Natural Resources Journal

7 Nat Resources J. 4 *(Fall 1967)*

Fall 1967

Community Property—Power of Testamentary Disposition—Inequality Between Spouses

Theodore E. Jones II

COMMENTS

Community Property—Power of Testamentary Disposition—Inequality Between Spouses*

The most glaring inequality between the spouses under the New Mexico community property system[1] is that found in the provisions governing the powers of testamentary disposition. While the husband is given the power of testamentary disposition over one-half of the community property,[2] the wife is denied this power.[3] Of course, if the husband predeceases the wife, one-half of the community property becomes her separate property, and she thereby acquires the testamentary power over it.[4] The problem, therefore, arises from the situation where the wife dies first.[5]

This Comment will examine this inequality between spouses in light of the history and nature of community property, the arguments advanced for retaining it, the improved status of women, and the law of the other community property states. Ways to avoid the inequality will also be presented. The tax aspects of this problem will, for the most part, be summarized because they have been thoroughly discussed in another place.[6]

The community property law of our American states is the com-

---

* N.M. Stat. Ann. §§ 29-1-8, -9 (1953, Supp. 1965).

1. *See* J. Wood, The Community Property Law of New Mexico (1954).

2. N.M. Stat. Ann. § 29-1-9 (Supp. 1965):

> Upon the death of the husband, the entire community property goes to the surviving wife, subject to the husband's power of testamentary disposition over one-half [½] of the community property. . . .

3. N.M. Stat. Ann. § 29-1-8 (1953):

> Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband . . . .

As to their separate property, the New Mexico spouses have full and exclusive powers of control and disposition. N.M. Stat. Ann. § 30-1-1 (1953), § 57-3-3 (Repl. 1962).

4. If the husband dies intestate the entire community property becomes her separate property. See note 2 *supra*.

5. It is interesting to note that the wife has been given testamentary power in the situation of simultaneous death. N.M. Stat. Ann. § 29-1-27 (Supp. 1965):

> Where a husband and wife have died, leaving community property, and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall pass as if the husband had survived and as if said one-half were his separate property, and the other one-half thereof shall pass as if the wife had survived and as if said other one-half were her separate property.

6. *See* Swihart, *Federal Taxation of New Mexico Community Property*, 3 Natural Resources J. 104 (1963).

munity property law of Spain established in the Spanish possessions of North America from which our community property states were formed.[7] It is necessary to look briefly at the nature of this Spanish law in order to determine to what extent New Mexico has departed from it by permitting inequality of testamentary power between the spouses.

The essential characteristic of the Spanish law was that the wife was placed on a basis of equality with the husband as to the ownership and rights in the community property. She was made the partner of the husband, and during the marriage itself they were equal and present owners of the common property.[8] The causes of this partnership de Funiak considers to be largely economic in nature:

> It is among those races or among those classes of society in which the wife works shoulder to shoulder with the husband to maintain and preserve the common home and possessions, in which she contributes labor rather than the mere "adornment" of her presence, that she is found to be the partner of her husband with an ownership in the acquests and gains of their common labor and struggles.[9]

The important point is that the wife's interest in the common property under the Spanish system was equal, present, and vested. The husband was made administrator of the community, but he did not thereby acquire a greater interest in the community property.[10] This concept of equal ownership was extended to the testamentary power of the spouses. Each spouse had the power of testamentary disposition over his or her separate property, and each had the same power over one-half of the community property. Certain restrictions attached to this power, but they applied equally to each spouse.[11]

The New Mexico modification, denying to the wife the power of testamentary disposition over one-half of the community property, not only conflicts with the Spanish system, but seriously undermines the Spanish ideal concerning the nature of the wife's interest. How

7. 1 W. de Funiak, Principles of Community Property chs. 1-4 (1943). The eight community property states are New Mexico, Arizona, Texas, California, Nevada, Washington, Idaho, and Louisiana.

8. *Id.*

9. *Id.* § 11, at 27.

10. *Id.* § 102.

