

December Article Title: *SHARING THE AMERICAN DREAM*

As a result of overwhelming interest in the November column of *LaCROIX IN BRIEF*, "Planning for Peace of Mind", I thought I would expand our topic of estate planning in this issue to address the most popular question asked by our readers: How does community property affect planning an estate? This is a very interesting topic and certainly worth looking into.

Before we begin, I would like to remind you that topics discussed in this column are for informational purposes only. My objective is to provide you with a cost-free, no-obligation forum to gain some basic knowledge about issues that are important to you. This column does not take the place of a legal consultation or any legal advice given to you by your attorney.

Let us start our discussion with a general explanation of the principles of community property. During your lifetimes, husbands and wives share equal ownership of all property acquired during your marriage. This means that the property is subject to equal rights of management and control by both the husband and the wife. These rights are yours to share automatically, 50-50, as soon as the property is acquired.

When one spouse passes on before the other, the living spouse automatically gets one-half of the property. This is the 50% that was acquired by the surviving spouse automatically when the property was obtained. The other 50% (the half that belonged to the deceased spouse) becomes subject to the deceased spouse's will or trust. It is possible for the deceased spouse to leave all, part, or none of his/her share of the property to the surviving spouse.

What this means so far is that the law of community property guarantees that the surviving spouse will get *at least* one-half of the property acquired during the marriage. Whether the surviving spouse gets more than one-half depends on the will or trust left by the deceased spouse.

So, how do we determine what is "one-half" of the property? Quite simply, we assess the value of the property and then split it right down the middle. This is why it is so very important that spouses act responsibly and fairly when managing their community property.

In fact, the law tries to protect each spouse's share of the community property by imposing the obligations of a "confidential relationship" on a husband and wife. A "confidential relationship" requires that the people in that relationship -- in this case, you and your spouse -- always act in good faith toward one another when managing the community property.

If either you or your spouse act irresponsibly with any part of your community property -- for instance, gambling away \$50,000 without your spouse's permission -- that part of the property with which you were irresponsible will come out of *your* half of the estate only. In other words, if your total estate is worth \$300,000 and you gambled \$50,000 without your spouse's permission, your spouse will still be entitled to \$150,000 of the estate, and only \$100,000 of the estate will be subject to your will or trust.

This protection is in effect if both spouses pass on at the same time, as well. In a "simultaneous death" when both of the spouses acted responsibly with their community property, the 50% that automatically belonged to the wife passes on to the wife's heirs, and the 50% that automatically belonged to the husband passes on to the husband's heirs. However, if either the husband or the wife acted irresponsibly with the community property, the amount that was squandered will be taken from the heirs of the squandering spouse only.

It is important to keep in mind that this simultaneous death rule applies only to community property law. Things become much more complicated in a simultaneous death with insurance law. For instance, under an insurance policy, when it cannot be proven that the beneficiary survived the insured, it is assumed that the insured survived the beneficiary. This means that the insurance money of the insured will go to the alternate beneficiary instead of to the heirs of the beneficiary. The principles of community property do not apply in insurance matters.

Sometimes, the principles of community property may conflict with the intent of a will, as well. For example, let us imagine a husband who is accustomed to making all of the financial and legal decisions in the family. Being an informed man, he is aware that his wife would be able to claim one-half of the estate upon his death because of her rights under community property law. This gentleman, hoping to provide for his wife as best he can, decides that he should write up a will that leaves one-third of the property to his wife and two-thirds to other heirs. This way, in this man's mind, his wife can claim not only her automatic half, but also one-third of his half (basically, then, inheriting two-thirds of the entire estate).

The unfortunate twist in this situation is that the husband's will has not been written in such a way as to make his intent absolutely clear to the court. Because it appears that the husband is referring to the entire estate rather than simply his half, his wife is given the option of claiming either one-half of the estate, as she is entitled by community property law, or one-third of the entire estate, as interpreted through her husband's will. The poor wife is barred from claiming the two-thirds of the estate on which she very innocently -- and mistakenly -- had her hopes set.

My point is that community property law is a wonderful tool in constructing an estate plan; it is a secure foundation on which to build. However, community property cannot be looked upon as the sole structure of your plan. You must implement a clear, precise will or trust, and, most importantly, both spouses must be involved in the planning process.

Togetherness is the key to community property. It was together that you set and reached your goals, and it is together that you need to plan for your heirs. Now is not the time for either of you to fall asleep on the American Dream!

Bob LaCroix is an attorney who has served San Diego County since 1979. To request a topic for a future edition of LaCROIX IN BRIEF, write to Bob in care of this newspaper. If you would like to participate in one of Bob's low-cost legal workshops, or if you need to discuss a legal matter in private, feel free to call Bob's office at 223-2527.