C and D
- A, C and D



*What's the difference between in-laws and outlaws?*

*Outlaws are wanted!*

# Marriage

- It's a partnership
  - Each partner contributes labor (& capital)
  - For the benefit of the community
- Fiduciary relationship
  - Each spouse entitled to rights & duties
- Comes in all sizes, shapes & colors...



# Registered Domestic Partnership

- Partners = individuals of same sex
  - Registered with state (or municipality)
  - Created to give legal rights & benefits as if married
  - CA allows certain heterosexuals couples to register
- Recognized in 8 jurisdictions:
  - CA, DC, CT, NJ, NV, OR, VT & WA
  - No longer needed after *Obergefell* (2015) upheld same sex marriage
- RDPs not considered “married” for federal tax purposes
  - RDPs in CP states must treat income, deductions & ppty as if married
  - Report ½ of community income on each partner’s separate return



# Same Sex Marriage & Civil Unions



- Not available everywhere but ALL states must recognize marriage performed elsewhere
  - Get same benefits & burdens as opposite sex couples

# Common Law Marriage

- Originally recognized to remove “unwed” stigma
- Based on various factors but NOT time spent together
- Still recognized in CO, IA, KS, MT, NH, OK, RI, SC, TX, UT & DC  
[**NOTE:** None, except TX, are CP states]
  - BUT state laws change!
  - AL, FL, GA, ID, IN, OH & PA no longer allow

# Non-resident Aliens

- NRA does not have lawful permanent residency in US
  - Green Card
  - Substantial Presence Test (183 days)
- Must file Form 1040-NR to claim US source income
- Special Rules:
  - Only S, MFS or QW filing status (i.e. an *individual*, not joint return)
  - Can elect to file joint return with citizen spouse (Marriage Election)





# The 879 Override

- NRA spouse must file separately
  - If either or both spouses in CP jurisdiction, income must be split for MFS reporting
  - But cannot use normal CP allocation if either or both are NRA
- MUST allocate as per IRC § 879...



# § 879: Earned Income

- Allocated solely to EARNING SPOUSE
  - Wages, salaries, professional fees, personal service comp.

## EXAMPLE 1

- H is married to NRA
  - H lives & works in CP country (H is sole earner)
- Despite local CP law, income for US tax purposes is *not* split
- H files Form 1040 (MFS) & reports 100% of income

## EXAMPLE 2

- H is married to NRA spouse (W is sole earner)
- H files Form 1040 (MFS) & reports NO income since ALL allocated to W



# § 879: Other Income

- Allocated solely to spouse who contributed to biz or involved in partnership
  - If both spouses active, then allocate income based on distributive share
- Income from separate ppty belongs to owner of separate ppty, even if local law makes it CP

§ 879 rules trump local CP laws

- All other income characterized based on CP laws of marital domicile
  - EXCEPT real ppty characterized based on CP law of ppty location



# Polling Question # 6

IRC § 879 special allocation rules apply to:

- All non-resident aliens
- Only those NRAs where one or both spouses are domiciled in a CP jurisdiction
- NRAs who have elected to file jointly with a citizen spouse

# International Marriages

- US recognizes all foreign marriages if:
  - Valid in jurisdiction where celebrated AND
  - Would be recognized by at least 1 US state or territory (even if couple is not domiciled there)

## EXAMPLE

- Polygamy allowed under Sharia law
- H marries 4 wives
- Only 1 marriage recognized in US

[although legal in Saudi Arabia, NO jurisdiction in US accepts >1 marriage]



# Place of Celebration Rule

Recognizes foreign marriage AND divorce...

## Facts

- H married W1 in NY in 1955, got Mexican quickie divorce in 1967
- Married W2 in 1967, but lost interest in 1974
- W1 contested Mexican divorce, H did not protest, marriage to W2 declared null & void [H1 was not represented & b/c parties were non-residents, local court lacked jurisdiction] → W2 receives no marital settlement
- H asked W1 for religious divorce in 1986, married W3 in Israel
- H died in 2014, leaves \$87 million estate to W3

## Issues

- IRS: H not entitled to unlimited marital exclusion since not legally married to W3 b/c religious divorce from W1 is not recognized by NY
- Estate: NY law recognizes marriage if valid in place of celebration

Outcome: 3<sup>rd</sup> marriage deemed legal in Israel & NY b/c foreign marriage accepted under state law → validity of religious divorce @ NY irrelevant