11. *Id.* § 193. The restrictions prevented either spouse from devising more than one-fifth of the property to strangers. At least four-fifths had to be disposed of to descendants as heirs, or in their absence, to ascendants. Idaho presently retains similar restrictions. Idaho Code Ann. § 14-113 (1947).

can the wife's interest be said to be a present, vested interest equal to that of her husband when she is denied an equal power of disposition upon death? Or in the words of Professor Swihart, "If up to the moment of her death both husband and wife were owners of the property in community, how could it thereupon belong to the husband?"[12]

These questions have not deterred the New Mexico Supreme Court, however, from concluding that the wife's interest is vested and equal.[13] This conclusion is particularly interesting in light of the history of the present New Mexico community property law. In 1907 the legislature enacted a new set of community property rules,[14] which remain substantially unchanged in New Mexico today.[15] The 1907 statutes were patterned after the California system,[16] with the provision denying the wife her testamentary power being an exact copy of the California provision.[17] The California Supreme Court, however, arrived at a much different conclusion concerning the nature of the wife's interest than did the Supreme Court of New Mexico.

The California court determined that the wife's interest was not equal to that of the husband and was but a mere expectancy.[18] In New Mexico on the other hand, the court in *Beals v. Ares* concluded that the interests of the husband and wife in New Mexico were equal.[19] In *Baca v. Village of Belen*[20] the court relied on *Beals v. Ares* in announcing that the wife's interest was present, vested, and equal to that of the husband. Since *Baca* no case has analyzed the relative powers of husband and wife over the community property, and no attempt has been made to support the rule. It is apparent, however, that regardless of the New Mexico court's characterization, the wife's interest is somewhat less than equal to that of the husband, although it is more than a mere expectancy.[21]

12. Swihart, *supra* note 6, at 111.
13. See text accompanying notes 19 and 20 *infra*.
14. N.M. Laws 1907, ch. 37.
15. Swihart, *supra* note 6, at 110.
16. R. Clark, Community of Property and the Family in New Mexico 13 (1956).
17. N.M. Laws 1907, ch. 37, § 26; Cal. Civ. Code, § 1401 (Kerr 1909).
18. Spreckles v. Spreckles, 116 Cal. 339, 48 P. 228 (1897).
19. 25 N.M. 459, 499, 185 P. 780, 793 (1919).
20. 30 N.M. 541, 546, 240 P. 803, 805 (1925).
21. *See* Arnett v. Reade, 220 U.S. 311 (1911), *rev'g* Reade v. de Lea, 14 N.M. 442, 95 P. 131 (1908). The New Mexico court had held that the wife's interest was a mere expectancy. On appeal, the United States Supreme Court held, without going further, that her interest was greater than an expectancy.

In addition, the inequality of testamentary power between the spouses can, upon occasion, be even more pronounced. A New Mexico statute provides for the substitution of the wife as manager of the community in certain situations, such as where the husband becomes incompetent or incapacitated.[22] She petitions the court "praying that she be substituted for her husband, as the head of said community, with the same power of managing, administering and disposing of the community property, as is vested in the husband *by this chapter.*"[23] Even though the wife becomes manager of the community, this provision apparently does not affect her power of testamentary disposition. The testamentary powers of the spouses over community property are found in chapter 29[24] of the New Mexico statutes, while the above provision appears in chapter 57.

Why, then, has New Mexico continued to make this distinction between husband and wife with regard to their powers of testamentary disposition? This question seems to be particularly significant since New Mexico is the only one of the eight community property states which presently retains this inequality in modification of the Spanish system.[25] New Mexico copied the California provision in 1907,[26] but in 1923 the California legislature gave to the wife the power of testamentary disposition over one-half of the community property.[27] Similarly, in 1957 Nevada granted testamentary power to the wife,[28] although the legislature was apparently motivated by tax considerations rather than by any particular concern for the wife.[29]

Several arguments are used in opposition to a similar amendment to the New Mexico statute. One is the estate tax "advantage" en-

22. N.M. Stat. Ann. §§ 57-4-5 to -8 (Repl. 1962). Spanish law contained similar features. 1 W. de Funiak, *supra* note 7, at § 128.

