Marital Property Law in Wisconsin

Fourth Edition

Volume III

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2010
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State Bar of Wisconsin CLE Books
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First edition published 1984. Second edition 1986.
Third edition 2004. Fourth edition 2010.

Printed in the United States of America
13 12 11 10 5 4 3 2 1
ISBN 978-1-57862-278-8
Product Code AK0067
Also available online

Library of Congress Cataloging-in-Publication Data
Marital property law in Wisconsin / Keith A. Christiansen ... [et al.]. -- 4th ed.
p. cm.
Includes index.
ISBN 978-1-57862-278-8 (books are in 3-ring binders) 1. Marital property--Wisconsin. I. Christiansen, Keith A. II. State Bar of Wisconsin.
KFW2497 .M3722
346.77501'664--dc22
2010023016

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Note to Readers

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Estate Planning

The authors have determined that the uncertain status of the laws concerning the estate and generation-skipping transfer taxes necessitated holding off on comprehensively revising this chapter. The book's editors made stylistic changes to the chapter but did not make substantive changes. The following is a brief summary of the current status of estate and transfer taxes.

The Temporary "Repeal" and Uncertain Future of the Federal Estate and Generation-skipping Taxes

In 2001, a federal law (the Economic Growth and Tax Reconciliation Act of 2001 [hereinafter 2001 Tax Act]) was adopted that made significant changes to the federal estate and generation-skipping transfer (GST) tax laws. The 2001 Tax Act contained a provision for the "repeal" of the estate and GST taxes in 2010 and a "sunset" of the 2001 Tax Act at the end of 2010. Although the clear expectation was that the 2001 Tax Act would be revisited before the one-year repeal in 2010, Congress has not yet acted.

Thus, as of publication of this revision to *Marital Property Law in Wisconsin*, federal estate and GST taxes do not apply with respect to deaths that occur in 2010 or generation-skipping transfers made in 2010. The federal gift tax, which applies to gifts made during life, remains in effect (with some modifications). Along with the repeal of the estate and GST taxes comes a new rule regarding carry-over basis for capital assets. This new rule differs from the basis-adjustment rule—commonly referred to as *stepped-up basis*—that applies when the estate tax is applicable. The new carry-over basis rules are complex. Generally, however, the new rules allow allocation of $1.3 million of basis adjustment to assets passing to anyone and an additional $3 million of basis adjustment to assets passing to or for the direct benefit of a surviving spouse.

Under current law, the repeal of the federal estate and GST taxes is scheduled to last for just one year, and the estate and GST taxes are scheduled to be reinstated on January 1, 2011, but with significant differences from the law as it existed in 2009. The most notable difference is a return to an estate tax exemption of only $1 million per person instead of the $3.5 million exemption that applied in 2009. Adding to the complexity is the possibility that Congress will reinstate or revise the estate and GST taxes and try to make those changes retroactive to January 1, 2010.

This state of affairs creates potential opportunities and considerable uncertainty for many existing estate plans. Estate plans most likely to be affected are those that include formula provisions tied to (1) the federal estate tax marital deduction/exclusion amount, (2) the federal estate tax charitable deduction, or (3) the federal GST tax exemption. Other plans may be affected as well, depending on the makeup of assets and their intended disposition.

Federal Gift Tax Law

The 2001 Tax Act limited the lifetime exemption from the federal gift tax to $1 million per donor, with any use of the lifetime exemption to be charged against the federal estate tax exemption (which, as noted above, is scheduled to return in 2011). The 2001 Tax Act also reduced the gift tax rate to 35% for gifts made in 2010 (although, as in the case of the estate and GST taxes, Congress might try to enact a law changing that retroactively).

The lifetime exemption is consumed only in the case of “taxable gifts.” Taxable gifts do not include gifts of a so-called present interest that are within the gift tax annual exclusion amount (in 2010, $13,000 per donor for an unlimited number of donees). Taxable gifts also do not include direct payments (in any amount) for another person’s qualified tuition or medical expenses as long as the payments are made directly to the school or medical provider.

Wisconsin Estate Tax

The former Wisconsin estate tax expired at the end of 2007. Under current law, for Wisconsin residents dying after 2007, there is no Wisconsin estate tax for assets that have a taxable situs in Wisconsin. It is of course possible that the state law on estate taxes (as with any law) could change. For now, however, Wisconsin does not have an estate tax, nor does it have a gift tax or GST tax. (For persons who own property in a state that still has an estate or inheritance tax, state death taxes still can be an issue.)

Marital Property Agreements

In the case of married persons who plan their estates together, a marital property agreement often is an integral part of the estate plan. Marital property in Wisconsin is a form of community property, which has a unique tax attribute: upon the death of one spouse when the estate tax is applicable, both halves of a marital property asset receive an adjustment in basis. While sometimes this double adjustment in basis results in a double step-up, it could instead result in a double step-down if the value of the asset has fallen below its income tax basis.

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Estate Planning

I. Scope of Chapter [§ 10.1]

This chapter assumes a fundamental knowledge of law and practice relating to estate planning. Its focus is on the marital property law implications of estate planning in Wisconsin. The classification and ownership rules under marital property law have significant implications both for property disposition (lifetime as well as death transfers) and taxation (income as well as transfer taxes). In addition, the marital property law may have significant implications with respect to creditors' rights in certain situations. This chapter addresses these and other issues the estate planner must consider when advising married persons in Wisconsin.[1]

For a discussion of income and transfer tax issues relating to marital property, see chapter 9, *supra*. For a discussion of estate planning generally, see John R. Price, *Price on Contemporary Estate Planning* (2d ed. 2000 & Supp.); Susan Collins et al., *Eckhardt's Workbook for Wisconsin Estate Planners* (State Bar of Wisconsin CLE Books 5th ed. 2008).

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2005–06 Wisconsin Statutes, as affected by acts through 2007 Wisconsin Act 19. Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

II. Separate vs. Joint Representation [§ 10.2]

In most cases, spouses will work together in developing an integrated estate plan based on common goals and objectives and will retain the same counsel in a joint representation relationship. In such instances, it is advisable for counsel to have his or her clients sign a joint (or dual) representation letter after consultation. See chapter 14, *infra*, for a discussion of representation of spouses jointly in estate planning. Sometimes, however, counsel may be advising only one spouse, whose objective may be to minimize the impact the marital property law has on the other spouse's ability to assert property rights. In either case, marital property law and its impact from both a property law and tax law standpoint should be considered, including the impact on the rights of creditors and division of property in the event of dissolution of the marriage.

III. Basic Estate Planning Considerations Under Marital Property Law [§ 10.3]

A. Marital Property Fundamentals [§ 10.4]

1. Application of Chapter 766 to Spouses [§ 10.5]

Wisconsin's marital property law has a pervasive effect on the property rights of spouses in Wisconsin. As a result, when marital property law applies, it is important to consider its implications for the estate plan.

Chapter 766 specifies when that chapter begins to apply to spouses and when it ceases to apply. *See* Wis. Stat. § 766.03. Both spouses must be domiciled in Wisconsin for the marital property law to apply to property rights acquired by the spouses. Wis. Stat. §§ 766.01(8), .03(1). Even if both spouses are domiciled in Wisconsin, the marital property law does not purport to classify certain assets acquired before the determination date (*predetermination date property*), such as property acquired before 1986 or property acquired before the spouses became domiciled in Wisconsin (but the law may nonetheless confer elective rights as to such property at the death of the first spouse). And even when chapter 766 no longer applies to spouses, property rights acquired and obligations incurred while the law applied continue. Wis. Stat.

§ 766.03(3). For spouses moving from Wisconsin (or if only one spouse moves from Wisconsin), the preservation of marital property rights acquired while chapter 766 applied may be an important tax-planning consideration.

> ➤ ***Note.*** Before the amendment of chapter 766 by 1987 Wisconsin Act 393 [hereinafter 1988 Trailer Bill], application of chapter 766 was dependent on the spouses' having a "marital domicile" in Wisconsin. The reference to marital domicile was eliminated because of the uncertainty concerning its meaning.

2. Classifications and Presumptions [§ 10.6]

Under the marital property law, all property of spouses is classified as marital property unless classified otherwise under chapter 766 or unless not classified by reason of having been acquired before the spouses' determination date. Wis. Stat. § 766.31. All property acquired by spouses is presumed to be marital property. Wis. Stat. § 766.31(2). Subsections 766.31(6) and (7) identify property classified as individual property. Establishing that property is not marital property generally requires proof of the time, method, or source of acquisition in a manner that shows that the general classification as marital property should not apply. For a general discussion of classification of property, see chapter 2, *supra*. For a discussion of the classification of property when mixing has occurred, see chapter 3, *supra*.

3. Spouses' Respective Interests in Marital Property Assets [§ 10.7]

Each spouse owns a present undivided one-half interest in each marital property asset. Wis. Stat. § 766.31(3). That interest continues throughout the marriage unless the asset is reclassified by one of the means specified under the marital property law. Each spouse's ability to deal with a marital property asset during the ongoing marriage is affected by rules relating to management and control under section 766.51, the remedies for gifts of marital property in excess of the limits specified under section 766.53, the duty of good faith under section 766.15, and the remedies afforded under section 766.70.

4. Respective Interests of Surviving Spouse and Successor in Interest to Deceased Spouse in Former Marital Property Assets [§ 10.8]

Upon the death of a spouse, the surviving spouse retains his or her undivided one-half interest in each item of marital property regardless of title. Wis. Stat. § 861.01. The surviving spouse's interest is not subject to administration, and a third party who is a successor in interest to all or part of the decedent's one-half interest (such as the decedent's personal representative) is a tenant in common with the surviving spouse. *Id.*

5. Spouses' Ability to Reclassify by Marital Property Agreement and Other Methods [§ 10.9]

Chapter 766 gives spouses considerable flexibility to modify the property regime otherwise specified by statute. Section 766.17(1) provides that, with limited exceptions, spouses may vary the effect of chapter 766 by marital property agreement. A marital property agreement may classify assets in a different manner than the law would otherwise specify. Assets may be classified or reclassified by other means as well, as specified in section 766.31(10), or by taking title in certain forms, Wis. Stat. § 766.60. Thus, a spouse who owns an individual property asset or predetermination date property asset may reclassify it as marital property. Spouses may reclassify a marital property asset as the individual property of one spouse. This flexibility to alter property rights can be an important part of achieving the spouses' estate planning objectives. For a discussion of marital property agreements, see generally chapter 7, *supra*. For a discussion of considerations involved in deciding whether to reclassify assets and determining the method of reclassification, see sections 10.18–.33, *infra*.

Spouses can also unintentionally reclassify assets—for example, by mixing marital and nonmarital property assets or by applying efforts to the improvement of nonmarital property assets. For a discussion of reclassification by way of such mixing, see chapter 3, *supra*. Unintentional reclassification also can occur by taking title to assets in certain joint forms (for example, taking title as "tenants in common" or "joint tenants"). *See* Wis. Stat. § 766.60(4)(b). From a planning standpoint, spouses need to understand the potential effects of their actions to avoid unanticipated reclassification that may undermine aspects of their estate planning.

6. Item-by-item Rule [§ 10.10]

The difference between the item-by-item rule and the aggregate rule is a significant marital property concept. Wisconsin follows the item-by-item rule. Wis. Stat. § 861.01.

Under the *aggregate rule*, at the death of one spouse, the surviving spouse owns one-half the community property assets in the aggregate, not in each and every item. For example, if the aggregate community property assets are $100,000 and one spouse dies, the surviving spouse owns $50,000 but does not have an ownership interest in each and every asset. In contrast, under Wisconsin's *item-by-item rule*, the surviving spouse owns an undivided one-half interest in each and every former marital property asset, as a tenant in common. Wis. Stat. § 861.01.

The item-by-item rule is important for several reasons. As part of the estate planning process, the assets that can be disposed of by each spouse must be ascertained. A marital property agreement may be necessary so that one spouse is able to dispose of a particular asset. If a spouse wishes to dispose of an entire asset but owns only one-half of it, participation of the other spouse is necessary to make a complete and final disposition of the asset. This participation can be accomplished by various means but is often accomplished with a marital property agreement. Conversely, the spouses must be careful not to make unanticipated dispositions. For example, a general residuary clause in the deceased spouse's will may result in an unanticipated transfer of a one-half interest in those assets if a third party is the beneficiary of the residuary clause.

2005 Wisconsin Act 216, section 42, created section 766.31(3)(b) to permit distribution on an aggregate rather than on an item-by-item basis so as to allow more flexibility in the administration of the estate of the first deceased spouse. For a general discussion of this provision, see section 2.22, *supra*. For a discussion of the federal and Wisconsin tax issues relative to this change, see section 9.20, *supra*. For suggested provisions to include in a marital property agreement to accommodate this change, see section 7.151, *supra*.