# CP Law Abroad

- Common law countries  $\neq$  CP (e.g., Australia, Canada & England)
- CP mostly in South America, some Europe, China, Mexico, Philippines & South Africa
- 3 types of CP regimes:
  1. Universal – all spousal assets (even pre-marital) become CP
  2. Spousal assets become CP only at divorce or death
  3. Only assets acq'd during marriage – except gift/inheritance – become CP

# Foreign CP law for US tax



- For US tax purposes, each spouse must have vested interest in CP ppty
  - Non-managing spouse may obligate community & is entitled to acctg from managing spouse

RULE: If no vested interest, CP rules cannot be applied for US tax
- Marital domicile at outset of marriage may change if couple moves
  1. Mutable – Marital ppty governed by domicile where acquired
  2. Immutable – ALL marital ppty remains governed by original domicile
  3. Mixed – Marital ppty acq'd in original domicile governed by original domicile; ppty acq'd later governed by new domicile
- Situs: In US, location (not marital domicile) of real ppty determines CP
  - Some foreign jurisdiction have situs rules



# Migrating Couples: EXAMPLE

## Facts

- H & W were married in Uganda; both born in Uganda; both UK citizens
- Couple exiled from Uganda; moved to Belgium (where H died)
- H acquired US Stock (XYZ Corp) while in UK; still owned on DOD



Question: Is XYZ community ppty (Belgium law) or separate ppty (UK law)?

## Analysis

1. Marital domicile on DOD = Belgium
2. BUT due to conflict of laws provision, ownership is determined based on common nationality of spouses → UK
3. Under UK conflict of law rules, matrimonial domicile at start of marriage → Uganda
4. As per UK, doctrine of mutability, ppty character is governed by new domicile → UK

Conclusion: XYZ shares = SEPARATE ppty & 100% includable on H's US tax return

# Migrating Couples: Analysis

- CP law where the marriage was celebrated may not govern
- Trace current & previous marital domiciles; determine which law survives conflict
- Establish if doctrines of (im)mutability apply
- Determine if spouses have vested interests
- Confirm that spouses did not elect out of CP regime with contract or convert community ppty into separate ppty







# Close to Home: Canada

- Residency-based taxation in Canada (not citizenship-based)
  - Taxed on worldwide income
  - NO joint returns
  - No recognition of CP
- Canadian taxed in US: CP regime applies only if domiciled in CP state
  - If here on temporary work visa, no CP
  - If here w/ Green Card, must report  $\frac{1}{2}$  of Canadian spouse's income on state & federal returns BUT...
  - NO federal inclusion of Canadian income on dual-status return (year of residency change)

# EXAMPLE: Canadian comes to CA

## Facts

- Canadian H works in Canada; owns home & lives in Montreal
- American W works in California (CA); lives in jointly-owned CA home
- H regularly visits W in CA; stays in CA whenever he's not working

## Analysis

- H is a dual-resident deemed to be **Canadian resident** (as per tie-breaker rules of US-Canada Treaty)
- **Marital domicile** = CA
  - Family home in CA
  - H returns frequently & appears to have “intent” to stay in CA
- Subject to **CA community property regime** on worldwide income

## Tax Filings

- H files Form 1040-NR (must attach Form 8833)
  - Reports US source income (but not W's wages)
- W files Form 1040 (uses MFS filing status)
  - Reports 100% of her wages [IRC § 879] + 50% of H's Canadian wages on federal & state returns





# Close to Home: Mexico

- Couples may choose joint or non-joint ownership of ppty
  - ½ of marital (& pre-marital) assets → spousal ppty at divorce or death
  - Both partners are liable for marital debts
  - Joint regime must be affirmatively elected
- Same sex & foreign marriages recognized
  - If foreign spouse, marriage must be registered in MX
  - Marital agreements recognized if incorp'd into marriage license
- Marital domicile = place where spouses live together > 6 months



# Polling Question # 7

Even if the international marriage is legal, foreign CP is recognized for US tax purposes only if:

- A. Each spouse has a vested interest in the property.
- B. The laws of the marital domicile can be traced.