23. N.M. Stat. Ann. § 57-4-5 (Repl. 1962) (emphasis added).

24. N.M. Stat. Ann. §§ 29-1-8, -9 (1953). See notes 2 and 3 *supra.*

25. Swihart, *supra* note 6, at 154-55.

26. See text accompanying note 16 *supra.*

27. Cal. Laws 1927, ch. 265, § 1.

28. Nev. Laws 1957, ch. 264, § 1.

29. *See* Swihart, *supra* note 6, at 158-60. In 1955 the Internal Revenue Service issued a ruling for Nevada which held that at the wife's death before her husband, one-half of the community would be included in her gross estate for Federal estate tax purposes. Rev. Rul. 55-605, 1955-2 Cum. Bull. 382, 383. This prompted the Nevada legislature to amend its statute the very next session, and for good reason—double taxation. The ruling together with the wife's lack of testamentary power meant that one-half of the community would be taxed upon her death and again upon the death of her husband.

joyed by the husband upon the death of his wife. In *Hernandez v. Becker*[30] the Tenth Circuit Court of Appeals concluded that the estate tax provisions of the 1921 Revenue Act did not require the inclusion of one-half of the community property in the wife's estate if she predeceased her husband. In other words, the husband became absolute owner of the entire community without any estate tax having to be paid on the wife's one-half interest. Consequently, this decision has become the basis for strong opposition to any change in the New Mexico statute, even though tax considerations did not provide the motivating force for the original enactment in 1907.[31]

The estate tax advantage may not be an advantage at all, however. Not only might there otherwise be no tax because of the $60,000 exemption,[32] but it is likely that the husband's estate will be forced to pay a higher tax upon his death. This factor becomes more important in larger estates because the tax rates increase progressively.[33] Moreover, the estate tax advantage could be eliminated altogether because of the loss of the stepped-up basis.[34]

In addition, the case of *Hernandez v. Becker* itself has been criticized as resting on shaky grounds.[35] Consequently, the Tenth Circuit Court of Appeals, if it agrees, might very well take one of

30. 54 F.2d 542 (10th Cir. 1931).

31. See text accompanying notes 14-17 *supra*.

32. Int. Rev. Code of 1954, § 2052.

33. Int. Rev. Code of 1954, § 2001.

34. Swihart, *supra* note 6, at 146-50. In the seven other community property states the wife's one-half interest in the community property is subject to federal estate tax since she has testamentary power. At the same time, although only one-half of the community property is taxed, the entire community receives a stepped-up basis for purposes of capital gains taxation. Int. Rev. Code of 1954, § 1014 (b) (6). In New Mexico this advantage is lost because no estate tax is paid upon the death of the wife.

35. Swihart, *supra* note 6, at 133-50. The inconsistency of finding the wife's interest to be vested and equal to her husband's, yet not subject to federal estate taxation upon her death, places the decision in doubt. Changes in the Internal Revenue Code since the decision also call for a re-examination of the *Hernandez* doctrine.

These criticisms of the *Hernandez* case probably prompted the Internal Revenue Service to issue its ruling in Nevada in 1955 subjecting one-half of the community property to federal estate taxation upon the death of the wife before her husband. See note 29 *supra*. The strategy is apparent. Since Nevada is in the ninth circuit, a decision by the Circuit Court of Appeals in that circuit opposing the *Hernandez* decision would automatically have sent both cases to be resolved by the United States Supreme Court. The Internal Revenue Service probably thought the ninth circuit decision would be affirmed and *Hernandez* rejected, thus setting an estate tax upon the wife's death in both states. The Nevada legislature acted quickly, however, and the expected test case never arose.

two approaches when a proper case is presented.[36] The court might conclude that the wife's interest is not vested and equal for estate tax purposes. If so, no estate tax would result if the wife were to predecease her husband, but the entire community would be subject to tax if the husband were to die first.[37] On the other hand, the court may simply agree with the New Mexico Supreme Court's determination that the wife's interest is vested and equal,[38] and hence subject to federal estate taxation upon her death. Either way, the estate tax "advantage" would be eliminated.

Notwithstanding the correctness of the decision in *Hernandez v. Becker,* if federal estate tax considerations constitute such a primary goal in the New Mexico community property system, why have there been no legislative attempts to save the same taxes upon the death of the husband, by denying to him the power of testamentary disposition?

