Overview of Arizona's Community Property System

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Theories for a marital property system

Community Property ("CP") System = one method for regulating marital property.

CP jurisdictions = Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin.

There are several theories concerning why a comprehensive system of rules for marital property has developed. The theories aren't mutually exclusive; some complement each other, while some approaches conflict. No one of these views is correct. As is true with all law, when you need to figure out which of several possible rules should be used, and how those existing rules should be used, the theories unlock the secret of the answer to "what's the best thing to do?"

Some of the different bases for Marital Property Law:

--There is a need to have some system for Marital Property - like property generally, or distribution of assets at death, or bankruptcy, or partnership dissolution, or contracts.

--Marital property rules are in part just a default (like intestate succession and gap-filling rules for contracts), with the default set as an approximation of what many people would say they want or can live with, given that most people won't adjust the default.

--Marital property rules in part promote sharing, and translate into during-the-marriage comfort and efficiency while married - they thus facilitate on-going marriages by assisting in ease of allocation by calming fears within an on-going marriage.

--Marital property rules in part may be set to effectuate evenhanded distribution of controlled assets at the end of a marriage, with a goal of an affirmative distributional shift as protection for the spouse who does not generate tangible assets, which historically was women.

--Marital property rules can be set to promote distribution of assets towards the child-care giver(s), perhaps the primary reason for post-marriage unequal economic circumstances faced by the former spouses.

--Marital property rules are in part capable of facilitating ease of separation at divorce (it is not as clear as it might seem at first glance that this is what people desire, however).

Structure for AZ marital property - (Typical of Community Property jurisdictions generally with some differences among jurisdictions noted)

Existence and termination

Existence: The marital community starts w/a valid marriage on the date of that marriage.

Not before - living together - whether before a marriage or without marriage - is left to contract (enforceable despite the fact that open/notorious cohabitation used to be a crime)

A marriage valid in any state is treated as valid in Arizona.

Most CP states, including PROBABLY Arizona, have a "putative good faith spouse" concept, applicable only when at least one spouse believes in good faith that he or she was lawfully married. It does not apply to "living together but aware there is no valid marriage."

There is no common law marriage in AZ. (The only CP jurisdiction recognizing common law marriage by that name is Texas.)

Termination - Community ends at either death or divorce (agreements by spouses can eliminate community property but do not end the "marital community").

Effective date of Termination at Divorce: CP asset and debt generation ceases when one of the spouses files for divorce and notice is served on the other spouse, IF THAT FILING results in final decree. The old AZ rule left the community in place end until divorce/separation judgment decree is final. That is still true (so for example income generated by a community asset is CP until final judgment). Assets and debts generated by either of the spouses stops being CP at filing/notice that leads to divorce.

(Different jurisdictions do this differently - CA and WA CP assets/debts no longer generated if no intention of being married or no "will to union.")

Conflicts of Law rule = AZ rules concerning existence and termination apply if AZ is the marital domicile - if AZ not the marital domicile, AZ rules may well not apply.

Definition of Community Property

ARS 25-211 (Classic definition of CP, present everywhere) - All property acquired by either spouse during marriage other than by gift, descent, devise.

So from first day of valid marriage through filing and notice of divorce that ends up in a final decree or date of death of one of the spouses:

Salary/wages/assets generated through working - profit sharing - stock - benefits - bonuses - pensions - goodwill - money acquired through loans - borrowing - tort awards -

Anything created by efforts of either spouse = CP

PLUS - Anything TRACEABLE to that CP = CP - eg

interest on CP accounts; increases in worth of CP real property increases in worth of CP business; investments made with CP income

Nature of ownership of Community Property

During a marriage CP = undivided ½ ownership. This means there is no partitioning or severing of the CP unless by agreement of both spouses. In AZ neither spouse can individually turn his or her or their "share" of the CP into his or her or their own (that is, Separate Property) assets, nor can a creditor force such a partitioning or severing event. (A few CP jurisdictions vary aspects of this, while AZ and CA notably strictly maintain this structure.). CP only exists during an on-going marriage. Community Property does not survive divorce or death - at either point, the CP is divided and the shares becomes the SP of the recipients.

Definition of Separate Property -

ARS 25-213 (also typical of CP jurisdictions generally) - All property acquired by either spouse prior to marriage

So what each spouse brings in = SP - not turned into CP just by marriage - (This means it is as much a SP system as a CP system!!!!)