7. Title vs. Ownership [§ 10.11]

Under Wisconsin's previous common law system, title and ownership were largely synonymous. If one spouse were the sole grantee on the deed to a parcel of real estate, that spouse was the sole owner of the real estate. Title and ownership are not synonymous under Wisconsin's marital property law. For example, one spouse may be the sole grantee of the residence, but the residence may be marital property, so that each spouse has a vested, one-half ownership interest in the residence. The concept that one can be an owner and not be a titleholder is significant; it is this concept that causes the most difficulty in applying the marital property law.

As a result of the potential difference in title and ownership, the estate planner gathering information from married clients may need to ask more than simply which spouse holds title to an asset. *How* the asset was acquired, *when* it was acquired, and with *what* it was acquired also are potentially significant questions in ascertaining ownership of the asset.

8. Management and Control [§ 10.12]

Under Wisconsin's previous common law system, ownership was largely synonymous with management and control. For example, if stock were titled in one spouse's name alone, that spouse had the sole right to manage and control the stock. But under Wisconsin's marital property system, ownership is not synonymous with management and control. Generally, title, not ownership, determines the right to manage and control. Thus, if stock classified as marital property is registered in one spouse's name alone, that spouse has the right to manage and control the stock, even though the spouse has only a one-half ownership interest. Conversely, the other spouse has no right of management and control despite being a one-half owner of the stock.

9. Gifts and Remedies [§ 10.13]

Lifetime gifts may be an integral part of the estate plan. If the subject of a gift is a nonmarital property asset (e.g., individual property or predetermination date property), the married donor need not be concerned about property rights and tax consequences arising from the marital property law, with one exception. If predetermination date property assets that meet the definition of *deferred marital property* are given away within two years of the donor's death or if the donor transfers such property while retaining certain rights in the transferred property, the assets may be included within the deferred marital property election available to the surviving spouse and may be subject to recovery. *See* Wis. Stat. §§ 861.03(3), (4), .06(4).

When a marital property asset is the subject of a gift, the gift will be deemed for federal gift tax purposes to have been made by both spouses, even if one spouse acted alone in making the gift. This may facilitate the efficient use of gift and generation-skipping transfer (GST) tax annual exclusions, applicable credit amounts, and GST exemptions. A gift-splitting election is not necessary when the subject of the gift is a marital property asset. The treatment of the gift as having been made one-half by each spouse also may give rise to unanticipated estate tax consequences. *See* chapter 9, *supra*, for a general discussion of the tax consequences of gift transactions.

The right to manage and control a marital property asset includes the power to make a gift of that asset to a third party, but a gift that exceeds the limit specified by section 766.53 gives rise to a right of recovery by the other spouse unless the spouses acted together in making the gift. Wis. Stat. §§ 766.53, .70(6)(a). From a planning standpoint, if the spouses jointly intend to make a gift of a marital property asset to a third party, contemporaneous evidence of both spouses' intent may eliminate questions that could arise later. For example, if a spouse having management and control of a marital property asset makes a gift of that asset (in excess of the section 766.53 limit) to a trust and the other spouse subsequently dies without having evidenced an intent to join in the gift, the personal representative of the deceased spouse may feel compelled to pursue the remedy provided under section 766.70(6)(a). A contemporaneous written consent by the spouse not having management and control could eliminate uncertainty.

10. Nonseverability of Marital Property Assets [§ 10.14]

Each spouse owns a present undivided one-half interest in a marital property asset. Wis. Stat. § 766.31(3). Spouses can reclassify an asset as marital property, but a marital property asset cannot be severed by the spouses. If a marital property asset is divided in two parts, each part remains marital property. If the spouses wish to divide a marital property asset, so that each spouse is the sole owner of a portion, the spouses must reclassify the asset as individual property. This reclassification can be accomplished before or after a division has occurred. With regard to the prohibition against unilateral severance of marital property assets, see section 2.23, *supra*.

11. Taxation [§ 10.15]

The Internal Revenue Service (IRS) has recognized that marital property under chapter 766 is a form of community property. Rev. Rul. 87-13, 1987-1 C.B. 20. This is significant because there is an established body of federal tax law concerning income and transfer taxes as they relate to community property assets. Chapter 9, *supra*, discusses principles of income and transfer taxation and the application of those principles to marital property assets.

B. Deferred Marital Property Elective Rights [§ 10.16]

The comprehensive revision of the probate code under 1997 Wisconsin Act 188, which took effect on January 1, 1999, included a wholesale revision of the former deferred marital property election against probate assets and the augmented marital property estate election against nonprobate assets. The former elections have been combined into a single deferred marital property election under section 861.02, which applies to both probate and nonprobate assets and provides for a pecuniary amount rather than an item-by-item election.

From a planning perspective, the assertion of the deferred marital property election has the effect of altering the plan of disposition that otherwise would apply at the death of the first spouse. When spouses have planned together under circumstances in which they are represented by the same counsel and have put in place a plan that reflects shared goals and objectives, the possible existence of elective rights is generally of little consequence. Indeed, in most of these situations, the spouses will have entered into a comprehensive marital property agreement that classifies their assets either as marital property or individual property so that there is no election to be made.

But when spouses are not working together in their estate planning, the existence of the deferred marital property election is something for each to consider. If the spouses have previously entered into a marital property agreement defining their respective rights and obligations, the agreement will normally include a waiver of spousal elective rights. In such a situation, the estate planning that follows need not take into account elective rights (unless there is concern about the enforceability of the marital property agreement). In situations in which there is no marital property agreement or in which there is concern about the enforceability of a marital property agreement, the extent to which the exercise of the deferred marital property elective right could upset a plan of disposition should be considered. For a discussion of alternatives for limiting the impact of elective rights at death, see section 10.169, *infra*.

C. Intestacy [§ 10.17]

A thorough estate plan normally will result in no assets passing by way of intestacy. However, the estate planner should be aware of the manner in which assets would devolve in the absence of effective provisions in a will. The rules of intestacy in the case of a deceased spouse are set forth in section 852.01.

IV. Classifying and Reclassifying Assets [§ 10.18]

A. Determining Classification of Existing Assets of Spouses [§ 10.19]

At the beginning of the estate planning process, the estate planner gathers information from the spouses that will be important to the estate plan, such as family information and information regarding assets and liabilities. From the perspective of marital property law, this information should include when the spouses were married, when they established their domicile in Wisconsin, and whether they have entered into any marital property agreements. The responses to all these inquiries may have implications concerning the classification of assets. Information gathered regarding assets and liabilities typically will include identification of the type of asset and how it is titled (in one spouse's name or in both names). Under a common law property regime, that information may be enough. In planning under the marital property law, for some clients, it may be necessary to obtain further information to ascertain the classification of assets. For example, if an asset held in one spouse's name alone was acquired by gift or transfer at death, that asset will not be classified as marital property. Wis. Stat. § 766.31(7)(a), (8). The reclassification of the asset as marital property would have an effect on the owner's property rights, both during the ongoing marriage and at the termination of the marriage by death or dissolution. Hence, depending on the type of plan to be adopted, the estate planner may need to have spouses identify property that was acquired by gift or by transfer at death in the information-gathering process.

Similarly, the planner may wish to seek information regarding *when* an asset was acquired to ascertain whether it was acquired before or after the spouses' determination date. For example, publicly traded stock titled in the spouses' names as joint tenants that was acquired by them before 1986 is classified as joint tenancy property. *See* Wis. Stat. § 700.19. By contrast, publicly traded stock acquired by Wisconsin-domiciled spouses in their names as joint tenants after 1985 is survivorship marital property (with limited exceptions). *See* Wis. Stat. § 766.60(4)(b)1.a.; *supra* ch. 2.

Depending on the type of plan to be adopted, it may or may not be necessary to identify the classification of each and every asset owned by the spouses. In each instance, the planner must exercise judgment regarding what information is important to the estate plan.

B. Determining Whether Reclassification of Assets Is Appropriate for Spouses [§ 10.20]

1. In General [§ 10.21]

Under the marital property law, spouses have considerable flexibility in determining how assets are classified. As a result of the unlimited gift tax marital deduction, assets generally can be reclassified by spouses without any gift tax consequences, though caution should be observed in adopting any contractual provisions that might cause a donee spouse's interest to be deemed a gift of a nonqualified terminable interest. Further, caution should be observed if both spouses are not U.S. citizens, *see infra* § 10.131. Whether assets should be reclassified in each instance requires an exercise of judgment regarding whether the reclassification will help achieve particular tax or nontax objectives. If the spouses decide to reclassify an asset, there is the further question of the method to use in achieving the reclassification (e.g., gift, conveyance, marital property agreement, written consent).

2. Preservation of Property Rights of Spouses [§ 10.22]

The reclassification of an individual property asset as a marital property asset (or vice versa) changes each spouse's property rights regarding that asset. These may be rights during the marriage (e.g., rights with respect to management and control or the availability of the asset to satisfy the claims of certain creditors), rights at the death of a spouse (e.g., the right to dispose of all or part of the asset by will), or rights at dissolution of the marriage (e.g., the right to treat an inherited asset as not subject to property division). When spouses are working together in the estate planning process, the adjustment of their relative property rights may be in furtherance of shared goals and objectives (e.g., in the case of reclassification as marital property, the ability of the survivor to enjoy the tax benefits of a full adjustment in tax basis).

However, shared goals and objectives can change over time and sometimes diverge, or unforeseen circumstances can arise. The husband's inherited asset that has been reclassified as the marital property of both spouses may become the subject of property division at dissolution. The wife's former individual or predetermination date property asset reclassified as marital property can be reached by the husband's creditors to satisfy family-purpose obligations. Classification decisions are made in light of shared goals and objectives and possible or unforeseen circumstances. The estate planner should discuss with his or her clients the relative advantages and disadvantages of reclassifying assets in one manner or another.

3. Creating Certainty Regarding Classification of Assets [§ 10.23]

As discussed at section 10.10, *supra*, Wisconsin's community property regime depends on an item-by-item classification of assets. This means that, at the death of one spouse, it is necessary to determine the classification of each asset owned by the spouses. In some situations, this may not be difficult or may not be critical. For example, if the spouses were married after 1986, have been domiciled in Wisconsin during their entire marriage, and have acquired all of their assets through the expenditure of their efforts, determining the classification of assets may be a rather straightforward task. Similarly, if the estate plan provides that all assets are to pass to the surviving spouse, the precise determination of the classification of each and every asset may not be particularly significant.

In many situations, however, determining the classification of all the spouses' assets can be a daunting task, particularly in view of the general mixing and tracing rules under section 766.63 and the special classification rules for life insurance and deferred employment benefits under sections 766.61 and 766.62, respectively. But if the spouses have entered into a comprehensive marital property agreement during their lifetime, the determination of the classification of assets can be simplified immensely. Hence, a marital property agreement can add a level of certainty to the planning process and ultimately to the administration of the estate of the first spouse to die.

See section 10.10, *supra*, describing the option of deviating from the item-by-item rule by virtue of the change made to section 766.31(3) by 2005 Wisconsin Act 216, section 42.

4. Utilization of Applicable Credit Amount (Unified Credit) or GST Exemption of Each Spouse [§ 10.24]

Efficient planning for the utilization of each spouse's applicable credit amount (unified credit) for federal estate tax purposes and, when applicable, each spouse's exemption from the federal GST tax (GST exemption) depends on each spouse having sufficient assets to dispose of at death to utilize the exclusion or exemption. Often, one spouse has more assets than the other spouse, which, if the spouse with fewer assets dies first, can undermine effective estate and GST tax planning.

➢ ***Example.*** If a husband has individual property or predetermination date property assets of $2 million and his wife has individual property or predetermination date property assets of

$600,000, the husband dies first, and the estate plan includes an optimal marital deduction/credit shelter plan, there would be no federal estate tax in the survivor's estate. If his death occurred in 2005 (when the federal estate tax exemption amount was $1.5 million) and no change in the current federal law, at the husband's death the applicable credit amount would shelter $1.5 million of assets passing to a credit shelter trust, while the balance of $500,000 would pass to or for the benefit of the wife and qualify for the marital deduction, resulting in no federal estate tax in the husband's estate. At the wife's subsequent death (assume in 2005) her gross estate of $1.1 million (assuming constant values) would be sheltered from federal estate tax by reason of her available applicable credit amount.

On the other hand, if the wife died first in 2005, her assets of $600,000 would pass to a credit-shelter trust and would be sheltered from estate tax by the applicable credit amount, but the husband would continue to have a gross estate of $2 million. If he died later in 2005, $1.5 million would be sheltered from federal estate tax by the applicable credit amount, but the balance of $500,000 would be subject to federal estate tax.