Another argument used in opposition to any change in the wife's lack of testamentary power over one-half of the community property is the possible adverse effect upon the husband's business. He might be forced into partnership in his business with the wife's devisee (an unwanted relative, perhaps) or be forced to liquidate his business in order to satisfy the wife's disposition. In the case of *In re Chavez's Estate* the Supreme Court of New Mexico stated the objection succinctly: "No other course would be logical unless the lawmakers desired to add to the sorrows of a bereaved husband the further burden of the enforced liquidating of his business affairs upon the death of his wife."[39]

The argument is a legitimate one, especially for a sole proprietorship where the husband's personal good will constitutes a substantial part of the value of the business. In this situation the value of the

36. A recent case, while not directly in point, may nevertheless stir the Internal Revenue Service into challenging the *Hernandez* decision. Hurley v. Hartley, 379 F.2d 205 (10th Cir. 1967). The husband died intestate, and his widow brought suit to recover federal estate taxes paid, on the ground that his death did not give rise to a transfer because he owned no interest in any property at the time of his death. The court rejected this contention holding that the husband's testamentary power, whether exercised or not, gives him a taxable interest in property at his death. Although the court seemed to endorse *Hernandez* by way of dicta, the Internal Revenue Service is expected to issue a ruling similar to the one issued in Nevada in 1955. See note 29 *supra.*

37. Swihart, *supra* note 6, at 163-65.

38. See text accompanying notes 19 and 20 *supra.*

39. *In re* Chavez's Estate, 34 N.M. 258, 263, 280 P. 241, 243 (1929). *See also* G. McKay, Community Property § 74 (2d ed. 1925).

business to the husband is much greater than its fair market value, so a sale would result in a substantial pecuniary loss to him. In addition, there would be the unfortunate uprooting of the husband, possibly at an age when starting anew would be difficult.

While the problem is a real one, and one which may result in substantial hardship in a few cases, several other considerations tend to overcome its burden. Most of these considerations go to the improbability of the problem ever arising. According to the argument, it is the idea of the forced liquidation of the business and the uprooting of the husband that is the worry, not that he is being divested of property that belongs to him.[40] This argument is valid, therefore, only in so far as a change in the wife's testamentary power is likely to adversely affect the business interests of *many* husbands.

Statistics, however, indicate that the chances are good that a married woman in the United States will outlive her husband. The expectation of life for a female exceeds that of the male for all ages.[41] Moreover, the trend has been for the average life span of women to increase faster than that for men.[42]

Furthermore, not all husbands are sole proprietors. Indeed, many are engaged in work that would not be adversely affected by the wife's devise, such as those who work for wages or salaries. In addition, even some of those whose enterprises would otherwise be adversely affected may have sufficient separate funds or community funds to prevent the liquidation. Insurance proceeds payable to the husband upon the death of the wife could also be applied to this purpose.

---

40. Male vanity undoubtedly plays a part in the New Mexico arrangement, but it is never advanced as a specific argument.

41. The following table compares the average number of years of life remaining for white men and women at the beginning of the age interval given.

AVERAGE REMAINING LIFETIME

Age Interval	*Male*	*Female*	*Life Expectancy of Female Over Male*
0-1	67.7	74.6	6.9
20-25	50.2	56.6	6.4
30-35	41.0	47.0	6.0
40-45	31.8	37.5	5.7
50-55	23.2	28.5	5.3
60-65	16.0	20.1	4.1

U.S. Bureau of the Census, Statistical Abstract of the United States 53 (87th ed. 1966).

42. *Id.* at 52.

A third consideration is the absence of adverse results in the community property states which allow the wife the power of testamentary disposition. Professor Clark states the argument best:

> There has been no objecive showing that the community property states . . . which permit the wife this power have had unusual or insuperable problems as a consequence. It would be absurd to conclude that New Mexico and Nevada, which do not grant the wife this power, have had a unique problem with wives predeceasing their husbands.[43]

Besides, certainly it should not be assumed that the wife will devise her one-half interest to an adverse party. Indeed, she may give her interest to one who would be willing to receive a share in the income of the business rather than interfere or force a liquidation of the enterprise. Her children and husband would be probable devisees.[44] A life estate to the husband, with a remainder over to the children might be common, for example, and would not affect the husband's business unfavorably.

Finally, the argument of forced liquidation does not apply only to the husband. The wife's business interests may also be harmfully affected by the husband's power of testamentary disposition over one-half of the community property, though admittedly the problem will arise less frequently. In 1964, fifty-seven percent of all women in the labor force were married, and the trend has been for this percentage to increase.[45] To the extent that a woman works as a partner in her husband's business, or even manages a business of her own, she could be adversely affected by the husband's devise or bequest.