PLUS - SP includes all property acquired by gift, descent, devise during marriage

So specific gifts and inheritances received by either during marriage remain that spouse's SP

PLUS - SP includes all rents, issues, profits of SP acquired during marriage but traceable to SP

So interest income from a spouse's SP bank account, although acquired during the marriage, even if withdrawn from that SP account, remains the SP of that spouse. (This rule, which is typical of most CP jurisdictions, but not all, is known as the "American rule." The alternative is to consider rents, issues and profits acquired during the marriage to be CP, and only leave things like "natural appreciation" of SP real property as staying with the SP.)

Thus to sum up SP = whatever owned by each spouse at time of marriage - houses, stock, $ in accounts, real property, cars, business, etc. These assets DO NOT turn into CP just by virtue of the marriage. In addition, whatever is acquired during marriage by gift, descent, devise = SP, and whatever is SP generated and traceable to SP e.g. interest on SP bank account/rent on an SP building/increase in SP stocks and bonds = SP.

At the end of a marriage:

SP is also the proper characterization for all assets and liabilities generated by either spouse (not traceable to CP) after someone files for divorce and gives notice, IF THAT FILING results in divorce (this varies by CP jurisdiction depending on the rule for when community ends)

How to identify CP and SP: Characterization of Assets

The strong emphasis on SP in the statute means that when an event arises necessitating classification of assets as CP or SP (typically divorce or death, but also during on-going marriages concerning debts) there will inevitably be disputes concerning whether assets are SP (which MUST stay with the SP owner) or CP (to be divided between the spouses).

The basic process for characterizing an asset as CP or SP requires a presumptive default characterization and tracing evidence.

Basic presumptions for community property issues

Presumptions assign burdens of proof, which is necessary concerning e.g. a divorce, because there is no plaintiff/defendant concerning a division of assets at divorce or death. Presumptions matter and MUST be considered when giving advice, because they establish burdens and give you a sense of how easy or hard it will be to prove something.

The presumptions also indicate particular biases of rules and signal outcomes.

There are two general, overriding presumptions concerning the characterization of an asset as either CP or SP:

1. All property acquired by either spouse DURING the marriage is PRESUMED CP

but . . .

2. A change in asset form does not cause a change in characterization of an asset.

For example (assume the following events happen in the number order listed):

1. A person has money in a bank account;

2. That person gets married;

3. While still married, that person takes money out of the account and uses it to buy a car

The question: Is the car CP or SP? (This could arise at divorce, death, or in on-going marriage.)

The overriding presumption = PRESUME the car is CP b/c it was acquired during the marriage.

This places the burden on the SP spouse to prove it isn't CP.

But . . . in this example, if the SP spouse provides clear and convincing evidence that the car was purchased out of the SP bank account, the ultimate characterization of the car = SP, b/c a change in asset form (here from money to car) doesn't change characterization of the asset.

Remember, a presumption is just a starting point, assigning who has the burden of proof. All assets acquired during the marriage will be presumptively characterized as CP, so the person arguing that any of these assets are SP will have the burden of proving that an asset is SP and not CP. The level of proof required to overcome the presumption of CP is clear and convincing evidence. The burden of proof for establishing that the asset in question was acquired during the marriage is generally on the person who wants to argue that the asset is CP. (Notice that proof that an asset was acquired during the marriage is far less complex than tracing an asset to SP by clear and convincing evidence.)

Other fundamental presumptions for the AZ Community Property/Separate Property system

Commingled assets presumption: If CP and SP liquid assets are commingled (i.e. combined in the same account), ALL amounts presently existing and ALL assets traced to that account at any time during the marriage are PRESUMED CP. But this is just a presumption - the SP proponent has the opportunity to trace $$$ and assets traced to that commingled account, but must prove the SP nature of such $$$ with clear and convincing evidence.

Family Expense presumption:

When tracing $$$ in a commingled liquid account, if a family expense is paid from that account, the amount of the expense will be presumed to come entirely from the CP and not at all from the SP unless the CP is entirely exhausted.

Presumptions concerning contributions:

--CP contributions to SP

Reimbursement is presumed - the question is how to value the amount.

If during the marriage CP is contributed to SP, the contribution is presumed reimbursable to the community. The question will be the value of the contribution and whether reimbursement will include interest or increases in value of the SP asset to which the community contributed. The amount of reimbursement, whether it includes interest or increases in value, and how to value the CP reimbursement interest varies depending on the asset: there are (unfortunately) different rules depending on whether the SP asset to which the community contributed is an SP business, SP-owned real property, SP mortgage payments on real property, an SP life insurance policy, or other kind of asset. Remember, however, that it is the COMMUNITY that entitled to the reimbursement - roughly half the value of that reimbursement amount will go to the spouse that owns the SP contributed to by the community, and roughly half the value of that reimbursement amount will go to the other spouse.

