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# Nothing Says ‘I Love You’ Like a Contract

BY CAPTAIN MATTHEW H. ORMSBEE, USAF

**Abstract:** A community property agreement (CPA) is a unique estate planning device that could save considerable time and resources for the heirs of military members with relatively simple estates by avoiding the probate process. Air Force legal assistance attorneys are well positioned to advocate for greater usage of CPAs and to draft them with confidence, together with a will, using the Air Force’s primary testamentary document drafting software.

As legal assistance attorneys and paralegals, we draft our clients’ requested estate planning documents, oversee document execution, and generally consider our work done. But it is also our job to ensure that clients’ later efforts to use their estate documents are as painless as possible. In other words, clients’ estate planning should continue beyond the execution of the will to incorporate community property agreements (CPAs), when possible, to effectuate our clients’ overall intent.

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The probate process is often lengthy, bureaucratic, and expensive. For this reason, the probate process should usually be avoided.<sup>[1]</sup> Yet, as legal assistance attorneys and paralegals, we often focus on producing estate planning documents for our clients without considering which documents are most practical for their unique circumstances. As such, this article will explore how we can arm ourselves with knowledge on the array of estate planning documents at our disposal to fulfill our clients’ wishes and assist in avoiding unnecessary probate.

## COMMUNITY PROPERTY

Nine states—Washington, California, Nevada, Arizona, New Mexico, Texas, Louisiana, Wisconsin, and Idaho—apply the community property principle of law.<sup>[2]</sup> The U.S. Territories Guam and Puerto Rico also apply the community property principle of law.<sup>[3]</sup> Alaska has also adopted a community property system, but its residents must opt in for such provisions to apply to them.<sup>[4]</sup>

Under the community property regime, a spouse automatically owns one-half of all property acquired during the marriage, absent a written agreement to the contrary.<sup>[5]</sup> Property includes all money earned by either party during the marriage, anything bought with that money, and all debts incurred by either party.<sup>[6]</sup> Exceptions to this system deem ownership as spouse-specific for property if received as a gift or inheritance, or if otherwise obtained before the marriage.<sup>[7]</sup>

## COMMUNITY PROPERTY AGREEMENTS

CPAs are notarized contracts in which two spouses agree: (1) to convert all their property, whenever and wherever acquired, into community property upon the death of the first to expire; and (2) to give all such property to the surviving spouse free of probate (and even successor beneficiaries in certain states).[8] Property included in a CPA completely avoids probate, while the parties' property that is excluded from the CPA may not avoid probate.[9] Because CPAs are contractual agreements, they remain valid even if the spouses should move to a common law state, if the agreements are valid at the time and place where they are executed.[10] Best of all, CPAs can easily be generated through the Wills Program in the Drafting Libraries™ software (hereinafter "DL Wills"). Within DL Wills, the option to generate a CPA is an automatic prompt for married testators claiming domicile in a community property jurisdiction.

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### CPA is a vehicle for wholly avoiding probate.

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While ownership by joint tenancy with right of survivorship is another option for property ownership by spouses without the need for probate, it also presents limitations that a CPA would avoid. For instance, while a CPA converts all included property owned by two spouses to community property on the date of the first spouse's death, ownership by joint tenancy with right of survivorship is a chosen method of ownership that is selectively applied to certain assets held by a couple, such as real estate. Thus, less valuable property, such as personal property, may not be significant enough to be legally held in a joint tenancy. Instead, furniture, firearms, or jewelry, for example, would simply be owned by one spouse and brought into the marriage without reflecting joint ownership of the property. Thus, a CPA is a vehicle for wholly avoiding probate, while ownership by a joint tenancy would save some but not all assets from probate. Finally, as discussed in the next section, when considering third party creditor claims to one spouse's property, keeping spouses' property separately owned may be well warranted until the

date that the first spouse dies, in order to limit the extent of creditor claims to the second spouse's property.

## CPAS LOVE COMPANY

While a CPA offers the enormous benefit of disposing of all of one's property without the need for a will (and without the complexity of a trust), it is not a stand-alone document. A CPA cannot completely replace a will, which is still useful to capture vital decisions concerning, for example, simultaneous death of spouses, guardianship, and disposition of separate property, such as property expressly excluded from a CPA. A CPA is inappropriate for these vital decisions and including them in a CPA might risk invalidating the agreement, since such issues are outside the scope of a CPA.[11] As an alternative to a CPA, spouses may place property in joint names. However, there are reasons to avoid placing property under joint names if, for instance, one spouse has considerable debts and wishes to keep creditors from reaching the joint property.[12] Further, in case of an inconsistency between a will and a CPA (or between joint ownership with a third party and a CPA), the CPA takes precedence.[13]

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### Before turning to a CPA, a practitioner should be fully aware of the benefits and drawbacks of doing so.