If the spouses in the above example were to reclassify their assets as marital property, the first decedent would have an estate subject to disposition of $1.3 million. Assuming the death occurred in 2005, this entire amount would pass to the credit-shelter trust free of federal estate tax. In the survivor's estate (again assuming death in 2005), the survivor's $1.3 million likewise would be sheltered from federal estate tax by the applicable credit amount. In larger estates, equalizing the spouses' respective estates can further facilitate estate tax planning by providing the opportunity to pay some estate tax in the first estate at lower marginal estate tax rates.

Of course, with scheduled increases in the federal applicable exclusion amount, and the uncertain future interplay of the Wisconsin estate tax, creating an example is a moving target. However, as a general principal, equalization of estates can be valuable for estate tax planning purposes. For a comprehensive discussion of the "decoupled" Wisconsin estate tax, see Michael W. Wilcox, *Wisconsin's New Estate Tax*, Wis. Law., Dec. 2001, at 10.

A similar analysis applies to a larger estate when the plan adopted contemplates the use of each spouse's GST exemption. By balancing the sizes of the spouses' respective estates, optimal (or substantial) use of the GST exemption can be ensured regardless of which spouse dies first.

Using a marital property agreement to achieve balance in the size of the spouses' respective estates is an ideal planning technique since it does not require the retitling of assets held in either spouse's name alone. Each spouse can maintain management and control of his or her "own" assets during lifetime (subject to the duty of good faith and spousal remedies that apply to marital property assets). For cases involving assets held in the spouses' names together (for example, in a joint account), see section 10.31, *infra*.

5. Obtaining Full Adjustment in Basis of Marital Property Assets upon Death of One Spouse [§ 10.25]

The IRS has recognized that, for federal tax purposes, Wisconsin marital property is community property. Rev. Rul. 87-13, 1987-1 C.B. 20. At the death of the first spouse, each marital property asset, not just the decedent's one-half interest, receives a basis adjustment (except for income in respect of a decedent, *see* I.R.C. § 1014(c). This is favorable if the assets have increased in value above their tax basis but unfavorable if the assets have declined in value below their tax basis. The classification of assets as marital property can be done on an item-by-item basis, thereby avoiding the potential adverse consequences of the full adjustment for assets that have declined in value below the tax basis.

Assuming assets have increased in value, the full adjustment in basis allows the surviving spouse the opportunity to sell former marital property assets without realizing predeath capital gains. When the spouses' assets have been concentrated in a particular asset (e.g., stock of a particular company), the full basis adjustment provides greater opportunity for tax-free diversification by the survivor.

The full adjustment of basis can be particularly beneficial for depreciable property classified as marital property (e.g., investment real estate). The death of one spouse results in the establishment of a new tax basis, thereby allowing the decedent's estate and the surviving spouse to redepreciate the property for income tax purposes. *See supra* Ch. 9

6. Consideration of Creditor Rights [§ 10.26]

Reclassifying assets as marital property can expand the pool of assets available to satisfy certain obligations incurred by only one spouse. For example, family-purpose creditors can satisfy obligations from all marital property. Wis. Stat. § 766.55(2)(b). Tort creditors can satisfy claims from the tortfeasor's interest in marital property. Wis. Stat. § 766.55(2)(cm).

When liabilities (or potential liabilities) incurred by one spouse are a concern, the potential tax advantages of opting in to marital property classification for assets that otherwise would be the individual property or predetermination date property assets of the nonincurring spouse may be outweighed by such liability concerns. The better strategy for such spouses may be to preserve the individual property or predetermination date property status of assets of the spouse with less liability risk.

Further, for some spouses, concerns about potential liabilities may dictate the *manner* in which assets are reclassified as individual property. A creditor without advance knowledge of the provisions of a marital property agreement or unilateral statement (or who does not receive a copy thereof) cannot be adversely affected by the terms of the agreement or statement. Wis. Stat. § 766.55(4m). On the other hand, reclassification by certain other methods authorized by statute (for example, by gift, conveyance, or written consent) normally will be binding absent circumstances giving rise to remedies under fraudulent transfer laws. *See supra* ch. 6.

Hence, concerns about liabilities may affect both the decision whether to reclassify assets and the manner in which reclassification is accomplished.

7. Federal Preemption Issues [§ 10.27]

Certain assets are not readily subject to reclassification under the marital property law because the relative property rights of the spouses are defined by federal law rather than state law. *See* chapter 2, *supra*, for a general discussion of federal preemption as it relates to community property rights. See chapter 4, *supra*, for discussions of preemption issues related to certain government benefits. *See supra* chapter 2, and *infra* § 10.110, for a discussion of federal preemption as it may apply to certain intellectual property rights.

In many instances, benefits under a qualified retirement plan governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461, may constitute a significant part of the spouses' estates. Because of the Supreme Court's decision in *Boggs v. Boggs*, 520 U.S. 833 (1997), planning for such assets in the context of a state community property law is problematic. For a discussion of planning for qualified plan assets, see §§ 10.132–10.147, *infra*.

C. Determining Appropriate Method of Classifying or Reclassifying Assets [§ 10.28]

Assets may be classified or reclassified by a number of different methods. *See generally supra* ch. 2. The most common and straightforward means of classifying the assets of spouses is by use of a marital property agreement. The requirements for creating a binding marital property agreement are discussed in chapter 7, *supra*.

Although an enforceable marital property agreement will be binding as between the spouses, it will not be binding on creditors who do not have a copy of or advance knowledge of the provisions of the agreement. Wis. Stat. § 766.55(4m). Hence, in some instances, a different means of reclassifying assets may be desirable. *See infra* §§ 10.171–.177.

Further, a marital property agreement requires the participation of both spouses. If one spouse is unwilling to participate, the other spouse may wish to use a unilateral statement under section 766.59 to effect the future classification of income from nonmarital property as his or her individual property. Like a marital property agreement, however, the unilateral statement is not binding on creditors without a copy of or advance knowledge of the terms of the unilateral statement. Wis. Stat. §§ 766.59(5), .56(2)(b).

D. Retitling Assets to Conform Title to Classification [§ 10.29]

1. In General [§ 10.30]

When assets have been reclassified by marital property agreement or other means, it may be unnecessary to change the title of the asset. For example, if a husband's individual property asset is reclassified as marital property, he may continue to hold title to the asset, the effect of which is that he has management and control rights with respect to a marital property asset. In other instances, changing title to conform with classification may not be necessary but may nonetheless be advisable to facilitate later title transfers. For example, if spouses hold Wisconsin real estate as common law joint tenants and subsequently enter into a marital property agreement that classifies their assets (including the real estate) as marital property, the agreement controls the classification of the property. But on the death of one spouse, if the title has not been changed to conform with the classification, record title will still reflect a survivorship form of ownership. It may be necessary to record a court order establishing the classification of the real estate as marital property to satisfy title insurance requirements upon the subsequent disposition of the property. A more practical approach may be to have the spouses sign and record a deed confirming the classification of the property as marital property.

In other situations, changing the form of title may be necessary to avoid future ownership or tax disputes regarding the property rights of spouses and their successors in interest. For example, if an asset is held in the spouses' names together as joint tenants and then the spouses by marital property agreement reclassify the property as the individual property of one spouse, the property should be retitled in the name of that spouse alone.

2. Joint Tenancies [§ 10.31]

When assets are held in spouses' names together with the intent that those assets be owned as marital property without a right of survivorship, taking steps to have assets held in a manner that does not specify a right of survivorship may avoid future ownership or tax disputes.

When spouses have entered into a marital property agreement that classifies assets as marital property, the agreement, and not the title of the asset, determines the asset's classification. For example, when real estate is owned by spouses as joint tenants under section 700.17(2) and is later reclassified as marital property by a marital property agreement, the asset is marital property with no right of survivorship. Although retitling the real estate may facilitate future title transfers, retitling is not required. Similarly, if a stock certificate is owned by spouses as joint tenants under section 700.17(2), a marital property agreement reclassifying the spouses' assets as marital property changes the classification of the stock. The right of survivorship for joint tenancy assets specified by statute, *see* Wis. Stat. § 700.17(2), no longer applies because the classification of the asset has been changed.

Note, however, that if an asset is acquired after the spouses' determination date and the applicable document of title, instrument of transfer, or bill of sale expresses an intent to establish a joint tenancy exclusively between the spouses, absent a contrary provision in a marital property agreement, the asset is survivorship marital property. Wis. Stat. § 766.60(4)(b)1.a. For example, if spouses enter into a general opt-in marital property agreement before or after acquiring a security owned as survivorship marital property pursuant to section 766.60(4)(b)1.a. and the agreement is silent regarding any right of survivorship, the form of holding title will control the right of survivorship. Unlike the effect on a predetermination date security owned by spouses as joint tenants under section 700.17(2)—in which case an opt-in marital property agreement serves to change the classification of the security from joint tenancy to marital property—a general opt-in marital property agreement does not change the classification of the security already owned by the spouses as survivorship marital property. Survivorship marital property is not a separate classification but merely marital property with a right of survivorship. Hence, absent a provision in the marital property agreement providing otherwise, *see* Wis. Stat. § 766.60(4)(b)1., the spouses' agreement that such assets are classified as marital property does not alter the right of survivorship.

3. Brokerage Accounts [§ 10.32]

Other assets may present a more difficult case because the right of survivorship may arise from a contractual arrangement as opposed to a statutory classification. For example, the terms of a brokerage account agreement may specify a right of survivorship. Does entering into a marital property agreement classifying assets generally as marital property override the contractual right of survivorship in the brokerage agreement so that the will of the first deceased spouse disposes of one-half of the assets in the brokerage account? Or, does the marital property agreement simply cause the assets of the account to be classified as marital property but with the deceased spouse's interest passing at death in accordance with the brokerage agreement to the surviving spouse?

Although its context is a tax dispute, the U.S. Tax Court's decision in *Estate of Richman v.Commissioner*, 66 T.C.M. (CCH) 527 (1994), illustrates the uncertainty that may be created when the dispositive provisions in a brokerage-account agreement differ from the dispositive provisions under the deceased spouse's will in a community property state. In *Richman*, Texas community property had been invested in a Massachusetts business trust. The governing instrument creating the business trust provided that the trust and the rights of all parties would be determined under the laws of Massachusetts (which is not a community property state). The tax controversy arose because the deceased husband's will left his share of community property in a manner that did not qualify for the marital deduction. The decedent's estate maintained that the decedent's interest in the trust passed pursuant to the terms of the investment application, which specified that the applicants would be joint tenants with right of survivorship. The tax court concluded that the choice of law provision in the application controlled. As a result, the interest passed to the surviving wife and qualified for the marital deduction.

In a decision not involving an analysis under chapter 766, the Wisconsin Court of Appeals concluded in *Templeton v. Moccero (In re Estate of Moccero)*, 168 Wis. 2d 313, 321, 483 N.W.2d 310 (Ct. App. 1992), that a joint account held by spouses at a brokerage firm passed by survivorship to the husband at the wife's death. This was so even though the circuit court found that the husband, who contributed all the property to the account, had intended to make a gift of one-half of the property to his wife. The wife's daughter argued that one-half of the account was required to be inventoried as part of her mother's estate and thus was subject to disposition by her mother's will. The circuit court concluded that the account was a joint account with right of survivorship. The court of appeals, quoting section 705.04(1) (which by its terms applies only to joint accounts at financial institutions), held that the circuit court's finding was not clearly erroneous and that the circuit court had correctly applied the law. Despite the court's reference to section 705.04, it is clear that the court of appeals concluded that the account was a joint tenancy. *See also First Wis. Trust Co. v. United States*, 553 F. Supp. 26 (E.D. Wis. 1982) (holding that, in gift tax dispute, solely owned stock transferred to brokerage account in spouses' names denominated as "joint tenancy with right of survivorship" resulted in spouses becoming joint tenants with respect to stock).

From a planning standpoint, questions about the effects of dispositive terms in a brokerage-account agreement can be avoided by either inserting specific provisions into the marital property agreement or by retitling an asset or account to conform the title with the intent regarding survivorship. One possibility is to specify in the marital property agreement the incidents of survivorship for assets held in certain forms. For example, the agreement might provide:

> Property held by the Parties jointly with the right of survivorship (for example, but not necessarily limited to, joint tenancy property, joint bank accounts, joint brokerage accounts which provide for a right of survivorship, and survivorship marital property), whether such joint ownership was established before or after the Parties' determination date, shall be survivorship marital property.