The presumption of reimbursement is imperative to prevent a spouse from attempting to appropriate CP for personal benefit at the expense of the other spouse. Especially when the husband was sole manager and controller of the CP (that rule was discontinued in AZ in 1973), without the presumption the husband could unabashedly use CP for his SP benefit, hide the records, and take the benefits when he took his SP.

--SP contributions to CP

NO reimbursement is presumed

In contrast, if an SP owner uses SP toward a CP asset or liability, that contribution is presumed and unreimbursed gift to the community. This presumption can only be overcome with clear and convincing evidence that the OTHER spouse agreed to reimburse the SP spouse for the contribution. If that evidence exists, the reimbursement amount is the agreed-upon amount.

This presumption also makes sense. SP owners have sole Management and Control over their SP assets. They have no obligation to use the SP for CP obligations or benefit. If they do so, unless they get a reimbursement agreement, it appears to be a gift. And the contributor will still have an undivided 1/2 ownership in the benefits of the contribution, unlike CP contributions to SP. But this presumption makes little sense for SP contributions to CP when divorce is pending

Title Presumptions and how they interact with other presumptions:

If Title to an asset is in ONE spouse's name, there is NO presumption concerning the asset based on the one name. The presumed characterization of the asset will be based on date of acquisition. Sole name on a title is one piece of evidence a spouse asserting that an asset is SP may use to try to prove that asset is SP by clear and convincing evidence.

Example:

1. A couple marries.

2. One spouse buys a car using money from an account containing both CP and the purchaser's SP, and places title to the car in the purchasing spouse's name only.

Result: There is zero presumptive effect from the title. The car is presumed CP because it was acquired during the marriage AND because it is traced to a commingled account. The spouse that purchased the car can attempt to trace the car to their SP, and can use single title as evidence corroborating that the car was SP. By itself, the title is insufficient to overcome the CP presumption.

If Title to an asset is placed in BOTH spouses' names during marriage, that asset is presumed to be CP, and this presumption is NOT overcome by tracing. The "both names on the title" presumption is only overcome by clear and convincing evidence that the spouse now arguing for CP agreed or understood that the title did not change the asset to CP. (This will be unusual.)

Example:

1. A single person buys a house. Title is solely in that person's name.

2. The house-purchasing person marries.

3. During the marriage, title is changed so that both spouses' names are listed as owners (e.g Community Property with right of survivorship).

Result: The house is presumed CP. The fact that the purchaser can trace the time of acquisition to prior to marriage, which ordinarily is sufficient to negate a presumption of CP, because title is in both names this evidence is INSUFFICIENT to overcome the presumption. The house will be characterized as CP unless the purchaser spouse produces clear and convincing evidence that the other spouse understood and agreed that despite the title change the house would remain the SP of the purchaser spouse.

Bank Account Title Presumptions: Joint title presumption NOT treated the same as real property and (probably) other titled assets at divorce

Bank Account Title has little presumptive effect AT DIVORCE

Sole title means little, as commingling will result in a presumption that all of the money in the account and traceable to the account is CP regardless of the sole name on the account

Both names on the title may be sufficient for a presumption of CP for the money in and traced to the account even if there is no evidence of commingling.

But for liquid accounts the SP proponent is always permitted to try to trace back, including when both spouses' names are on the account, in contrast to eg real property. (There is no particular reason for the different treatment. If anything, when one spouse gives the other spouse access to the SP funds sitting in a heretofore SP account, that sounds much more like a present gift than does one spouse changing title on SP real property, which may be done with death rather than transmutation in mind).

Intertwining of Community and Separate Property during the marriage:

This major marital property area for the most part involves accounting.

It is all the same problem, but the rules (unfortunately) vary depending on the asset in question.

Bank accounts and other liquid accounts:

--At divorce: Commingling of accounts presumed CP but SP proponent always given opportunity to trace to SP. Directly tracing the SP an acceptable tracing method. Family Expense/exhaustion also an acceptable tracing method. But for clear and convincing evidence either must be on a continuous date total throughout the marriage. Recapitulation accounting techniques that total up over the entire marriage or each year, eg. have large potential to distort and are not clear and convincing evidence.

--At death: Sole title does not change the above-described situation. The form of jointly held title will dictate the result, however, with any right of survivorship language dictating the entire amount and all amounts traced to the account go to the surviving spouse.