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## FURTHER DETAILS

Before turning to a CPA, a practitioner should be fully aware of the benefits and drawbacks of doing so. First, a CPA is ordinarily an all-or-nothing document—meaning that, traditionally, all property owned by two spouses is included in the agreement.[14] While this means that specific gifts under a CPA are forbidden, spouses may nevertheless still expressly state in an attachment to the CPA which property is excluded from the agreement so that these items remain separate property. If such an attachment is not used, the surviving spouse will inherit all the CPA property and the deceased spouse's children will receive nothing—which may be important if there are concerns about a step-parent caring for a deceased spouse's child(ren).[15]

Second, clients must know the two ways to void a CPA. Spouses can either: (1) mutually consent in a written and notarized agreement that the CPA is voided (or amended, as the case may be); or (2) the CPA will be automatically voided if the spouses divorce or permanently separate.[16] Importantly, because CPAs are binding contracts, neither spouse, acting alone, can change or revoke them (contrast this with a will, which a testator can unilaterally revoke). Note also that merely separating, taking a “break” from the relationship, or living apart, without the intent to permanently separate, generally does not suffice to revoke a CPA, unless the verbiage of the CPA relaxes this commonly held standard (by stating, for instance, that separating for two months or longer shall suffice).[17] Clients must be aware that there is case law to suggest that in the event of conflicting language between a CPA and a will, or between a CPA and a claim of joint ownership, the CPA will not necessarily be found invalidated, and thus may still control.[18] The reasoning is that a later will disposing of property differently from a CPA is a *unilateral* choice, but the consent of both spouses is necessary to terminate a CPA.

Third, the limitations of CPAs must be clear. For instance, a CPA alone does not avoid probate for the surviving spouse, unless they later take additional steps to avoid probate.[19] As previously mentioned, a CPA also does not help in the case of the simultaneous death of spouses, nor does it permit gifts or specific dispositions. In addition, a CPA does not avoid probate for out-of-state real estate, which must be probated through an ancillary probate proceeding in the given state. Finally, a CPA may affect a spouse’s eligibility for government benefits, though there is often language in a CPA stating that if an inheritance would disqualify a spouse for government benefits (e.g., Medicaid determinations), the spouse can disclaim to qualify. In such a case, the spouses may be better served with a special-needs trust, which allows the surviving spouse to benefit from inherited property without impacting government benefit eligibility.

Finally, each state provides its own rules on how to draft and execute a CPA. As a best practice, CPAs should be in writing and witnessed or notarized, so that they undergo the same level of scrutiny and review as other estate planning

documents.[20] In some states, CPAs covering real estate may be filed in the county assessor’s office where the real estate is located.[21] Thus, it is vitally important for legal assistance attorneys to review the state’s laws on the subject and ensure that the CPA generated by DL Wills is facially in conformity with state-specific legal requirements.[22] While DL Wills currently takes into account state-specific requirements for estate planning documents, if a legal assistance attorney is given unorthodox or complex facts for a CPA—or if a legal assistance attorney does not feel comfortable advising on state laws regarding CPAs—it is advisable to suggest that the client see a private estate attorney.

### CPAS TRAVEL

It is a fact of life that military members and dependents travel often. So long as a CPA is valid when and where it is originally executed, CPAs can travel with military members and retain their validity under the original state’s laws, even if military members move to a non-community property state or a foreign country, and even if spouses change their residency.[23] This is because CPAs are contracts, and absent a contractual term to the contrary, contracts remain valid even if the parties change addresses. Indeed, another benefit of a CPA is that it may clarify the classification of property acquired by a couple during their multiple duty station assignments, whether community property or common law property. Note, however, that if a couple later moves to a common law state, all assets and debts acquired during the life of the marriage in such state shall be viewed in light of the common law property division rules, instead of community property rules. Nevertheless, real estate in a common law state that is bought with community property income can be treated as community property.[24]

### CONCLUSION

CPAs should be used more often, since thousands of military members and dependents are stationed within community property jurisdictions. Many more will rotate through servicing legal offices in these states in the coming years. Given the number of service members changing station each summer—and the number of members domiciled in a community property state while stationed in a non-community property state—a substantial number of clients could benefit

from CPAs. Legal offices in community property states should inform clients of the benefits of having a CPA, which can effectuate the client's estate plan, while saving their heirs unnecessary stress and wasted time. By doing so, legal assistance attorneys and paralegals fulfill our mission to provide effective and efficient estate planning to our clients.