A or B

A and B

# Gift & Estate Taxes

- US citizens subject to tax regardless of residence or domicile
- Non-citizens subject to tax based on domicile at DOD
  - Domicile if living in US (even temporarily) if no intention to move away
  - May be domiciled for estate/gift but not income tax
- Special rules for NRAs
  - Annual exclusion (\$15K available)
  - Transfers to non-citizen spouses limited to \$159K (2021)
  - NO gift-splitting
  - NO lifetime exemption; estate exemption limited to \$60K
- Domiciliaries subject to tax on worldwide assets; non-domiciliaries taxed only on US-sited assets





# US-sited Assets

| Asset Type                | Example  | Gift Tax | Estate Tax |
|---------------------------|--|----------|------------|
| <b>Real Estate</b>        | Land & buildings   | ✓        | ✓          |
|                           | Co-op interest   | ✗        | ✗          |
| <b>Tangible pers ppty</b> | Cash & Currency  | ✓        | ✓          |
|                           | Collectibles   | ✓        | ✓          |
|                           | Art on loan for public xhbtn                                       | ✗        | ✗          |
| <b>Intangible ppty</b>    | Cash & money market accts at B/D                                   | ✗        | ✓          |
|                           | Bank, S & L, credit union accts (if NOT effectively connected)     | ✗        | ✗          |
|                           | Bank deposits (if effectively connected to trade or biz)           | ✗        | ✓          |
|                           | Offshore branch of US bank   | ✗        | ✗          |
|                           | Domestic (US) stocks, mutual funds, partnerships (filing as corps) | ✗        | ✓          |
|                           | Foreign stocks, ADRs, stocks of US Territories                     | ✗        | ✗          |
|                           | US-sited assets of LLC   | ✗        | ✓          |
|                           | US-sited assets of grantor trust                                   | ✗        | ✓          |
|                           | US corporate debt (if eligible for portfolio interest xctn)        | ✗        | ✗          |
|                           | Short-term debt (< 183 days)                                       | ✗        | ✓          |
|                           | US Treasury obligtns (incl. short-term)                            | ✗        | ✗          |
|                           | Municipal bonds  | ✗        | ✗          |
|                           | Life insurance on decedent   | ✗        | ✗          |
|                           | Life insurance on 3 <sup>rd</sup> party                            | ✗        | ✓          |
|                           | Copyrights & patents   | ✗        | ✓          |
| <b>Treaty-based xclns</b> | Currently 15 in effect   | ✗        | ✗          |

# Basis

- Inherited assets are valued at FMV on DOD
  - Introduced in 1916 to ease administrative burden
  - Minimizes (or eliminates) capital gains tax
- Surviving spouse gets *full* (double) step-up on CP assets
  - Step-up applied only to decedent's share of joint assets until 1948
  - Some common law states now allow CP trusts for (non)-residents



## EXAMPLE 1: OLD law

–\$500K ppty (\$100K basis)

→if H's separate ppty, W got full step-up

→If CP, W got step-up on H's ½ (\$250K) but kept own basis on her ½ (\$50K)

## EXAMPLE 2: NEW law

–\$500K ppty (\$100K basis)

→If CP, W gets step-up on H's ½ (\$250K) *and* W's ½ (\$250K)

# Form 706 Reporting

- Use form to compute decedent’s gross estate & estate tax due
- Enter assets & liabilities on Schedules A – O
  - Valued on DOD or Alternate Valuation Date (AVD)
  - Carry each schedule’s totals to Recapitulation onto Page 3, Part 5

under section 2039(b)(7) and which is not reported on this return. If "Yes," attach an explanation . . . . .

**Part 5—Recapitulation. Note:** If estimating the value of one or more assets pursuant to the special rule of Reg. section 20.2010-2(a)(7)(ii), enter on both lines 10 and 23 the amount noted in the instructions for the corresponding range of values. See instructions for details.

| Item no. | Gross estate  | Alternate value | Value at date of death |
|----------|---|-----------------|------------------------|
| 1        | Schedule A—Real Estate . . . . .  | 1               |                        |
| 2        | Schedule B—Stocks and Bonds . . . . .   | 2               |                        |
| 3        | Schedule C—Mortgages, Notes, and Cash . . . . .   | 3               |                        |
| 4        | Schedule D—Insurance on the Decedent’s Life (attach Form(s) 712) . . . . .                  | 4               |                        |
| 5        | Schedule E—Jointly Owned Property (attach Form(s) 712 for life insurance) . . . . .         | 5               |                        |
| 6        | Schedule F—Other Miscellaneous Property (attach Form(s) 712 for life insurance) . . . . .   | 6               |                        |
| 7        | Schedule G—Transfers During Decedent’s Life (att. Form(s) 712 for life insurance) . . . . . | 7               |                        |
| 8        | Schedule H—Powers of Appointment . . . . .  | 8               |                        |
| 9        | Schedule I—Annuities . . . . .  | 9               |                        |