Increases in value of SP business with Community Productive Effort:

Frequently a spouse brings a SP business into the marriage. The business stays SP, however, and isn't recharacterized simply by virtue of the marriage. The same is true for any rents, issues, profits, and increases in the SP business that take place during the marriage.

At the same time, any pay for work during the marriage is a classic CP asset, generated by productive work effort by a spouse during the marriage. If someone has a job and then marries, the pay earned for work done during the marriage will always be CP despite the fact that the person had the job before marriage.

As a consequence, every time a spouse owns a SP business, if that spouse does any productive work for the business, there is CP pay residing in the value of the SP business. The approach of AZ (and all CP jurisdictions) is to continue to characterize the business itself as SP but to identify the value of the CP work and identify that amount as belonging to the community.

There are two different methods for valuing:

--Calculate an imputed salary that would have been paid for the work done, subtract any amounts already paid to the community (if any), and the remainder is CP; or

--Identify increases in the value of the SP business that took place during the marriage, calculate a "normal" rate of return on the SP capital during the marriage, subtract that amount from the full increase in value during the marriage and attribute the remainder of the increase to the CP work effort.

SP House - CP used for Mortgage payments

Example:

1. A person buys a house with 20% downpayment and a 30 year mortgage for the remaining 80% of the purchase price.

2. The purchaser earns a wage at a job, and uses the earnings to pay monthly mortgage payments that consist of Principal, Interest, Taxes and Insurance (PITI).

3. The purchaser marries and continues to work and pay the monthly PITI out from work earnings.

The house = ? SP, by virtue of time of acquisition. (It makes NO difference whether it is a mortgage or some sort of real estate contract providing that title doesn't pass until the full amount is paid off).

The earnings used to pay the mortgage are classic CP.

So CP is used toward home ownership of a SP-owned home.

Results:

 --The house does not change characterization even though CP used for "ownership" payments

--CP is entitled to reimbursement (remember that each spouse gets roughly half of the CP reimbursement value) but - Arizona has adopted CA's method for reimbursement - CA, however, considers the community to buy into ownership of the house - so AZ says it is doing reimbursement but has an ownership style method for reimbursing the community:

 CP payments to principal (so ignores interest, taxes, insurance)

 Plus

 A Share of appreciation that occurred during marriage -

 CP "appreciation share" = payments to principal

 purchase price X appreciation during marriage

 (recent cases appear to use value

 when CP initiates payments)

At least one case suggests calculating "depreciation" share the same way using negative numbers

These methods systematically bias in favor of the SP owner and against the community:

1. If the community takes over the payments early in an eg 30 year mortgage, much more payment is allocated to interest than to principal. While it is true that interest payments do not contribute to "equity" (that is, the value of the house less the loan outstanding, the amount of cash that the owner would keep if the house were sold), but from the community's perspective it is real community money that could have been used for different community benefit. Thus the reimbursement aspect is smaller than it would be if the full amount of CP dollars spent on the SP asset were used. If you are thinking "well, the community benefits by living in the SP house" that is a good thought - but the rule in AZ is that SP contributed to the benefit of CP is presumed unreimbursed gift. So why should this hidden rule in fact give the SP owner an implicit reimbursement of rental?

2. The use of principal only when calculating the CP share of the appreciation also skews in favor of the SP owner. The bulk of the CP payments go uncredited. If they weren't made, however, the house would have been foreclosed and there would have been no appreciation.

3. If value at time the community takes over the payments is used in determining the appreciation share, the CP share of the appreciation is reduced if there has been pre-marital appreciation. This makes little sense, because the CP is already only sharing in appreciation that took place during the marriage.

Intangible assets - generated by combined SP and CP effort/investment

--Personal Injury awards

Example:

During the marriage, a spouse suffers significant personal injury. Harms include physical pain and suffering, emotional distress, reduced life expectancy, loss of earning capacity, and medical expenses, some continuing.

There is a large lump sum settlement, acquired during the marriage.

Shortly after the settlement the other spouse obtains a divorce.

Is the entire amount CP, acquired during the marriage other than by gift, descent or devise?

That was the result until 1980, a result that enabled a non-injured person to take outright roughly half of the tort award designed for the tort target for the rest of their life. This was unfortunate.

Current result:

CP is restricted to amounts compensating for that which would have been community property had there been no tort: medical and other expenses actually paid by the community, actual losses in earnings. Pain and suffering, emotional distress, and anything designed to compensation for a period after the marriage ends is SP.