Another approach to opposing any change in the wife's lack of power of testamentary disposition takes the form of asking unanswered questions, mainly sociological in nature. An authority on New Mexico community property law raises some of them:

> Would legal equality aid or injure the family and the unity of the family? Would it promote the idea of action for and in behalf of

43. R. Clark, *New Mexico Community Property Law: The Senate Interim Committee Report,* in Comparative Studies in Community Property Law 102 (J. Charmatz & H. Daggett eds. 1955). Professor Clark's observation preceded the Nevada statutory change. See note 29 *supra.*

44. Problems can arise, however, upon a devise or bequest to children. *See* J. Wood, *supra* note 1, at 148.

45. U.S. Dep't of Labor, 1965 Handbook on Women Workers 19, 21 (1965).

> the family or action for and in behalf of the individual spouse? Would it contribute to increased divorces, less divorces, or would it have no effect on the divorce rate? . . . Will it result in a lessening or an increase in the activity of the husband toward achieving financial success for his family? . . . If the wife may dispose of half of the community property upon her death with the husband surviving, will this power tend to discourage entrepreneurial activities that will require some years of effort before a profitable return may be realized?[46]

These questions are interesting and important, but, unfortunately, they remain unanswered. Perhaps the only reply is the one already mentioned: there has been no indication that the states which give the wife power of testamentary disposition have suffered serious or unusual problems.[47] To the extent that such problems do arise, however, they would surely constitute a convincing argument for retaining the present arrangement.

A fourth contention made in opposition to granting the wife the power of testamentary disposition in New Mexico is the issue of added costs of administration. Under the present statute,[48] upon the death of the wife before the husband, her share of the community "belongs" to the husband without administration. If the statute is amended, there will arise added costs of making a will, administration, and an accounting—a determination of the assets and liabilities. While it is true that such costs will increase substantially, the high costs of administration should be attacked by correcting the probate code, not community property provisions. Even so, the argument is still not very convincing. On the contrary, to be consistent, the husband's power of testamentary disposition should be denied, with his one-half interest in the community property belonging to the wife without administration upon his death. Moreover, administration costs arise anyway if the wife dies possessed of any separate property. This argument is clearly the weakest of the four.

So it is that in New Mexico every wife has been denied the power of testamentary disposition over one-half of the community prop-

46. J. Wood, *supra* note 1, at 150-51. Judge Wood raises most of these questions in connection with equalizing the system as a whole, including the management function, not merely with changing the wife's testamentary power. The questions, however, are equally valid as applied to that change alone.

47. R. Clark, *supra* note 43, at 102. Clark's argument is quoted in the text accompanying note 43 *supra*.

48. N.M. Stat. Ann. § 29-1-8 (1953), note 3 *supra*.

erty[49] in order to gain one federal estate tax advantage while losing other tax advantages, to avoid a situation of forced liquidation of the husband's business that may occur only rarely,[50] and to prevent family unrest and loss of incentive, results which have not been found in the other community property states with the opposite rule. Why have the interests of the wife been reduced to such minor importance that the interests of *every* husband must be protected before hers are even considered? The answer to this question becomes even less clear when the arguments advanced for change in the New Mexico arrangement are considered.

The present New Mexico statute, denying the wife the power of testamentary disposition, seems to ignore the ever improving status of women. The Married Women's Property Acts in the mid-19th century started a trend which has continued to equalize married women's rights with those of married men in the enjoyment and disposition of property. The adoption of the nineteenth amendment to the federal constitution marked the beginning of the political emancipation of women, and the Civil Rights Act of 1964[51] may mark a new era in the economic life of women.[52]

In addition, married women are comprising an ever increasing percentage of the female labor force, and are contributing more income to the family, especially those families in the higher income brackets.[53] This is not to say that married women who do not work outside the home have any less claim to equality with the husband. However, the husband has less justification for feeling cheated, if the spouses share equally, when the wife contributes income to the family. The inequality of testamentary power becomes even more suspect when the wife works as a partner in the husband's business, has a business of her own, or when she is the sole support of the family.

The New Mexico inequality, as has been seen, also conflicts with the whole nature of community property. The ideal community property system elevates the economic position of a woman and

49. That is, every wife who has not otherwise avoided the effect of the New Mexico statute. See text accompanying notes 57-60 *infra*.

50. This is, of course, pure conjecture.

51. Public Law 88-352, July 2, 1964.

52. For general studies on the status of women see Committee on Civil and Political Rights, Report of the President's Commission on the Status of Women (1963); President's Commission on the Status of Women, American Women (1963).