# 706: Reporting CP assets

- Do not use *Schedule E, Jointly Owned* property. Instead...
  - Report each asset on Schedules A – I at full value
  - Make 2<sup>nd</sup> line entry to remove surviving spouse's ½ value of CP

| Item number | Description   | Alternate valuation date | Alternate value | Value at date of death   |
|-------------|---|--------------------------|-----------------|--------------------------|
| 1           | Personal Residence: 1543 South Cardiff Street, Los Angeles, CA 90030<br>Described as "TRACT # 7671 LOT 106" Parcel # APN 430601402.<br>(Value based on sales price at the close of escrow on May 5, 2020).<br>LESS: 1/2 allocable to surviving spouse as community property |                          |                 | 2,400,000<br>(1,200,000) |

- Use *Schedule M, Bequests to Surviving Spouse* to report transfers eligible for unlimited marital deduction
  - Include only decedent's ½ interest in CP

# Form 709 Reporting

- Use form to report assets transferred during life & compute gift tax liability
  - File for individuals only (not couples)
  - If CP gifted, must report ½ value on each spouse's return
  - No consent to gift-splitting required for CP ppty

## EXAMPLE 1

- In CP state, H & W gift \$100K of CP assets to Son
- Each spouse must file 709 to report \$50K (no gift-split consent)

## EXAMPLE 2

- In CP state, H gifts \$100K of separate assets to Son
- Each spouse must file 709 to report \$50K (sign consent on Line 18)

|   |   |
|---|---|
| Form <b>709</b><br>Department of the Treasury<br>Internal Revenue Service | <b>United States Gift (and Generation-Skipping Transfer) Tax Return</b><br>▶ Go to <a href="http://www.irs.gov/Form709">www.irs.gov/Form709</a> for instructions and the latest information.<br>(For gifts made during calendar year 2020)<br>▶ See instructions. |
|---|---|



## Polling Question # 8

A decedent's estate includes the full value of community property.

- Yes
- No

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# Termination of Community

- Via death, divorce, separation, or change of domicile depending on jurisdiction
  - In most CP states, dissolution of marriage only w/ final court decree
  - CA & WA: Can dissolve with physical separation if no intent to reconcile

## EXAMPLE 1

- H & W file for divorce but continue to live together
- H incurs credit card debt of \$5
- Court will allocate 1/2 of debt to W

## EXAMPLE 2

- H & W file for divorce; H moves out and incurs debt
- Court will allocate 100% pf debt to H



# Written Agreements

- Pre- & post-nups
- CP Trusts
- IRS will honor agreements drafted in accordance with state law (Rev Rul 73-390)
- Debtors must be notified of agreements
  - AZ & CA: Beware of fraudulent conveyance statutes
  - LA: must be recorded
  - WA: not effective against debts already in existence prior to creation of agreement
  - WI: must give actual notice *before* liability incurred



# Doctrine of CP

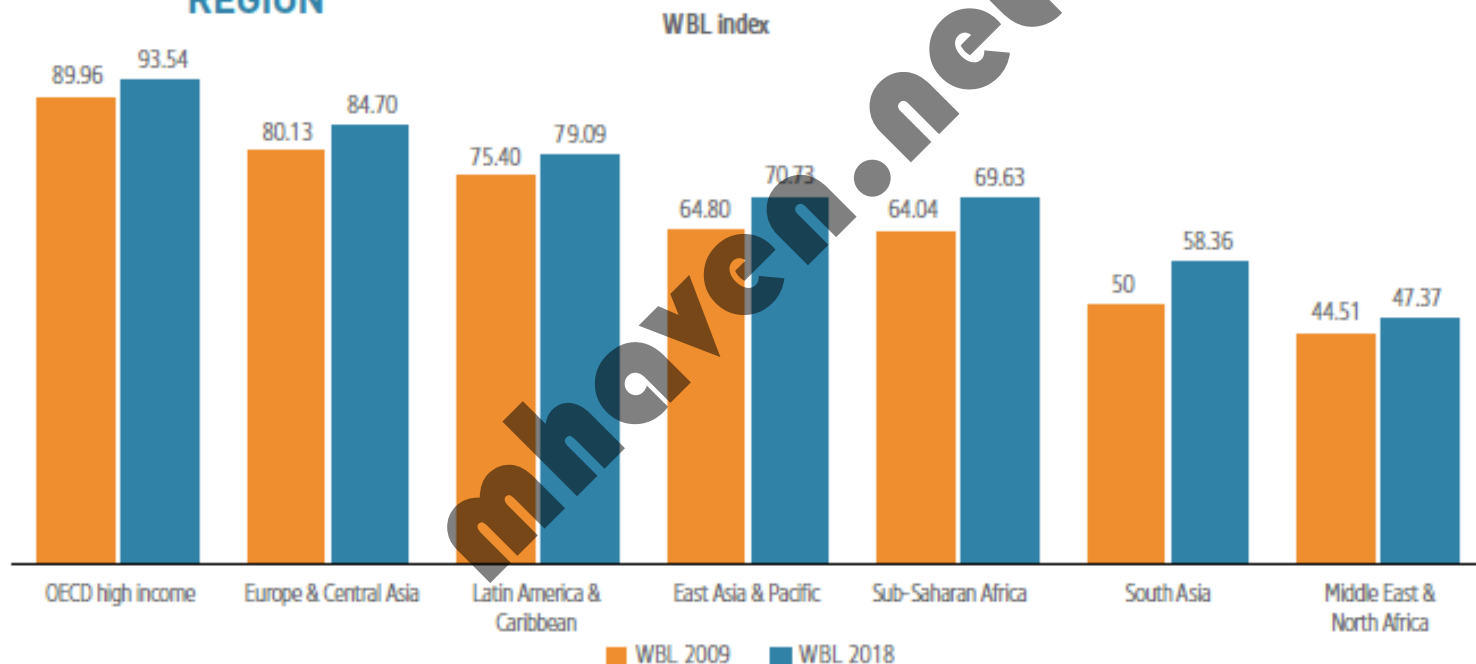
- Based on 3 principles:
  1. Separate legal identity
  2. Partnership
  3. Ownership not title
- Benefits for women:
  - Financial reward for work done in home
  - Can enter into contracts independently
  - Maintain or establish separate ppty
  - Acquire wealth through marriage
  - Protected by equitable distribution if marriage terminated