--Retirement plans:

Example:

1. A person age 25 gets a job and enrolls in a retirement plan. Pursuant to the plan an account for the employee is set up and funded by contributions from the employee's salary and from the employer. The money in the account is invested and earns a return. The employee is not eligible to obtain any of the retirement until age 60 (the "maturity" date). The employee works for about 10 years.

2. The employee marries and continues on in the retirement plan exactly as above for 20 years.

3. At age 55, 5 years short of retirement age, the employee is divorced. The employee plans to keep on working at least 5 years.

Is the retirement plan SP? It was initiated as SP, and is designed as a replacement for wages when the employee can no longer work, and that will also be SP.

This was the rule for many years, until 1977 in Arizona.

But it was the wrong rule. All amounts contributed during the marriage are easily seen as salary and other earned benefits generated by community productive efforts. To give it to the employee is letting the employee appropriate CP and turn it into SP. So the rule changed.

For Defined contribution plans (the above-described plan is a defined contribution plan - the contribution amounts are defined, and not the amount that can be taken out):

Community ownership share is the value of the amounts deposited in the account and earnings on those amounts during the marriage. For all ERISA regulated plans, the share of the non-employee spouse can be separated out and turned into an account owned by the non-employee spouse. (Remember, the non-employee spouse is only entitled to roughly half the value of the CP share - the employee spouse is entitled to all of the SP generated value (before and after marriage) and roughly half of the CP value generated during the marriage.

For defined benefit plans (typically government sponsored plans, these plans define how much benefit will be paid out dependent on the amount of time worked at the job and the level of salary close to the time of retirement):

There is no specific value to a retirement account, so a time allocation system is used:

 CP share = # of months worked while married x expected benefit at maturity

 # of total months worked until plan matures

Disability Insurance - Often employer-facilitated, frequently paid for out of salary, designed to compensate if employee establishes inability to work and meets other criteria established in the policy. If the employee earns the benefit while married, but then needs the benefit pay out for a disability after marriage is over:

More like PI tort award, or more like Retirement plan? Answer: Yes?

Result: Arizona (and California, and unlike New Mexico and Idaho), treat disability pay for post-marriage wages as the SP of the employee and not to be divided even where the ability to take it was paid for by the community work effort during the marriage.

Disability "in lieu of retirement" - a common feature of many disability insurance plans is that employees take disability pay in lieu of retirement, meaning that there will be no retirement pay. Because retirement benefits generated by work during the marriage are CP even when paid out post-divorce, taking disability will reduce the other spouse's CP share in such situations. Arizona has responded to this situation by requiring the spouse taking disability to compensate the other spouse for the reductions. The compensation is not required for Federal Military disability taken in lieu of retirement, pursuant to both AZ statutory law and Federal case law.

Goodwill - formerly a question of characterization, currently a question of value

Business goodwill is an intangible asset that enables the possessor to earn more that the possessor would otherwise be able to earn. It can be in a name, in a location, in the experience customers have had, in the particular style of a person or team of people. If it resides in a business, it makes the business worth more. Professional goodwill often resides largely in an individual - that person's manner and experience leads to goodwill. If it was generated by community effort, it certainly looks like a community asset.

For quite a while, professionals (e.g. MDs, lawyers, accountants) took their business at the end of a marriage and successfully argued there was no goodwill value (at the time it was overwhelmingly husbands who dominated the professions and made this argument). So a medical practice developed entirely during a marriage was worth only the value of the physical assets and accounts receivable, and the intangible that enabled the doctor to earn say $400,000 a year, developed by the doctor during the marriage, was not valued and divided as CP. That idea stopped in the mid-1970s. Goodwill generated during a marriage, including professional goodwill, is now firmly entrenched as a CP asset.

The valuation questions are difficult, however, especially for professional goodwill, and it isn't possible to actually market and sell the goodwill that resides in an individual. The result is that the other spouse takes CP in the form of more tangible assets, and it is tricky to tease out a goodwill value from the post-divorce (and thus SP) work effort of the spouse that keeps the community generated goodwill. There are many ways to attempt the value, all of them speculative. But assigning zero value to a major CP asset is simply wrong.

Professional Degrees and Licenses -

Despite the similarities between this and Professional Goodwill, AZ (and all CP jurisdictions) refuse to acknowledge that a degree/license earned during the marriage is a community asset. AZ pretends they aren't property (which comes as a surprise to anyone who knows that once earned a professional degree or license can't be taken away by a state/local or federal government without due process, anyone who knows the effort and opportunity cost that goes into generating them, and anyone who has invested in a degree/license with the expectation that they are assets that will enable considerable earning). Instead of addressing degrees and licenses as marital property for divorce purposes, AZ has included as a reason for entirely discretionary spousal support situations in which one spouse has "contributed to the educational opportunities of the other spouse."