53. U.S. Dep't of Labor, *supra* note 45, at 30-31.

recognizes the equality of her role in the family. The New Mexico statute seriously undermines these advantages.

> It is time that the legislatures, and the courts concern themselves with making the law foster the family as an integrated organization. The fact that the family unit is something more than the sum of individual parts, and does not exist for any one specific member, should be recognized. It is the basic social and economic unit in which joint and mutual responsibility, and the burdens and benefits of co-ownership, are experienced by the largest number of persons.[54]

The distinction between husband and wife becomes even more questionable in the situation where the wife has been allowed by the court to assume the functions of manager of the community. Even though she replaces the husband as manager, her testamentary power remains the same.[55]

In the face of these arguments the New Mexico legislature does not appear interested in amending the New Mexico statute creating the testamentary inequality between spouses.[56] The effects of the statute, however, can be avoided in several ways. One way is by means of an antenuptial or postnuptial agreement. The husband and wife agree to hold their property outside of the community.[57] Another way to avoid the effects of the statute is by means of a gift of community property by the husband to the wife. The property becomes her separate property and she thereby acquires testamentary power over it.[58] A third way is by means of a joint or mutual will based on mutual promises. "It would seem that the husband, by contract, could confer upon the wife the right to dispose of property which would otherwise be his, and having entered into and accepted

54. R. Clark, *supra* note 16, at 46.

55. See text accompanying notes 22-24 *supra.*

56. A bill was introduced into the 1967 New Mexico legislature to correct the present scheme, but was easily defeated. H.R. 54, 28th N.M. Leg., 1st Sess. (1967). Even at the time of its consideration, Rep. Raymond Davenport, Chairman of the House Ways and Means Committee, gave the bill little chance of success because of the tax argument discussed in text accompanying notes 30-38 *supra.* Interview With Rep. Raymond Davenport, March 7, 1967.

57. N.M. Stat. Ann. §§ 57-3-1, -2 (Repl. 1962); Turley v. Turley, 44 N.M. 382, 103 P.2d 113 (1940); Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952); R. Clark, *supra* note 16, at 14-15.

58. *In re* Miller's Estate, 44 N.M. 214, 100 P.2d 908 (1940); R. Clark, *supra* note 16, at 25.

benefits according to its terms, he should be bound thereby regardless of the fact that he will have made himself a poor bargain."[59] The only other way to avoid the statute is by simultaneous death, although this can hardly be considered an alternative.[60]

These means of avoiding the New Mexico testamentary inequality are inadequate substitutes for a proper statute. Simultaneous death is out of the question; mutual or joint wills based on mutual promises frequently cause more problems than they solve; and contract or gift may result in bargaining and, surely, awkwardness between the spouses, to say nothing of the federal gift tax that might be involved. The wife should not have to bargain for what she ought to own by right.

Nothing short of statutory amendment will suffice.[61] The interests of the husband and wife

> are united in pursuit of a common goal—the success of the marriage financially, socially and morally. Each contributes to the partnership, whether in money or labor and each is therefore entitled to share equally in the acquisitions of the partnership. . . . Although the system was originated in antiquity, the position of the modern woman is again that of a help-mate, an equal partner who works just as hard as her husband to insure victory of the marital union. For that reason, the community property system far better than any other, accords the woman the position to which she is entitled. Far from attempting to abolish the system, all efforts should be directed to expanding it. Based as it is on a concept with modern dynamics, and following a carefully inter-related philosophy so as to make it conveniently workable, *any decision which results in a restraint on the functional or theoretical success of community property is only indescribable folly.*[62]

THEODORE E. JONES II

59. J. Wood, *supra* note 1, at 123.

60. See note 5 *supra* for the simultaneous death statute.

61. N.M. Stat. Ann. § 29-1-8 (1953) should be amended to read exactly like the first sentence of N.M. Stat. Ann. § 29-1-9 (Supp. 1965), to wit:

> Upon the death of the wife, the entire community property goes to the surviving husband, subject to the wife's power of testamentary disposition over one-half [½] of the community property.

How much of the last sentence of section 29-1-9 should be included in the wife's section is beyond the scope of this Comment.

One practical problem arising from the above amendment has yet to be mentioned: Many estate plans in New Mexico will need revising.

62. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions,* 19 Baylor L. Rev. 20, 71-72 (1967) (emphasis added).