If the goal is to avoid any right of survivorship for marital property assets, the spouses might attempt to override the right with provisions in a marital property agreement. The problem with this method, however, is that the third party may insist on a court determination of ownership rights before acknowledging the right of the personal representative of the first deceased spouse to manage and control the deceased spouse's interest in the former marital property asset. Further, as discussed below, in the case of joint accounts at financial institutions governed by chapter 705, the statutes create questions as to the effectiveness of such a provision in a marital property agreement when it comes to overriding the presumptive right of survivorship. If this method is used and the intent is to have the decedent's interest in a jointly held asset pass other than to the surviving spouse, having the survivor execute a disclaimer following the death of the first spouse will eliminate uncertainty regarding the disposition of the decedent's interest in the asset.

The more certain approach to eliminating rights of survivorship is to simply have spouses hold title to marital property assets in a form that does not include a right of survivorship. A marital property asset may be held in the name of one spouse alone (and, if the spouses desire joint management, the holding spouse can grant the nonholding spouse a durable power of attorney). Or, if the spouses desire to have both names on the title and to jointly manage an asset, it may be held in a joint form that does not include a right of survivorship. Wisconsin real estate may be held in the form "Husband and Wife, as marital property." Wis. Stat. § 766.60(2). Publicly traded securities and brokerage accounts normally will not have "marital property" as an optional form of holding title to property, but spouses may nonetheless hold title to marital property assets as tenants in common. Wis. Stat. § 766.60(4)(b)1.b. If spouses have created a joint revocable trust as part of their estate plan, marital property assets may be held by the spouses as trustees of the trust. *See generally infra* §§ 10.55–.10.63. At the death of one spouse, the terms of the trust will specify the disposition of the deceased spouse's one-half of former marital property assets.

4. Accounts in Financial Institutions [§ 10.33]

Chapter 705 governs multiple party "accounts" in "financial institutions" (both being defined terms in section 705.01). It appears that the accounts described in chapter 705 do not include brokerage accounts since brokerage firms do not appear to be included within the definition of *financial institution* under section 705.01(3). Moreover, section 766.01(9)(b) does not appear to regard *accounts* under section 705.01 as including brokerage accounts. But see *Estate of Moccero*, 168 Wis. 2d at 321, discussed at section 10.32, *supra*, in which the court looked to chapter 705 in resolving a dispute regarding entitlement to assets in a brokerage account; see also *Reichel v. Jung (In re Estate of Jung)*, 2000 WI App 151, 237 Wis. 2d 853, 616 N.W.2d 118, discussed *infra*, in which the court of appeals included an insurance company within the term financial institution.

In Wisconsin financial institutions (including banks and credit unions) whose accounts are governed by chapter 705, spouses may open a "marital account" as an alternative to a joint account. *See generally supra* ch. 2. At the death of one spouse, the deceased spouse's one-half interest in the account is subject to administration, and the surviving spouse continues to own his or her one-half interest. Wis. Stat. § 705.04(2m).

Section 705.04(1) provides in part that "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." What is the effect of a marital property agreement classifying assets generally as marital property without right of survivorship when the agreement is entered into *after* a joint account between spouses has been established? Under the statute, the right of survivorship should continue to apply because assets of the account belong to the surviving owner absent "clear and convincing evidence of a different intention *at the time the account is created*." (Emphasis added.) Uncertainty can be avoided by causing title to be held in a manner consistent with the spouses' expectations concerning the right of survivorship.

Uncertainty regarding classification can further be avoided by keeping one spouse's nonmarital property assets (for example, inherited funds) from a joint bank account held by the spouses together. Although placement of funds in a joint bank account is not a statutory method for reclassifying assets, case law has suggested that reclassification may be effected in this manner. *See Lloyd v. Lloyd (In re Estate of Lloyd)*, 170 Wis. 2d 240, 487 N.W.2d 647 (Ct. App. 1992), *supra* § 3.14.

In *Estate of Jung*, 2000 WI App 151, 237 Wis. 2d 853, the Wisconsin Court of Appeals considered an appeal by the deceased husband's children from the circuit court's ruling that the decedent's surviving wife, and not the children, were entitled to receive the proceeds of an annuity of which the decedent was the owner. The husband and wife had entered into a "Marital Property Classification Agreement" in which they effectively adopted an individual property regime based on title, and the husband's will left the residue of his estate to his children. However, under the annuity contract, the husband was the first annuitant and the wife was the co-annuitant, and the terms of the annuity contract provided for a right of survivorship in favor of the co-annuitant. Affirming the circuit court, the court of appeals concluded that the annuity contract's survivorship provision constituted a "nonprobate transfer" under section 705.20 (now section 705.10) (even though "annuities" are not specifically mentioned in that section among the types of property that can be transferred by nonprobate means). The court further concluded that, under section 705.04, the annuity contract constituted a joint account that passed to the survivor by operation of law, concluding that the insurance company that issued the annuity was a financial institution within the meaning of section 705.01.

2005 Wisconsin Act 216, section 35, added a new subsection (4) to section 705.10 (formerly section 705.20), expanding the manner in which a nonprobate transfer can be confirmed following death.

V. Transfers by Will [§ 10.34]

A. Property Subject to Disposition by Will [§ 10.35]

1. Decedent's One-half Interest in Marital Property Assets [§ 10.36]

Each spouse owns a present undivided one-half interest in each marital property asset. Wis. Stat. § 766.31(3). Section 766.31(3)(b) allows for the postdeath allocation of marital property assets on an aggregate basis, rather than on an item-by-item basis. As a result, a spouse generally has a power of testamentary disposition over one-half of each marital property asset, with the other one-half continuing to belong to the survivor. But there are exceptions. If the marital property asset is an interest in a deferred-employment-benefit plan or an individual retirement account (IRA) traceable to the rollover of a deferred-employment-benefit plan, the interest of the nonemployee spouse terminates at death unless a marital property agreement provides otherwise. Wis. Stat. §§ 766.31(3), .62(5). If the marital property asset is an interest in a life insurance policy and the noninsured spouse dies first, the deceased spouse's interest in the policy is limited by statute to a share of the cash value unless a marital property agreement provides otherwise. Wis. Stat. § 766.61(7). If the marital property asset is a personal injury recovery for loss of income, the uninjured spouse's interest in the recovery terminates at death. Wis. Stat. § 766.31(7m). If a marital property asset is held as "survivorship marital property," at the death of the first spouse, the decedent's one-half interest passes by operation of law to the survivor. Wis. Stat. § 766.60(5). Likewise, the use of other nonprobate means of transferring property at death may affect a spouse's power of testamentary disposition over his or her share of a marital property asset, such as the use of a will-substitute agreement under section 766.58(3)(f) or a funded revocable trust.

If the surviving spouse has asserted the right to the deferred marital property elective share under section 861.02, the value of the deceased spouse's interest in marital property passing to the surviving spouse from decedent's estate is applied toward initial satisfaction of the elective share. Wis. Stat. § 861.06(2).

An important consideration for spouses who view their assets as being owned on the basis of title is that the first deceased spouse's will disposes of his or her interest in all marital property assets subject to administration, whether titled in the name of the deceased spouse or in the name of the survivor. If the residuary clause of the first deceased spouse does not pass the residue to the survivor, the survivor may be surprised by the result. If the spouses are working together on their estate plan, the surprise can be avoided if the estate planner educates the spouses as to how the law works. Once they understand the potential impact of the law, they may wish to address certain property rights at death with specific provisions in their wills, in a will-substitute agreement, or in a marital property agreement.

2. Decedent's Individual Property Assets and Predetermination Date Property Assets Not Subject to Elective Rights [§ 10.37]

A spouse is free to transfer his or her individual property assets, by will, without interference by the surviving spouse. The same is true with respect to predetermination date property assets that would have been classified as individual property had they been acquired when chapter 766 applied (*deferred individual property*, Wis. Stat. § 861.018(2)). In either case, such individual property and deferred individual property assets are not part of the augmented deferred marital property estate, Wis. Stat. § 861.02(2), and they are not available to satisfy the deferred marital property elective share if the surviving spouse makes the election under section 861.02. *See* Wis. Stat. § 861.06. However, to the extent that such assets pass to the surviving spouse, their value is included in determining whether the elective share has been satisfied (along with any such assets passing to the surviving spouse by nonprobate means as well). Wis. Stat. § 861.06.

3. Decedent's Predetermination Date Property Assets Subject to Elective Rights [§ 10.38]

As revised by 1997 Wisconsin Act 188, the deferred marital property election under chapter 861 allows a surviving spouse to take an *amount* equal to not more than one-half the augmented deferred marital property estate. *See* Wis. Stat. § 861.02(1). (This is in contrast to the former deferred marital property election, which allowed the surviving spouse to elect up to a one-half interest in each item of deferred marital property that was subject to administration.) However, assets disposed of by a deceased spouse's will that constitute part of the augmented deferred marital property estate are available to satisfy the deferred marital property elective share. Wis. Stat. § 861.06. Thus, the deceased spouse's will disposes of each item of deferred marital property in accordance with the terms of the will, subject to the possibility that the asset may be required to satisfy the deferred marital property elective share.

B. Specific Bequests and Devises [§ 10.39]

1. To Spouse [§ 10.40]

If the deceased spouse's will gives a specific asset to the surviving spouse, the classification of the property given has little significance from the standpoint of the ultimate ownership of the asset. If the asset is the decedent's individual property, the entire asset is subject to administration in the decedent's estate and passes pursuant to the terms of the will to the spouse. If the asset is predetermination date property, the entire asset is likewise subject to administration in the decedent's estate and passes pursuant to the terms of the will to the spouse, whether or not it is part of the augmented deferred marital property estate. If the asset is marital property of the decedent and surviving spouse, one-half of the asset is subject to administration in the decedent's estate and passes pursuant to the terms of the will to the spouse. The surviving spouse already owns the other one-half interest in the asset.

If the surviving spouse has asserted the elective right to the deferred marital property elective share under section 861.02, the value of the deceased spouse's interest in a marital property asset specifically bequeathed to the surviving spouse from the decedent's estate is applied toward initial satisfaction of the elective share. Wis. Stat. § 861.06(2)(b).

From an estate tax perspective, if the asset is nonmarital property, the entire value of the asset is includible in the decedent's gross estate. If the asset is marital property, only one-half the value is includible in the decedent's gross estate. *See supra* ch. 9. In either case, the value passing to the surviving spouse qualifies for the marital deduction under I.R.C. § 2056 so that there is no estate tax associated with the transfer. See, however, section 10.131, *infra*, regarding limitations on the availability of the marital deduction in the case of assets passing to a spouse who is not a U.S. citizen.

From the standpoint of the income tax basis of the asset, the result is the same whether the asset is marital or nonmarital property—that is, the entire asset receives a basis adjustment by reason of the decedent's death. *See generally supra* ch. 9.

Spouses' marital property assets may include items titled in one spouse's name alone that the other spouse clearly would want the titled spouse to own outright in the event of the death of the nontitled spouse. For example, a husband holds a membership interest in a golf club that was acquired with marital property assets and that is devisable (often such interests are not devisable). The residuary clause of the wife's will pours assets to a revocable trust, which in turn allocates assets between a qualified terminable interest property (QTIP) marital trust and a credit-shelter trust. Absent a specific provision in the wife's will (or in the revocable trust) to the contrary, if the wife predeceases the husband, the wife's interest in the golf club membership would pass to the revocable trust and would be allocable either to the QTIP trust or to the credit-shelter trust, which is not likely to be the intended result. The husband may be forced to purchase the interest from the wife's estate in order to own it outright. The spouses could have prevented this result by including a specific provision in the wife's will, such as, "I give and bequeath to my husband, John, if he survives me, any interest I may own in ABC Golf Club." Note, however, that if the wife has insufficient assets to fully fund the credit-shelter trust, forcing the husband to buy the wife's marital property interest from her estate or from the credit-shelter trust may provide an additional opportunity to shelter assets from estate tax in the husband's estate.

2. To Third Party [§ 10.41]

If an asset is bequeathed to a third party, its classification is important, because it may determine whether the testator's intent is carried out. If the asset is the decedent's individual property or is predetermination date property that is not part of the augmented deferred marital property estate (i.e., "deferred individual property" under section 861.018(2)), the asset passes under the decedent's will to the specified beneficiary and is not available to satisfy the deferred marital property elective share under section 861.02(1). Wis. Stat. § 861.06(2). If the asset is predetermination date property that is part of the augmented deferred marital property estate, the asset passes under the decedent's will to the specified beneficiary, subject, however, to the possibility that it may be applied toward satisfaction of the deferred marital property elective share if the elective right under section 861.02(1) is asserted by the surviving spouse. Wis. Stat. § 861.06(3).

If the asset is a marital property asset, the bequest or devise of it to a third party will transfer only the decedent's one-half interest in the asset to the third party. The specified beneficiary becomes a co-owner with the surviving spouse, which in many cases will not be the decedent's intent. This result can be avoided by having the spouses reclassify the asset as the individual property of the party who intends to make a gift of the asset in his or her will.