At death, however, the "not property" approach is sensible, although it is likely better to simply realize that since degrees and licenses can only be possessed (and thus used productively) by the degree/license holder, there is no value remaining at the death of the degree/license holder, and thus nothing to be divided.

Transmutation Agreements (Agreements to depart from the statutory CP and SP rules)

The CP-SP structure defined by the statutes can be altered by agreement, known as a transmutation agreement. (This is true in all CP jurisdictions.) Agreements may take place:

1. Prior to marriage (often known as prenuptial agreements) - The Uniform Premarital Agreements Act, enacted in Arizona, regulates these agreements and generally makes enforcement of such prenuptial agreements routine. (Other CP jurisdictions have similar laws.)

2. During marriage.

3. Pursuant to settlement at divorce.

Transmutation agreements, both pre-marital and during the marriage, are generally enforceable - so it is permissible to radically depart from statutorily defined structure of CP and SP.

SP to CP transmutations are seldom viewed suspiciously and sometimes are presumed to exist.

CP to SP transmutations often are viewed with considerable suspicion, and unconscionability notions as well as family promise ideas are raised concerning CP to SP transmutations. Perhaps because transmutation agreements fit into the contract category of "family promises," clear/convincing evidence of existence of a CP to SP transmutation agreement may be required, and implied promise theories are perhaps not going to be entertained (I say "perhaps" because there is precious little case law on the topic in Arizona and all CP jurisdictions).

Management and Control of CP

Solely during marriage - not relevant once marriage ends

AZ rule - Each spouse has ability to manage and control all community property

(Old appalling rule that Husband was sole manager and controller of all CP was eliminated in 1973)

Exceptions:

(1) Buying, selling, encumbering community real property;

(2) Guaranty, indemnity or suretyship transactions

require JOINT management and control decision. This requirement is short of requiring both spouses to be parties to the transaction.

Non-joining spouse has the power to exclude the community from any transaction for which joint management and control decision is required.

Marital Property Relationships with Creditors

All CP jurisdictions characterize debts as CP or SP for at least some purposes. Debt characterization is accomplished identically to asset characterization.

AZ has a CP/SP debt system - each spousal debt must be characterized as either SP or CP.

In CP/SP debt systems:

--SP debt = only the SP of the debt incurring spouse is available to creditors. No CP assets can be used to pay if the spouses object to using CP. (There is one mild exception: premarital SP debts (i.e. debts incurred by one of the spouses before they married) can be satisfied by the CP "that would have been SP of debt incurring spouse if there had been no marriage.")

--CP debt (defined as incurred in furtherance of the marital community) = the CP AND the SP of the debt-incurring spouse is available to creditors.

Thus creditors will argue a debt is CP to get CP assets, community will argue it is SP so no CP assets available, only SP of debtor spouse (and often there is none).

This system protects a non-debt incurring spouse's undivided interest in the community property.

(Other CP jurisdictions differ from AZ in allowing creditor access to marital property

--Managerial systems - CA has a managerial regime, in which all assets managed by debt-incurrer are available to the creditor. This means the creditor can obtain CP to pay off a SP obligation. If that happens, the debt-incurrer is required to reimburse the community at divorce. CA characterizes obligations as CP or SP for purposes of divorce distribution

and other relationships between spouses, but not for creditor-marital debtor relationships.

--Partition systems - Washington and New Mexico have forms of partition systems, pursuant to which an obligation is characterized, with creditors allowed access to all CP assets for CP debts, and up to half the CP for SP debts.)

Difficult obligations to characterize:

Torts committed by one spouse

Child/Spousal support obligations of one spouse from a previous marriage

Exception for Premarital Debts -

Premarital debts are SP debts - if CP is not available to satisfy such debts, a debtor without any SP could commit "marital bankruptcy" by getting married, working, and generating solely CP.

Solved by statute - CP is available to satisfy a premarital SP obligation "to the extent of that spouse's contribution to the CP which would have been such spouse's SP if single."

Makes sense - allows premarital creditor to get in line before the spouse when the obligation was incurred prior to the marriage but only for CP that would have been available to the creditor had their been no marriage.

Two different ways to interpret that make sense, however.

--Only presently existing CP assets generated by the debtor are available.

--All CP assets are available but only the total amount that the debtor spouse contributed to the community is available.