# Gaining on Equality for Women

FIGURE 6

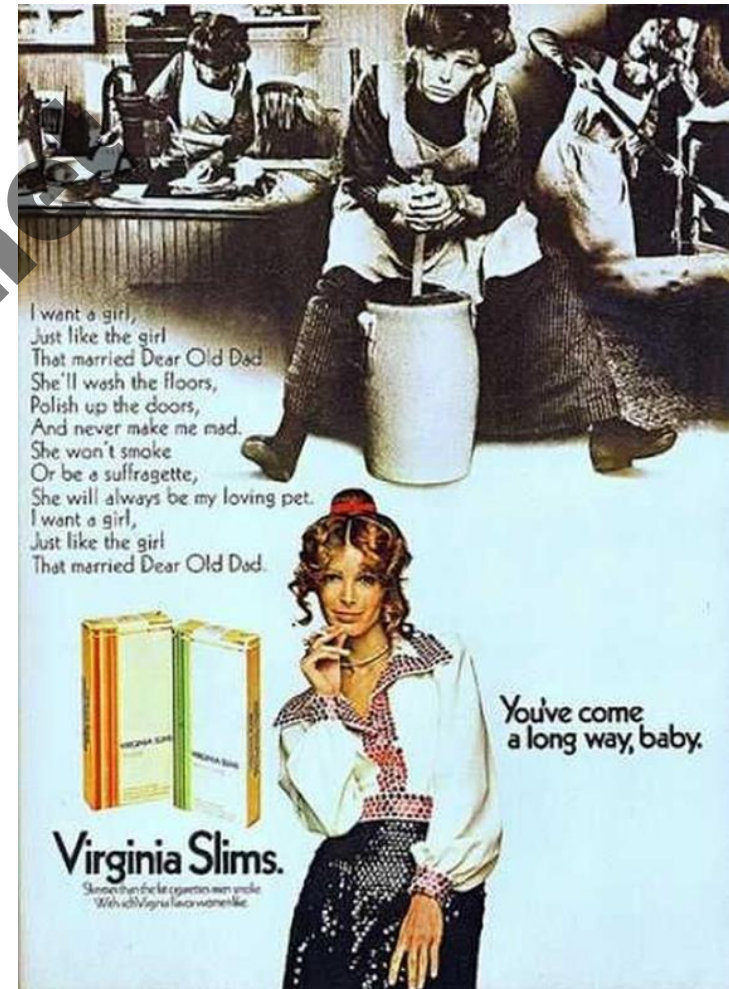
ON AVERAGE, LEGAL TREATMENT OF WOMEN BECAME MORE EQUAL IN EVERY REGION



Source: Women, Business and the Law database.

# Global Gender Gap

- 75 countries limit women's right to manage assets
- 9 countries still grant administrative rights to husbands only
- Countries where women most equal: Belgium, Denmark, France, Latvia & Luxembourg [World Bank Score = 100]
- Least equal in Saudi Arabia [Score = 25.63]
- US scores 83.75



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