## ABOUT THE AUTHOR



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## ENDNOTES

- [1] National Probate Court Standards, 3.2. Decedent's Estates, 40, [http://www.superiorcourt.maricopa.gov/SuperiorCourt/ProbateAndMentalHealth/docs/Probate\\_National\\_Standards.pdf](http://www.superiorcourt.maricopa.gov/SuperiorCourt/ProbateAndMentalHealth/docs/Probate_National_Standards.pdf), (last visited Aug 11, 2018), ("Without simplifying and reducing the expense of estate administration, the current trend to avoid probate to transfer property at death will accelerate.").
- [2] IRS Internal Revenue Manual, Section 25.18.1 Basic Principles of Community Property Law, [https://www.irs.gov/irm/part25/irm\\_25-018-001](https://www.irs.gov/irm/part25/irm_25-018-001), (last visited Aug. 11, 2018).
- [3] *Id.*
- [4] *Id.*
- [5] This article speaks in terms of marriage and spouses, though some community property jurisdictions also extend community property principles to unmarried individuals in a registered domestic partnership. See, e.g., Charlotte K. Goldberg, Opting In, *Opting Out: Autonomy in the Community Property States*, 72 La. L. Rev. (2011).
- [6] Each state's laws are different. A legal advisor must investigate each state's laws before advising a client based on widespread community property principles.
- [7] IRS Manual, *supra* note 2, at Section 25.18.1.3.11.
- [8] Karen E. Boxx, *Community Property Across State Lines*, A.B.A. (Jan/Feb 2005), [https://www.americanbar.org/publications/probate\\_property\\_magazine\\_home/rppt\\_publications\\_magazine\\_2005\\_jf\\_communityProperty.html](https://www.americanbar.org/publications/probate_property_magazine_home/rppt_publications_magazine_2005_jf_communityProperty.html).
- [9] Thomas M. Featherson, Jr., *Nonprobate and Probate Dispositions of Community Property*, BAYLOR U. SCH. OF L. (2010), 14, <https://www.baylor.edu/content/services/document.php/159727.pdf>.
- [10] Restatement (Second) of Conflicts of Laws § 259, (1971) (Notably, even using community property funds to purchase real property in a common law state would preserve the community interests of the spouses.) (hereinafter Second Restatement of Conflicts of Laws).
- [11] Boxx, *supra* note 8. (Note, however, that a severability clause may preserve a CPA, minus a clause that exceeds the scope of a CPA, if the parties agree to a clause that is inappropriate for inclusion in a CPA.)
- [12] Another reason would be to help a spouse qualify for Medicaid or social security.
- [13] *In re Estate of Bachmeier*, 52 P.3d 22, at 26 (Wash. 2002).
- [14] Morgan Hill, *Community Property Agreements* (2015), <http://www.olympialegal.com/blog/2015/1/27/community-property-agreements>, (last visited Aug. 11, 2018). (In addition, while spouses may hold separate property, which they solely own and control, "the law in the community property states does not favor this." IRS Manual, *supra* note 2, at 25.18.1.2.2. Thus, the majority of two parties' assets is generally included when a CPA is executed.)
- [15] *Id.*

- [16] In re Estate of Bachmeier, *supra* note 13, at 25.
- [17] *Id.*
- [18] *Id.*
- [19] In Alaska and Wisconsin, a CPA can name a beneficiary to inherit the property at the *second* spouse's death. (In Washington, some commentators believe this is allowed, but courts have not explicitly said so).
- [20] A notarization can proactively address a later allegation that a party to a CPA did not actually sign the document. *See, e.g.*, Wash. Rev. Code § 42.45.080(2), which states, "The signature and title of an individual authorized by chapter 281, Laws of 2017 to perform a notarial act in this state are prima facie evidence that the signature is genuine and that the individual holds the designated title."
- [21] *See, e.g.*, the Land Records FAQs for Ada County in Idaho, Ada County Assessor's Office, <https://adacounty.id.gov/assessor/land-records/land-records-faq>, (last visited Aug. 11, 2018).
- [22] For general information on select community property states' laws on this topic, see:
- Alaska Stat. § 34.77.090.
  - Arizona Stat. § 25-211.
  - Cal. Probate Code § 100(a).
  - Idaho Code § 15-6-201.
  - Louisiana RS 9:2801.
  - Nevada Rev. Stat. 123.225.
  - New Mexico Stat. § 45-2-807.
  - Tex. Probate Code § 112.051.
  - Wash. Rev. Code § 26.16.120.
  - Wis. Stat. § 766.58. (hereinafter "Community Property State Laws")
- [23] Second Restatement of Conflicts of Laws, *supra* note 10, at § 259.
- [24] *Id.* at § 223.