Ownership/Distribution of marital property during marriage, at death, and at divorce

Ownership During marriage

CP = undivided ½ ownership and no partitioning/severing

SP = solely owned, managed and controlled by SP spouse

Distribution of marital property at divorce:

SP all must go to SP owner (statutorily required). This makes CP/SP systems unlike some common law equitable distribution jurisdictions that put all marital assets into a "hotchpot" and divide them all.

CP and all other jointly held property (including Joint Tenancy with right of survivorship, tenancy in common, and any other form of jointly titled property) must be divided between the spouses.

Arizona, pursuant to statute, divides "equitably, but not necessarily in kind" and "without regard to marital misconduct." The meaning of "equitably, but not necessarily in kind" turns out to be less certain than one might suspect.

"Equitably" at a minimum means the overall wealth split need not be a perfectly equal dollar-for- dollar 50-50 split (although the language does not preclude that). "Not necessarily in kind" does establish that there is no requirement that each CP asset and each CP liability be divided evenly (this is sometimes called the "item" approach), although such an approach is entirely permissible. An "aggregate" approach of valuing all of the CP and splitting that value evenly between the spouses is also permissible. Trial judges thus have considerable discretion concerning how to effectuate a roughly 50 - 50 split, because there are practically unlimited different ways to split the overall worth of the CP. Trial judges are free to consider many reasons for awarding a particular CP asset to a particular spouse, including that a spouse generated it, wants it more, has more need for it, or that it originally was that spouse's SP. The only statutory limit concerning a trial judge's discretion concerning who gets what appears to be that marital misconduct can't be a basis for the decision.

There is considerable controversy concerning whether the statutory use of the word "equitably" combined with "without regard to marital misconduct" gives trial judges any discretion to depart from the 50-50 split of the overall worth. The basic theory of community property and undivided 1/2 ownership suggests it should not be allowed, and the "no fault" provision sounds like an admonition that judges not depart from a 50-50 split to punish or reward someone concerning their behavior during the marriage. But case law in Arizona (*Toth* and others) have controversially possibly expanded the number of circumstances for which an overall split other than 50-50 might be called for by the statute's "equitable" language.

(Other CP jurisdictions address distribution at divorce matters in different ways: California requires division of each asset in a strict 50- 50 manner (with a few assets excepted); Washington has an "equitable" system and is not bound so closely to the 50-50. Most non-CP jurisdictions are now similar in approach and result to CP jurisdictions, with 50-50 overall worth of what would be CP considered the presumptive norm, but not statutorily required. In all CP jurisdictions, the 50 - 50 split, regardless of how implemented, effectuates the CP ownership interests of each spouse, and must done W/OUT regard to marital misconduct and W/OUT regard to spousal support or lack thereof.)

Most divorcing couples settle their marital property disputes. There is no requirement that the settlements conform to the statutory requirements for asset and liability distribution, and frequently spousal support or lack thereof is lumped in with the property settlement. Such agreements are given only cursory review before being incorporated into the divorce decree. Agreements concerning child support are not effectuated, however, to the extent that the agreement would be inconsistent with child support statutes.

Distribution of Debts at divorce (All CP jurisdictions have similar but slightly varied systems)

SP debt must go to SP debtor.

CP debt can be assigned to either spouse, and doesn't have to follow the asset (if any) generated by the debt.

The divorce allocation just allocates between spouses, and does not preclude a creditor from seeking satisfaction from either spouse (!). If a spouse pays a debt allocated to the other spouse at divorce, the paying spouse can seek reimbursement from the other spouse. But if the creditor had trouble collecting from the spouse allocated the debt at divorce, there is little reason to think the paying spouse will have MORE success. To the contrary.

Distribution of Marital Property when a spouse dies while married

--SP remains with SP owner - Surviving Spouse (SS) keeps all SP outright, SP of dead spouse passes though decedent's estate, or via intestate succession if there is no will.

--CP goes ½ to SS outright as her or his ownership share. That half does not pass through the estate. The other ½ goes through dead spouse's estate (again either via will or intestate succession). Usually, but not always, both halves of CP end up with SS, because as an empirical matter when a spouse dies while still married the SS is most often the recipient of the dead spouse's entire estate (and intestate succession effectuates that result as well).

Variations -

Joint Tenancy With Right of Survivorship held by H and W all goes outright to SS. This can sometimes provoke a fight between the surviving spouse and other beneficiaries of the estate concerning whether the property is validly JTWRS or is instead CP. If it is CP, half of the value may pass through the dead spouse's estate to someone other than the SS. So be wary - despite the form of title, at death JTWRS real property is PRESUMED CP. Thus the surviving spouse will need to prove with clear and convincing evidence that the now dead spouse understood and intended to give up the ability to give away half the value of the property at death and give it all to the surviving spouse. The dead spouse's name on the deed is not sufficient - there must be other evidence reflecting this understanding. Also be wary because JTWRS, while divided as CP at divorce, is not treated the same as CP during an on-going marriage and for reimbursement of contributions at divorce.