C. Pecuniary Bequests [§ 10.42]

1. To Spouse [§ 10.43]

A pecuniary bequest to the surviving spouse will be satisfied from the decedent's interest in marital property assets or the decedent's nonmarital property assets. If the surviving spouse has asserted the elective right to the deferred marital property elective share under section 861.02, amounts passing to the spouse from the decedent's estate are applied toward initial satisfaction of the elective share. Wis. Stat. § 861.06(2).

2. To Third Party [§ 10.44]

A pecuniary bequest to a third party will be satisfied from the decedent's interest in marital property assets or the decedent's nonmarital property assets. These may include assets titled in the surviving spouse's name alone that were regarded by the spouses as belonging to the titled spouse. Hence, the potential exists for unanticipated consequences for the survivor when he or she learns that one-half of his or her solely titled asset is available to satisfy the pecuniary bequest. This result can be avoided by having the spouses reclassify the asset as the individual property of the spouse who holds title to the asset.

D. Formula Bequests [§ 10.45]

1. To Spouse [§ 10.46]

A formula bequest to the surviving spouse (for example, a bequest designed to make optimal use of the marital deduction and applicable credit amount) will be satisfied from the decedent's interest in marital property assets or the decedent's nonmarital property assets. If the surviving spouse has asserted the elective right to the deferred marital property elective share under section 861.02, amounts passing to the spouse from the decedent's estate are applied toward initial satisfaction of the elective share. Wis. Stat. § 861.06(2).

2. To Third Party [§ 10.47]

A formula bequest to a third party will be satisfied from the decedent's interest in marital property assets or the decedent's nonmarital property assets. These may include assets titled in the surviving spouse's name alone that were regarded by the spouses as belonging to the titled spouse. Hence, as with a pecuniary bequest, the potential exists for unanticipated consequences for the survivor when he or she learns that one-half of his or her solely titled asset is available to satisfy the formula bequest. This result can be avoided by having the spouses reclassify the asset as the individual property of the spouse who holds title to the asset.

E. Residuary Bequests [§ 10.48]

1. To Spouse [§ 10.49]

A residuary bequest to the surviving spouse passes, to the surviving spouse, the decedent's interest in marital property assets and nonmarital property assets that are not the subject of specific, pecuniary, or formula bequests. If the surviving spouse has asserted the elective right to the deferred marital property elective share under section 861.02, amounts passing to the spouse from decedent's estate are applied toward initial satisfaction of the elective share. Wis. Stat. § 861.06(2).

2. To Third Party [§ 10.50]

A residuary bequest to a third party passes, to the third party, the decedent's interest in marital property assets and nonmarital property assets that are not the subject of specific, pecuniary, or formula bequests. These assets may include assets titled in the surviving spouse's name alone that were regarded by the spouses as belonging to the titled spouse. This can result in an unpleasant surprise to the survivor when he or she learns that one-half of his or her solely titled asset is available to satisfy the residuary bequest. Likewise, there may be marital property assets, titled in the deceased spouse's name alone, that were regarded by the spouses as belonging to the titled spouse. The residuary beneficiary will be entitled to receive only one-half of those assets, which may not be the intended result.

To avoid such unanticipated results, the spouses can reclassify assets to make the classification coincide with their view of ownership and their expectations of how the property should pass at death.

F. Spouse as Personal Representative [§ 10.51]

One responsibility of the personal representative of a decedent's estate is to file with the court an inventory of the decedent's property, including the property's value as of the date of death and indicating which assets are marital property. Wis. Stat. § 858.01. Absent a comprehensive marital property agreement classifying the assets, determining the assets' classification upon death may be a daunting task.

If the surviving spouse is not the sole beneficiary of the decedent's estate, there is a potential conflict in naming the spouse as the personal representative since he or she must determine which of the assets held either by the decedent or the survivor are classified as marital property. In many situations—particularly those in which the spouses worked together in their estate planning—this potential conflict poses little concern. In other situations, however—for example, second marriages in which there are children from the first marriage—naming the spouse as sole personal representative could prove troublesome. In those situations, the testator might designate someone else or at least require the appointment of a co-personal representative to serve with the surviving spouse.

G. Equitable Election [§ 10.52]

Wisconsin's equitable election statute, section 853.15, is discussed in detail in chapter 12, *infra*. The statute applies when a will "clearly purports" to transfer property that actually belongs to another person who is also a beneficiary under the will. If the statute applies, the other person is forced to elect between (1) keeping his or her interest in the specifically devised property and forfeiting his or her beneficial interest under the will, or (2) forfeiting his or her interest in the specifically devised property and accepting his or her beneficial interest under the will.

If a testator wishes for the equitable election statute to apply, his or her intention should be clearly stated in the will. Inadvertent application of the statute should be avoided in will drafting. Wisconsin's marital property system creates the potential for the inadvertent application of the equitable election statute in the case of a specific bequest or devise of property that the testator spouse believes to be his or her own but that in fact belongs to the spouses as marital property. A convenient way to clearly override the statute is to include a provision in each spouse's will stating, "It is not my intention to dispose of my spouse's interest in any marital property assets."

VI. Revocable Living Trusts [§ 10.53]

A. In General [§ 10.54]

Revocable living trusts are frequently used in estate planning. For an excellent discussion of the advantages and disadvantages of revocable living trusts, see Price, *supra* § 10.1, at sections 10.7–.17. The discussion here focuses on the marital property issues related to the use of revocable living trusts. The basic points to be elaborated upon in the following discussion are the following:

1. Marital property assets and income in a revocable living trust remain marital property while in the trust. *See* Wis. Stat. § 766.31(5).

2. Marital property assets in a properly prepared revocable living trust are eligible for the full adjustment in basis afforded marital property assets in the Internal Revenue Code. The provisions of one joint revocable trust holding community property that were determined to preserve qualification for the full basis adjustment are described in Rev. Rul. 66-283, 1966-2 C.B. 297.

3. If the revocable living trust contains marital property assets, the trust instrument should deal with the disposition of property upon the death of each spouse. A joint trust created by the spouses generally is the best way to do that. See sample form at section 10.180, *infra*.

B. Effect of Transfer of Marital Property Assets to Revocable Trust [§ 10.55]

The transfer of property to a trust does not by itself change the classification of the property. Wis. Stat. § 766.31(5). Assuming there is nothing in the trust instrument that would change the classification, assets transferred to a revocable living trust retain their classification while held by the trustee. The Comment to section 4 of the Uniform Marital Property Act (UMPA reprinted in appendix A, *infra*) also addresses this issue.

This conclusion is not inconsistent with section 766.70(6)(a), which provides a remedy for gifts of marital property assets to third persons. Because the donor retains the power to withdraw, there is no gift when a marital property asset is transferred to a revocable trust. A transfer to a revocable living trust is an exercise of the spouse's power to manage and control. *See generally supra* ch. 4.

For a discussion of grantor trust issues raised by the transfer of marital property assets to a trust, see chapter 9, *supra*.

C. Management and Control of Assets Held in Revocable Trust [§ 10.56]

The trustee of a trust has the authority to manage and control marital property assets transferred to the trust. Wis. Stat. § 766.51(3). Generally, the classification of the property in the possession or control of the trustee does not affect the trustee's right and duty to administer, manage, and distribute the property in accordance with the terms of the governing instrument, Wis. Stat. § 766.575(2), although this may be altered by the terms of the governing instrument, by a court order, or pursuant to the claim procedure set forth in section 766.575(3).

D. Joint Revocable Living Trust vs. Separate Revocable Living Trusts [§ 10.57]

1. Joint Trust [§ 10.58]

If spouses own assets as marital property and wish to transfer them to a revocable living trust (as a means of managing assets or for the purpose of avoiding probate, or both) a joint trust (created by the spouses as joint grantors) is superior to separate trusts (one created by each spouse). By using a joint trust, the spouses can easily address in the trust instrument what will happen to each spouse's interest in former marital property assets upon the death of the first spouse, as well as on the death of the survivor. Assuming there is nothing in the trust instrument that would change the assets' classification, assets held by the trust receive the full adjustment in basis on the death of the first spouse to die. *See* Rev. Rul. 66-283, 1966-2 C.B. 297. For a sample joint revocable living trust form, see section 10.180, *infra*.

2. Separate Trusts [§ 10.59]

Usually a joint trust created by the spouses together as grantors is the best approach when spouses wish to transfer marital property assets to a revocable living trust. However, there may be circumstances in which the use of a separate revocable living trust created by one spouse alone is warranted. For example, an estate plan adopted before the spouses were subject to the marital property law may involve separate revocable living trusts, and the spouses may prefer simply to amend their existing documents rather than to start over. Or one spouse may have significant individual property assets (for example, a large inheritance) that he or she wants to manage and control separately in his or her own trust along with other assets that may be marital property. A third possibility is that the spouses may not be of the same mind about dispositive provisions and therefore wish to have their own separate trusts. Whatever the circumstances, if it is possible that a spouse's solely created revocable living trust will hold marital property assets, the trust instrument should address the disposition of each spouse's one-half interest in those assets regardless of which spouse dies first.

If one spouse has significant individual property assets (for example, an inheritance) that he or she wants to preserve as individual property, placing them in a separate revocable living trust is a convenient way of segregating and tracing the assets. In creating such a trust, however, it is important to keep in mind the general rule that income from nonmarital property is marital property. *See* Wis. Stat. § 766.31(4). Unless steps have been taken to reclassify the income from nonmarital property as individual property, the provisions of the trust agreement should require that the net income of the trust be distributed to the grantor, so that it can be placed in an account holding only marital property funds.

To reclassify the income from individual property assets held by the trust, the grantor could execute a unilateral statement under section 766.59 to reclassify the income as individual property, or the spouses could enter into a marital property agreement that classifies the income as individual property. See chapter 2, *supra*, for a discussion of classification by unilateral statement and of classification by marital property agreement. Even if income is classified as individual property it may nonetheless be prudent to require the trustee to separately account for and trace the investment and reinvestment of income, since a unilateral statement would have no effect on property division in the event of dissolution, and a marital property agreement could ultimately be declared unenforceable.

E. Death of Spouse When Marital Property Assets Are Held in Single-grantor Revocable Trust [§ 10.60]

1. Death of Grantor Spouse [§ 10.61]

If the sole grantor of a revocable living trust dies before his or her nongrantor spouse, the trust becomes irrevocable by reason of the grantor's death. The surviving spouse owns a one-half interest in any former marital property assets as a tenant in common with the trustee. Wis. Stat. § 861.01. In addition to providing for the disposition of the grantor spouse's interest in property held by the trust, the trust instrument should provide for the disposition of the surviving spouse's marital property interest either to the spouse directly or to a trust that the surviving spouse controls.

For a discussion of issues relating to the administration of a former revocable living trust holding former marital property assets upon the death of the grantor, see generally chapter 12, *infra*. For a discussion of the remedy available to the surviving spouse when a revocable living trust established by his or her spouse fails to acknowledge the survivor's marital property interest, see section 8.48, *supra*.

2. Death of Nongrantor Spouse [§ 10.62]

If the nongrantor spouse dies before the grantor of a revocable living trust holding marital property assets, the trust remains revocable and the surviving spouse's one-half interest in former marital property is not subject to administration. Wis. Stat. § 861.01(1). However, the personal representative of the deceased nongrantor spouse succeeds to the interest of the decedent in all property of the decedent. Wis. Stat. § 857.01. This would include the decedent's one-half interest in all former marital property held in the surviving grantor spouse's revocable living trust. From a drafting standpoint, the deceased spouse's property interest can be addressed by including a provision in the grantor spouse's trust instrument directing the disposition of the decedent's interest in former marital property. The trust instrument should provide for the transfer of the decedent's interest in former marital property either to the decedent's personal representative or to a revocable living trust that was created by the decedent.

3. Flexibility to Distribute Assets Based on Aggregate Value Rather Than Item by Item [§ 10.63]

As noted in section 10.10, *supra*, 2005 Wisconsin Act 216, section 42, amended section 766.31(3) to permit distribution on an aggregate rather than on an item-by-item basis so as to allow more flexibility in the administration of the estate of the first deceased spouse. In drafting a trust agreement designed to hold marital property assets, the drafter may wish to include among the powers of the trustee something such as the following:

> To make any division, allocation, or distribution of property in cash, in kind, or both, and to allocate all or any part of any item or kind of property to any trust, trust share, or beneficiary, without regard to the basis of the property for income tax purposes, and to make non-pro rata distributions and determine the fair market values of any such property incident to any such division, allocation, or distribution (*including, without limitation, with respect to marital property assets upon the death of the first deceased spouse, some or all of which may be divided on the basis of aggregate value rather than divided item by item, in a manner consistent with Wisconsin law*).