CP With Right of Survivorship - exists as a form of property - all goes to SS spouse outright, not part of the CP to be divided between the SS and the estate. One real advantage of this form of a title does not require the same proof of evidence of understanding that does JTWRS. It also is treated as CP for on-going marriage and divorce purposes, unlike JTWRS.

Division of CP at death

1. Equal vs Equitable

The CP/SP statutes themselves do not define the division of marital property at death. They only define what is CP and SP and how those are to be divided at divorce.

The AZ probate statutes don't specifically confront whether the shares at death are to be determined the same way as is specifically identified for divorce, although the various statutes contains references to "equal" and to "one-half" and zero references to "equitable."

--ARS 14-3101 (A) simply refers to the "decedent's share of community property" passing by will and the surviving spouse's "share of the community property" belonging to the surviving spouse and not passing by will.

--ARS 14-3101 (B), in contrast, speaking only about an unusual situation in which both spouses have died but each's estate devolves as if they had survived each other, refers to "half of their community property" is subject to administration in each estate.

--ARS 14-2102 describes the intestate share of a surviving spouse by twice referring to "the one-half of community property that belongs to the decedent."

--"ARS 14-3916 - Community Property, uses the term "equal"

In making a division or distribution of community property held in the decedent's estate, the personal representative may consider community property held outside the estate so that the division of community property held in the estate and outside the estate is based on *equal* value but is not necessarily proportionate." (Emphasis added)

There is no clear reason for treating division at divorce as permitting something other than equal division while only equal is permitted at death. The "without regard to marital misconduct" language in the divorce distribution statute makes it clear departures from a 50-50 split are not justified for that purpose. So why different?

2. Aggregate division vs. division of each asset (called in-kind or item division)

Is there any reason to think an equal division of EACH community asset is required?

The short answer is no. Nothing prohibits it but nothing mandates it.

Arizona does not require division of each asset at divorce. The "not necessarily in kind" in the divorce distribution statute makes in-kind division appropriate but not mandatory.

One reason to require division of each asset at divorce (as California does but Arizona does not) is that divorce settlement bargaining takes place under the shadow of the distribution law. If a divorcing couple knows that if they can't agree to their own distribution each asset will be split in half, and to the extent that isn't possible each asset will have to be sold and the money split in half, it may be a significant incentive for the couples to agree concerning which assets each would prefer to remain intact. Distribution at death in the usual event offers no such bargaining under the shadow of the law.

The statutory language in the AZ death distribution statutory regime does not refer to equal division of each asset. To the contrary, ARS 14-3916 indicates that the personal representative has discretion concerning the division and that "division of community property held in the estate and outside the estate is based on equal value but is not necessarily proportionate."

For CP assets passing outside the estate (eg. IRAs, retirement plan death benefits, insurance policies), nothing precludes either approach. The requirement is only that surviving spouses take outright their share of the entire total of CP.

Strategy for assessing characterization and giving advice:

Here is a basic strategy for assessing whether an asset (or liability) will be ultimately characterized as CP or SP:

1. Identify ALL presently existing assets and liabilities

2. For each, identify the date of acquisition - if during the marriage tentatively conclude CP, if prior to marriage tentatively conclude SP.

3. For all assets acquired during marriage TRACE the source of the acquisition:

From gift, descent, devise to one spouse? (If yes change your tentative conclusion to SP)

If no, what resources were used for the acquisition? How and when were those resources acquired? Assess whether the asset can be traced back with clear and convincing evidence to SP.

4. For all liabilities incurred during the marriage, assess whether they were in furtherance of the community or were for the sole benefit of the SP of one spouse.

5. For all assets acquired prior to marriage or during the marriage from gift, descent or devise, or traceable to SP:

--Is there title to the asset, and if so was title placed in in the name of both spouses during the marriage? (If so change your tentative conclusion to CP)

--Did the asset get commingled with CP during the marriage? (If so change your tentative conclusion to CP and assess whether there is clear and convincing evidence tracing the asset back to its SP origin).

--Was CP contributed to this asset such that reimbursement is available?

6. Remember to inquire as to whether there were any pre-marital agreements AND any during-the-marriage agreements concerning any assets and liabilities.