VII. Will Substitute Agreements [§ 10.64]

A. In General [§ 10.65]

Spouses may provide in a marital property agreement for a nontestamentary disposition of property upon the death of either of them, including the nontestamentary disposition of after-acquired property. Wis. Stat. § 766.58(3)(f). If they include such a provision in the agreement, the marital property agreement acts as the dispositive instrument of transfer with respect to assets covered by the provision, like a will. The spouses may also provide for a nontestamentary disposition of property upon the death of the second spouse to die. However, section 766.58(3)(f)permits the second spouse to unilaterally amend the marital property agreement after the death of the first spouse unless the marital property agreement prohibits such amendment and except to the extent property is held in a trust established by the marital property agreement. For a detailed discussion of will substitute agreements, see generally chapter 7, *supra*. Such agreements are known colloquially in Wisconsin as "Washington wills" because Washington state law provides for a similar type of spousal agreement.

Section 766.58(3)(f) may be applied to all types of property, including marital property, individual property, and predetermination date property. A marital property agreement can classify property and provide for its disposition, property can be transferred by agreement to any person or to a trust, and the terms of the trust may be contained in the agreement or may be independent of the agreement. A marital property agreement may be amended or revoked only by a later marital property agreement. Wis. Stat. § 766.58(4).

B. Tax Consequences [§ 10.66]

The tax consequences of making a nontestamentary disposition by marital property agreement must be considered carefully. Is a provision regarding a nontestamentary disposition merely contractual? Or is the document presently dispositive (in the same sense that a deed conveying an interest in real estate is dispositive)? The distinction is significant. In *Pyle v. United States*, 766 F.2d 1141 (7th Cir. 1985), the U.S. Court of Appeals for the Seventh Circuit held that federal gift tax was payable by the surviving spouse upon the death of the first spouse to die because the spouses had a joint will and a contract not to revoke the will. The court held that, under Illinois law, the joint will combined with the contract not to revoke created a legal life estate in the surviving spouse and remainder interest in the persons who took the property after the death of the surviving spouse. The gift tax was assessed on the remainder interests. The court held that the provisions of the joint will were dispositive, not merely contractual.

Section 766.58(3)(f) addresses the *Pyle* issue by providing that the surviving spouse may amend the marital property agreement with respect to property to be disposed of at the death of the surviving spouse unless the marital property agreement expressly provides otherwise and except to the extent property is held in a trust established under the agreement. This right to amend, unless eliminated by the agreement, should prevent any gifts intended to take effect at the survivor's death from being treated as complete for tax purposes at the death of the first spouse to die. If the survivor's right to amend is eliminated, adverse tax consequences may result.

C. Adding Flexibility to Will Substitute Provisions [§ 10.67]

If a will substitute provision is to be included in a marital property agreement, consideration should be given to whether each spouse can take unilateral action so as not to be bound by the provision. For example, the agreement can specify that the will substitute provision applies only so long as a will exists that provides for a similar disposition. The agreement can provide that, if the will is changed, the will substitute provision no longer applies. (As discussed in section 10.69, *infra*, a backup will is recommended). Or, each spouse can have a right to revoke or modify the will substitute provision as to his or her own assets upon notice to the other spouse.

If the will substitute provision does not provide unilateral ways for a spouse to eliminate the provision, each spouse will be bound unless the other spouse consents to a change. Each spouse will have the ability to veto the other spouse's desire to change the will substitute provision. By contrast, a will can be changed at any time by a person without the knowledge or consent of his or her spouse.

D. Limiting Scope of Will Substitute Provision [§ 10.68]

The application of a will substitute agreement should be limited to assets that would otherwise be subject to administration. On its face, section 766.58(3)(f) seems to permit the spouses to enter into a marital property agreement disposing of assets not subject to administration. In most cases, the spouses would not want the agreement to apply to nonprobate dispositions arranged either before or after the agreement is executed. Examples of such nonprobate dispositions include retirement plan beneficiary designations, life insurance beneficiary designations, and survivorship marital property.

E. Additional Considerations Regarding Use of Will Substitute Agreement [§ 10.69]

Some things to consider when contemplating the use of, or preparing, a marital property agreement as a will substitute agreement include the following:

1. The agreement should state that the spouses intend to make a nontestamentary disposition pursuant to section 766.58(3)(f).

2. An advantage of a will substitute agreement over a will exists if one spouse subsequently becomes incompetent. In that event, the spouse's will substitute agreement can be amended despite the incompetency if the amendment is by a guardian with the approval of the court. *See* Wis. Stat. ch. 54. It is not possible for a guardian to amend or revoke a ward's will. *Id.*

3. Assets transferred by will substitute agreement pass by operation of law and are not subject to probate administration. The statutes provide for summary proceedings to confirm the transfer of assets by the agreement. Certain types of property may be transferred administratively (using a Form HT-110), including "an interest in any real property, a vendor's interest in a land contract, an interest in a savings or checking account, an interest in a security or a mortgagee's interest in a mortgage, including an interest in survivorship marital property."Wis. Stat. § 867.046(2). Other types of property require a summary confirmation proceeding before the court as contemplated by section 867.046(1m). *See Maciolek v. City of Milwaukee Employes' Ret. Sys. Annuity & Pension Bd.*, 2005 WI App 74, 280 Wis. 2d 585, 695 N.W.2d 875, *aff'd*, 2006 WI 10, 288 Wis. 2d 62, 709 N.W.2d 360. Subsequent to the Wisconsin Supreme Court's decision in *Maciolek*, the legislature modified the statute to expand permissible uses of a Form HT-110. *See infra* § 12.174.

4. A backup will to the agreement is advisable. A will can provide for some things a will substitute agreement cannot, such as the appointment of a personal representative or guardian. If the coverage of the will substitute agreement is limited, an all-inclusive backup, used in conjunction with the will substitute agreement, is necessary to avoid a partial intestacy. As discussed above, the

agreement and the will can be coordinated to eliminate a possible inconsistency between the will and the agreement.

5. A special administration pursuant to section 867.07 can be helpful in conjunction with a will substitute agreement. Often, it is necessary that someone with plenary authority represent the decedent regarding matters not involving the administration of assets. A representative may be needed to enter and inventory the decedent's safe deposit box, pick up mail at the post office, leave a forwarding address at the post office, execute a mortgage satisfaction, etc. If the will substitute agreement transfers the decedent's assets, the special administrator's duties will be strictly ministerial and he or she cannot be liable to the beneficiaries for asset management. If the will substitute agreement does not transfer all the decedent's assets, and some assets are subject to administration, a special administrator is usually not appropriate. A personal representative should be appointed.

6. A "pour-over" will substitute agreement can be useful when used in conjunction with an unfunded or partially funded revocable living trust when the trust contains dispositive provisions intended to avoid probate administration at death. The will substitute agreement can be used in lieu of funding the trust or to transfer assets that were inadvertently left out of the trust. If the trust is funded, assets such as tangible personal property can be left out of the trust and transferred later by the will substitute agreement.

7. One advantage of probate administration is the certainty and finality achieved by having a recognized procedure for the judicial determination of the classification of the decedent's and surviving spouse's assets and the adjudication of creditors' claims. In a situation in which the classification of assets under the marital property law may be disputed, for example, a second marriage with each spouse having children by a previous marriage, a probate administration may be the preferred way to transfer assets at death.

8. A Wisconsin will substitute agreement may not be recognized in another state in which the decedent owns real estate or to which the spouses later move, even if its terms specify that the agreement's effectiveness continues notwithstanding a change in domicile. This is another reason why it is important to have a will in addition to the will substitute agreement.

9. A will substitute agreement may be useful in effectuating a basic "all to survivor" estate plan, particularly for an older couple whose estates are below the applicable exclusion amount and involve no complex assets.

10. Dispositions under a will substitute agreement are subject to disclaimer. Wis. Stat. §§ 854.01, .13. For a disclaimer to be a "qualified disclaimer" for federal gift tax purposes, the disclaimant must make the disclaimer within nine months of "the day on which the transfer creating the interest in such person is made." I.R.C. § 2518(b)(2)(A). If, under the terms of the will substitute agreement, either spouse may unilaterally amend the provisions relating to the disposition of his or her assets, there is little doubt that the beginning date for the nine-month period is the date of the spouse's death. The question arises, however, whether, in the case of the death of the first spouse to die, the disclaimant has nine months from the date of death when the will substitute provisions do not allow either spouse to unilaterally amend the will substitute provisions. The IRS considered this scenario in Private Letter Ruling 95-07-017 (Feb. 17, 1995), in the context of a Washington community property agreement, and concluded that "for purposes of section 2518(a)(2), the nine-month period for making the disclaimer of the decedent's one-half community property interest passing to [surviving spouse] under the community property agreement commences on the date of death."

11. Section 859.18(6) provides that a marital property agreement providing for the nontestamentary disposition of assets "does not affect property available under [section 859.18] for satisfaction.…" It is not clear, however, how creditors' remedies are enforced when assets completely bypass the probate estate. Note, however, that for assets passing to a trust there is a claims procedure under section 701.065, but availability to creditors depends on the procedure being initiated by the trustee to establish a claims-bar date.

12. If assets pass by nontestamentary disposition under a marital property agreement, they bypass the decedent's estate; income attributable to those assets therefore is not taxed to the decedent's estate, which is a separate taxpayer that may select its own fiscal year. Selection of an estate fiscal year may in some situations be advantageous to the beneficiaries. Note, however, that if the assets pass by will substitute agreement to the decedent's revocable trust,

the trust may be able to elect pursuant to I.R.C. § 645 to have the revocable trust taxed as if part of the estate, thus allowing use of a fiscal year for a limited period of time. *See* Treas. Reg. § 1.645-1.

13. It may be preferable for some assets to be administered by a personal representative. For example, an employee-stock-option agreement may provide that, upon the death of the employee, rights under the agreement may be exercised by the deceased employee's personal representative. A comprehensive will substitute agreement transferring stock option rights without probate may result in uncertainty regarding the future exercise of stock option rights.

14. There are a number of unanswered questions concerning will substitute agreements. An agreement may be useful as part of an estate plan that is more complex than the basic all-to-survivor plan but should not be used as a complete alternative to a will. For example, it is questionable whether the decedent can direct the apportionment of federal and Wisconsin estate taxes in a will substitute agreement. The right of reimbursement for federal estate taxes paid can be waived only by a direction in a will under I.R.C. §§ 2206 and 2207, and only by the provisions of a will or revocable trust under I.R.C. §§ 2207A and 2207B.

For further discussion of the advantages and disadvantages of will substitute agreements, see chapter 7, *supra*.

In summary, a will substitute agreement, in many instances, will not be a complete substitute for a will, but it may be a valuable supplemental tool as part of the estate plan. Reliance on a will substitute agreement as the only dispositive instrument is not recommended. Coordination of the will substitute agreement with the spouses' wills and other dispositive instruments is important to coordination of the overall plan and to avoid unanticipated results.

For a more thorough discussion of nontestamentary dispositions by marital property agreement, see chapters 7 and 9, *supra*.

VIII. Other Nonprobate Transfers at Death [§ 10.70]

A. Payable on Death and Transfer on Death Designations [§ 10.71]

Chapter 705 authorizes forms of nonprobate transfer at death, including payable on death (P.O.D.) beneficiary designations for accounts at financial institutions and P.O.D. or transfer on death (T.O.D.) registrations for securities. *See* Wis. Stat. §§ 705.01(8), .25. Upon the death of the holder of an account or security who has made a P.O.D. or T.O.D. designation, the property passes to the designated beneficiary or beneficiaries without probate. If the account or security is classified as marital property, the surviving spouse has a remedy against the transferee to recover his or her one-half interest. *See supra* § 8.48. Failure of the surviving spouse to pursue the remedy could result in gift tax consequences for the surviving spouse. *See generally supra* ch. 9.

Spouses may believe that by making a P.O.D. or T.O.D. designation for an account or security, probate administration of the subject assets and any marital property complications will be avoided. However, if the subject assets are classified as marital property, this will not be the case if the nonholding spouse dies first.

> ➢ ***Example.*** A husband deposits $50,000 in a bank account titled in his name alone and designates his wife as the P.O.D. beneficiary. The wife deposits $25,000 in a bank account titled in her name alone and designates the husband as the beneficiary. All the funds are classified as marital property. If the husband dies first, the bank will be authorized to pay all the funds in his account to the wife. However, the husband's personal representative succeeds to the husband's one-half marital property interest in the wife's account, which is subject to administration.

As the example above shows, P.O.D. or T.O.D. arrangements are not particularly useful when the assets involved are classified as marital property. In some cases, however, a spouse might intentionally select such an arrangement to frustrate the efforts of the surviving spouse to claim his or her interest in marital property. The burden would then be upon the surviving spouse to pursue a remedy to enforce his or her rights. See chapter 8, *supra*, for a discussion of available remedies.

2005 Wisconsin Act 206, section 4, created section 705.15, which permits the nonprobate transfer of real estate via use of a P.O.D. or T.O.D. designation on a deed.

B. Right of Survivorship [§ 10.72]

1. With Spouse [§ 10.73]

When an asset passes by right of survivorship to the surviving spouse, the classification of the asset as marital or nonmarital property is inconsequential from the standpoint of determining the ultimate ownership of the asset. However, there are at least two reasons why one may wish to focus on the classification of the asset.

From a tax perspective, if the asset is common law joint tenancy property (as opposed to survivorship marital property), at the death of one spouse, except as noted below, only the deceased spouse's interest in the asset will receive an adjustment in basis. If the asset has a tax basis that is less than its fair market value, reclassification of the asset as marital property would be beneficial.

In some instances, an asset owned by a decedent and surviving spouse as joint tenancy property may receive a full adjustment in basis. In *Gallenstein v. United States*, 975 F.2d 286 (6th Cir. 1992), the court concluded that, when the surviving spouse had made no contribution to joint tenancy property and the joint tenancy was created before 1977, the full value of the joint tenancy property was included in the decedent's estate under the proportionate contribution rule of I.R.C. § 2040(a). Consequently, the basis of the entire property (and not just the decedent's interest) was adjusted. *See also Patten v. United States*, 1996-1 U.S.T.C. ¶60, 231 (W.D. Va. 1996), *aff'd*, 116 F.3d 1029 (4th Cir. 1997); *Anderson v. United States*, 1996-2 U.S.T.C. ¶60,235 (D. Md. 1996); *Hahn v. Commissioner*, 110 T.C. 140 (1998).

From the perspective of a family-purpose creditor to whom only one spouse has incurred an obligation, a joint tenancy under section 700.17 is a more attractive form of ownership than marital property or survivorship marital property. While both spouses are living, a family-purpose creditor can reach all marital property in satisfaction of the obligation but can reach only the incurring spouse's interest in nonmarital property. *See generally supra* ch. 6. The nonincurring spouse's interest in joint tenancy property (or tenancy in common property) is nonmarital property. Hence, it cannot be reached by a family-purpose creditor. Even if marital property funds have been mixed with joint tenancy or tenancy in common assets, the property incidents of joint tenancy or tenancy in common control. Wis. Stat. § 766.60(4)(a).

Upon the death of the only spouse who has incurred an obligation, whether property is held as joint tenancy or survivorship marital property, the property generally passes to the survivor free of claims of unsecured creditors. *See* Wis. Stat. § 859.18(4). This is not necessarily the case if the asset is a joint account under chapter 705. *See* Wis. Stat. § 705.07(2) (incorporating by reference the fraudulent transfer remedies of chapter 242 when the deceased account holder's estate is insolvent.)

2. With Third Party [§ 10.74]

An asset held by one spouse with a third party in a form that includes a right of survivorship (for example, a joint tenancy or joint bank account) may be classified in part as marital property. In that event, at the death of the holding spouse, the incident of survivorship will control in the case of joint tenancy property. Wis. Stat. § 700.17(2). In the case of a joint account held by a spouse with a third party, unless there is clear and convincing evidence of a different intention at the time the account was created, the account belongs to the third party at the death of the spouse. Wis. Stat. § 705.04(1). In either case, however, the surviving spouse has a remedy against the transferee to recover his or her one-half marital property interest. *See generally supra* ch. 8. The surviving spouse's failure to pursue the remedy could result in gift tax consequences for the surviving spouse. *See generally supra* ch. 9.

In view of these complications, spouses should generally avoid holding marital property assets with a third party in a form that includes a right of survivorship. In some cases, however, a spouse might intentionally select such an arrangement to frustrate the surviving spouse's efforts to claim his or her interest in marital property assets. The burden would then be upon the surviving spouse to pursue a remedy to enforce his or her rights.

C. Beneficiary Designations [§ 10.75]

Although federal law limits an employee's ability to designate a beneficiary other than his or her spouse in the case of qualified plans governed by ERISA, *see infra* §§ 10.134–.145, a spouse having management and control of an asset that passes by beneficiary designation generally has the power to name a beneficiary to receive the asset upon death. *See* Wis. Stat. §§ 766.01(11), .51(1). If the surviving spouse is designated as the beneficiary, there is no particular concern whether the asset is classified in whole or part as marital property (note, however, that the surviving spouse's ability to disclaim all or only part of the asset is affected by the classification). If a third party is designated as the beneficiary and the asset is classified in whole or in part as marital property, the surviving spouse has a remedy against the transferee to recover his or her one-half interest. *See supra* § 8.48. The surviving spouse's failure to pursue the remedy could result in gift tax consequences for the surviving spouse. *See supra* ch. 9.

In view of these complications, it is important to consider the asset's classification when designating a beneficiary other than the surviving spouse for an asset that passes by beneficiary designation. If the asset is classified as marital property and a third party is an intended beneficiary, the beneficiary designation can include a direction to pay the surviving spouse's marital property interest to him or her, with the balance passing to the third-party beneficiary. If a trust is designated as the beneficiary, the terms of the trust can include a provision directing that the surviving spouse's interest in former marital property be distributed to him or her or to a trust that he or she controls. For example, if the spouses have created a joint revocable living trust designed to hold marital property and the trust is designated as the beneficiary of a life insurance policy classified as marital property, the provisions of the trust would provide for allocation of the surviving spouse's marital property interest to him or her or to a survivor's trust (which is revocable by the survivor).

In some cases, a spouse might intentionally designate a third party as beneficiary of a marital property asset to frustrate the surviving spouse's efforts to claim his or her interest in the asset. The burden would then be upon the surviving spouse to pursue a remedy to enforce his or her rights. See chapter 8, *supra*, for a discussion of available remedies.

D. Other Nonprobate Transfers [§ 10.76]

Section 705.10, entitled "Nonprobate transfers at death," enumerates a panoply of methods that can be used to transfer property at death without a will. In pertinent part, it provides:

> A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary.

Wis. Stat. § 705.10(1). The section goes on to list the types of property that can be transferred by such means, including "[a]ny property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person whom the decedent designates either in the instrument or in a separate writing, including a will executed either before or at the same time as the instrument, or later." Wis. Stat. § 705.10(1)(c). Creditors' rights are not compromised by the use of a nonprobate transfer under section 705.20. Wis. Stat. § 705.10(2). By virtue of an amendment made by 1997 Wisconsin Act 188 (making major changes to Wisconsin's probate code), section 705.20 is tied into the probate code by its cross reference to chapter 854. Wis. Stat. § 705.10(3).

The Wisconsin Court of Appeals cited section 705.20 (the predecessor to 705.10) as authority for its holding in *Reichel v. Jung (In re Estate of Jung)*, 2000 WI App 151, 237 Wis. 2d 853, 616 N.W.2d 118, discussed in section 10.33, *supra*, regarding the transfer of an annuity at death pursuant to its contract terms. Given its breadth, section 705.10 may have other applications that have yet to be tested in court. For example, by its terms, section 705.10 would seem to authorize the titling of real property in a manner such that it can be owned by one person during his or her life and then pass to another at the owner's death pursuant to the terms of the governing instrument.

2005 Wisconsin Act 206, section 5, which renumbered section 705.20 as section 705.10 added a new subsection (4), expanding the manner in which a nonprobate transfer can be confirmed following death. Both 2005 Wisconsin Acts 206 and 216 contain provisions expanding the manner in which nonprobate transfers can be confirmed under section 867.046. *Cf. Maciolek v. City of Milwaukee Employes' Ret. Sys. Annuity & Pension Bd.*, 2006 WI 10, 288 Wis. 2d 62, 709 N.W.2d 360. For greater detail on the connection between *Maciolek* and these changes, see sections 12.173 and .174, *infra*.

IX. Lifetime Gifts [§ 10.77]

A. In General [§ 10.78]

Lifetime gifts of property can be an important part of the estate planning process. Such gifts may be used to take advantage of the annual exclusion from federal gift or generation-skipping transfer taxes or may be part of more sophisticated planning techniques to transfer value to descendants. A number of these techniques and the specific concerns relating to transfers in a marital property regime are considered in Part XI of this chapter, *supra*. Following is a discussion of the basic issues involved in making lifetime gifts of marital and nonmarital property assets.

B. Gifts of Individual Property Assets [§ 10.79]

Under section 766.51(1), a spouse acting alone may manage and control his or her nonmarital property, which includes that spouse's individual property assets. *Management* and *control* are defined broadly in section 766.01(11) to allow the party having management and control to deal with property as if it were the property of an unmarried person. The duty of good faith applicable to dealings with respect to marital property or nonmarital property of the other spouse is not applicable to a spouse's own individual property. *See* Wis. Stat. § 766.15.

Hence, a spouse is generally free to make gratuitous transfers of his or her own individual property during lifetime, with some limited exceptions. Section 766.51(8) preserves section 706.02(1)(f)'s requirement that a spouse join in a conveyance of an interest in homestead property, other than the granting of a purchase money mortgage. Note, however, that a valid waiver of homestead rights in a marital property agreement eliminates the need for the nontitled spouse's signature. *See Jones v. Estate of Jones*, 2002 WI 61, 253 Wis. 2d 158, 646 N.W.2d 280. Federal law limits a spouse's ability to alienate an interest in an ERISA-qualified plan, even though it may be classified under state law as individual property. *See infra* §§10.134–.146. A spouse's beneficial interest in a trust created by a third party, although classified as that spouse's individual property, may nonetheless be subject to limitations on transfer by the terms of the trust (e.g., a spendthrift clause). A spouse who has been divorced may be subject to limitations on the transfer of property (including his or her individual property assets) under the provisions of a divorce judgment designed to protect the support rights of the former spouse or children. Though they do not restrict the power to make transfers in the first instance, fraudulent transfer remedies under state law or federal bankruptcy law can result in the avoidance of a gratuitous transfer of a spouse's individual property assets if the transfer was made in actual or constructive fraud of a creditor's rights. It is also possible, though unlikely, that a transfer of individual property assets during lifetime could give rise to an equitable remedy under section 861.17, as discussed in section 10.80, *infra*.

If an individual property asset is the subject of a gift, unless the gift is to the other spouse, the spouses may elect to treat the gift as having been made one-half by each spouse for federal gift tax purposes. *See* I.R.C. § 2513. By contrast, if the subject of a gift is a marital property asset, the gift is deemed to have been made one-half by each spouse, such that the election under I.R.C. § 2513 is unnecessary. *See supra* ch. 9.

C. Gifts of Predetermination Date Property Assets [§ 10.80]

The considerations with respect to gifts of predetermination date property assets are the same as those with respect to gifts of individual property assets, with two additional considerations in the case of assets meeting the definition of deferred marital property under section 851.055. (For predetermination date property assets meeting the definition of deferred individual property under section 861.018(2), the considerations are identical to those applicable to gifts of individual property assets.)

If deferred marital property assets are given away within two years of the donor's death or if the donor transfers such assets and retains certain rights in the transferred property, the assets may be included within the deferred marital property election available to the surviving spouse and may be subject to recovery. *See* Wis. Stat. §§ 861.03(3), (4), .06(4); *see also infra* ch. 12.

In addition, section 861.17 provides a general equitable remedy for the surviving spouse in the event of property arrangements made by the decedent in fraud of the survivor's rights under chapter 852 (governing intestate succession) and chapter 861 (which includes not only deferred marital property elective rights under section 861.02, but other family rights relating to homestead property, selection of personalty, family allowance, etc.; *see* Wis. Stat. §§ 861.21–.35).

D. Gifts of Marital Property Assets [§ 10.81]

1. Power to Make Gifts; Limitations; Remedies [§ 10.82]

Because the right to manage and control marital property assets specifically includes the power to make gifts, Wis. Stat. § 766.51(4), a gift of a marital property asset is complete when made even though it may be subject to a remedy pursuant to section 766.53. *See supra* ch. 9. For a discussion of the right to make gifts of marital property assets pursuant to the power of management and control, see chapter 4, *supra*. For a discussion of remedies in the case of gifts of marital property assets, see generally chapter 8, *supra*.

2. Donor or Transferor for Federal Transfer Tax Purposes [§ 10.83]

Because each spouse owns an undivided one-half interest in each item of marital property, *see* Wis. Stat. § 766.31(3), a gift of a marital property asset, even if effected by the unilateral act of only one spouse (when that spouse has management and control under section 766.51(1)), is deemed for federal transfer tax purposes to have been made one-half by each of the spouses. *See supra* ch. 9.

Thus, for federal gift tax purposes, each spouse is deemed to have made a gift of one-half of a marital property asset, thereby making the filing of a gift-splitting election pursuant to I.R.C. § 2513 unnecessary for marital property assets.

➤ ***Example.*** A wife holds title to a bank account funded with earnings from her employment. She gives a check in the amount of $22,000 drawn on the account to her niece as a gift. Neither the husband nor the wife make any other gifts to the niece during the calendar year. Since the funds are classified as marital property, gifts during the calendar year to the niece from the husband and wife are limited to $11,000 per donor. No gift tax return is required with respect to the $22,000 given to the niece.

By contrast, if the funds in the wife's savings account were nonmarital property, for the $22,000 gift to the wife's niece to qualify for the gift tax annual exclusion, the wife and the husband would need to make an election under I.R.C. § 2513 to have gifts made by them during the calendar year treated as having been made one-half by each.

The "transferor" for GST tax purposes under I.R.C. ch. 13 is deemed to be the same as the donor for gift tax purposes under I.R.C. ch. 12. I.R.C. § 2652(a). Split gifts for gift tax purposes under I.R.C. § 2513 are so treated for GST purposes under I.R.C. ch. 13. *Id.* Hence, if a marital property asset is the subject of a GST under I.R.C. ch. 13, each spouse will be regarded as a transferor of one-half of the asset for GST tax purposes. If a transferred asset is not classified as marital property, to achieve the same result the spouses must make a gift-splitting election under I.R.C. § 2513.

The treatment of a marital property asset gratuitously transferred during lifetime by one spouse as having been given one-half by each spouse carries through for federal estate tax purposes. This can have adverse estate tax effects. See chapter 9, *supra*, for a discussion of I.R.C. § 2036 issues that may arise when marital property assets have been the subject of a gift and the surviving spouse has a retained interest.

X. Marital Deduction/Credit Shelter Planning [§ 10.84]

A. Use of Marital Property Classification to Balance Estates [§ 10.85]

Classic estate planning for spouses includes using the unlimited estate tax marital deduction under I.R.C. § 2056 and the applicable credit amount under I.R.C. § 2010 to eliminate estate tax in the estate of the first spouse to die and to reduce (or eliminate) estate tax in the survivor's estate. The ability to easily equalize the sizes of the spouses' respective estates with a marital property agreement can facilitate estate tax planning in two important ways.

First, when the spouses' assets are classified as marital property, each spouse owns an undivided one-half interest in each marital property asset and has the power of testamentary disposition at death with respect to his or her one-half interest, subject to the terminable interest rule applicable to deferred employment benefits and some IRAs. This is important for making use of the applicable credit amount when the first spouse dies, because if the spouses' estates are grossly unequal and the spouse with fewer assets dies first, a portion of the applicable credit amount may be wasted.

Second, the estate tax rates prescribed by I.R.C. § 2001 are graduated. If the spouses' combined estates exceed twice the amount that may be sheltered from estate tax by the applicable credit amount, overall estate tax savings can be achieved by equalizing the spouses' estates and paying estate tax in the first estate to utilize the lower marginal tax brackets (in contrast to deferring all estate tax to the survivor's estate, in which case the tax on amounts that qualified for the estate tax marital deduction in the first estate will be at higher marginal rates). Given the uncertainty as to which spouse will die first, balancing the size of the spouses' respective estates with a marital property agreement places the spouses in the best position to use this tax-savings strategy, whether the focus is on minimizing federal estate taxes, Wisconsin estate taxes, or both.

B. Use of QTIP Marital Trust to Facilitate Valuation Discount [§ 10.86]

One decision in implementing a marital deduction/credit shelter plan is deciding whether assets qualifying for the marital deduction in the first spouse's estate should pass to a qualified terminable interest property trust (QTIP trust) or outright to the survivor (or to a power-of-appointment marital trust). In the case of closely held business interests classified as marital property when the spouses together hold a majority interest, the use of a QTIP trust may facilitate valuation discounts in the survivor's estate.

➢ ***Example.*** A wife and her husband own, as marital property, 80% of the stock of a corporation. The wife dies first and leaves her one-half interest (40% of the stock of the corporation) to a QTIP trust for the husband's benefit. Upon the husband's later death, his 40% of the stock and the QTIP trust's 40% of the stock are includible in his gross estate for federal estate tax purposes. On the federal estate tax return filed in the husband's estate, the stock owned by the QTIP trust and the stock owned by the husband's estate are valued as separate 40% minority interests, rather than together as an 80% controlling interest.

See *Estate of Bonner v. United States*, 84 F.3d 196 (5th Cir. 1996), and *Estate of Mellinger v. Commissioner*, 112 T.C. 4 (1999), discussed in section 10.121, *infra*. Hence, the use of a QTIP trust as the recipient of the decedent's one-half marital property interest in a closely held business interest can reduce the value of the survivor's gross estate for federal estate tax purposes, thereby reducing estate taxes.

XI. Planning Considerations for Specific Types of Property [§ 10.87]

A. Jointly Held Assets and Forms of Holding Title [§ 10.88]

1. In General [§ 10.89]

Spouses often hold assets in a joint form that gives them equal rights of management and control. A joint form of holding title to assets also may include a right of survivorship (e.g., a joint bank account or survivorship marital property). In some cases, a right of survivorship may be desirable; in others, it may not (e.g., when, for estate tax planning purposes, each spouse needs to have a power of disposition over an asset at death to make full use of the applicable credit amount).

As indicated below, the various forms of holding title for different classifications of property vary depending on the type of asset involved.

2. Wisconsin Real Estate [§ 10.90]

Spouses may hold title to Wisconsin real estate classified as marital property in one of the following eight forms:

1. In the husband's name alone;

2. In the wife's name alone;

3. In the spouses' names together either in the "and" form or in the "or" form "as marital property," *see* Wis. Stat. § 766.60(1), (2);

4. In the spouses' names together as "tenants in common," deemed by section 766.60(4)(b)1.b. to constitute marital property if established after the spouses' determination date, unless otherwise provided in a marital property agreement;

5. In the spouses' names together as "joint tenants," deemed by section 766.60(4)(b)1.a. to constitute survivorship marital property if established after the spouses' determination date, unless otherwise provided in a marital property agreement;

6. In the spouses' names together either in the "and" form or in the "or" form "as survivorship marital property," *see* Wis. Stat. § 766.60(5)(a);

7. In the spouses' names together without designation or simply designated as "husband and wife"; and

8. In the name of one or both spouses or a third party as trustee(s) of a revocable trust that is designed to hold marital property assets.

If the property is acquired exclusively by the spouses after the determination date and is the spouses' homestead, the property is survivorship marital property, absent a contrary intent expressed in the instrument of transfer or in a marital property agreement. Wis. Stat. § 766.605.

The form selected for holding title to real estate may depend on the spouses' wishes regarding management and control, rights of survivorship, avoidance of probate of the subject real estate, or limiting exposure of the property to the creditors of one spouse. Whether to include or exclude a right of survivorship may be dictated by the type of estate tax planning adopted (for example, marital deduction/credit shelter planning) or by each spouse's wishes regarding the disposition of his or her interest to someone other than the survivor (for example, to his or her children from a prior marriage).

In some instances spouses may choose to convert their interests in real estate classified as marital property (either with or without right of survivorship) into a form of personalty that affords limited liability, such as a limited liability company (LLC) or limited liability partnership (LLP). In that case, the LLC membership interest or LLP partnership interest will be classified as marital property, and the incidents of survivorship will depend on the form of holding title to the interest (or, if applicable, by the terms of a marital property agreement).

If Wisconsin real estate was acquired before the spouses' determination date, its classification as of the determination date is determined under chapter 700, and in particular sections700.17 through 700.20 with respect to concurrent interests (joint tenancy and tenancy in common). However, postdetermination date events, such as asset or labor mixing or entering into a marital property agreement, can alter the classification in whole or in part. See chapter 3, *supra*, for a discussion of mixing and tracing, and sections 10.18–.33, *supra*, regarding the effect of a marital property agreement on the classification of predetermination date joint tenancy property. See sections 10.171–.177, *infra* and chapter 6, *supra*, regarding creditors' rights issues to consider in deciding whether to reclassify predetermination date property as marital property.

3. Bank Accounts [§ 10.91]

In this section the term *bank account* is used as shorthand to refer to an account at a *financial institution*, as that term is defined in section 705.01(3). The term financial institution arguably does not include brokerage firms, since the statutes treat accounts under section 705.01(1) and brokerage accounts as separate. *See* Wis. Stat. § 766.01(9)(b); *but see* § 10.32, *supra* (discussing *Templeton v. Moccero (In re Estate of Moccero)*, 168 Wis. 2d 313, 321, 483 N.W.2d 310 (Ct. App. 1992) (equating joint brokerage account with *account* under chapter 705)).

Chapter 705 authorizes essentially two types of bank accounts that spouses may hold jointly: joint accounts and marital accounts. *See* Wis.

Stat. § 705.02(1)(a), (d). In addition, a P.O.D. feature may be added to either type of account. *See* Wis. Stat. § 705.02(1)(c), (e). See section 10.71, *supra*, for a discussion of P.O.D. accounts holding marital property funds. Although joint accounts may be owned by multiple parties who are not married to one another and include a presumptive right of survivorship, *see* Wis. Stat. § 705.04(1), marital accounts may be owned only by a husband and wife and do not include a right of survivorship (although this may be altered by a marital property agreement), *see* Wis. Stat. § 705.04(2m). Absent a contrary provision in a marital property agreement, 50% of the amount remaining in a marital account may be withdrawn by the survivor upon the death of a spouse and the other 50% may be withdrawn by the decedent's estate. *Id.* Alternatively, it appears that a P.O.D. designation may be used with respect to disposition of the interest of a deceased spouse in a marital account. *See* Wis. Stat. § 705.06(1)(d).

Thus, in some respects a joint account held by spouses is analogous to joint tenancy property or survivorship marital property, since the sums in the account pass to the survivor upon the death of a spouse, at least presumptively. Likewise, in some respects a marital account held by spouses is analogous to tenancy in common property or marital property, since one-half remains with the survivor and the other half is subject to testamentary disposition in the decedent's estate.

The choice between a marital account and a joint account, therefore, depends on whether a right of survivorship is desired as part of the spouses' estate plan. The extent to which a provision in a marital property agreement classifying assets as marital property may affect the presumptive right of survivorship for a joint account is discussed at section 10.32, *supra*.

If spouses have created a joint revocable trust designed to hold marital and nonmarital property assets as part of their estate plan, a bank account may be held by the spouses as trustees of the trust. At the death of one spouse, the terms of the trust will specify the disposition of the sums remaining in the account.

A spouse who wants to preserve the classification of funds as individual property and avoid controversy such as that which arose in *Lloyd v. Lloyd (In re Estate of Lloyd)*, 170 Wis. 2d 240, 487 N.W.2d 647 (Ct. App. 1992), discussed at section 3.14, *supra*, should avoid placing them in either a joint account or a marital account with his or her spouse.

4. Securities Held Directly [§ 10.92]

Securities held directly by one or both spouses (as opposed to in a brokerage account) may be held in a number of different forms. If the securities are those of a closely held company, permissible forms of holding may include forms unique to Wisconsin law (e.g., "Husband or Wife as marital property," "Husband and Wife as survivorship marital property," or "Husband [or Wife] as individual property"). *See* Wis. Stat. § 766.60.

If the securities are registered, however, a transfer agent likely will not recognize these unique forms of holding title under Wisconsin law. Instead, securities classified as marital property without right of survivorship likely will be titled in one of four ways: (1) in the name of the husband alone; (2) in the name of the wife alone; (3) in the names of the husband and wife as "tenants in common," deemed by section 766.60(4)(b)1.b. to constitute marital property if established after the spouses' determination date; or (4) in the name of one or both spouses or a third party as trustee(s) of a revocable trust that is designed to hold marital property assets. The option selected will depend on the spouses' wishes regarding management and control and their interest in avoiding probate of the securities. Any of the above four forms of holding title can be used as a means to enable the first spouse to die to direct the disposition of his or her one-half interest, which is important in marital deduction/credit shelter planning. For a discussion of marital deduction/credit shelter planning, see sections 10.84–.86, *supra*.

If the spouses wish to hold the securities in a form that includes a right of survivorship, they may take title in the form "Husband and Wife as joint tenants," which, if established after the spouses' determination date, will cause the securities to be owned as survivorship marital property (absent a contrary provision in a marital property agreement). *See* Wis. Stat. § 766.60(4)(b)1.a. The same result can be achieved by holding title in the name of a revocable trust if the terms of the trust provide that upon the death of the first spouse, the survivor becomes the sole beneficiary of the trust with a continuing power of revocation. This arrangement may be appropriate when estate tax planning is unnecessary and the spouses want to avoid probate at both deaths.

If securities are the nonmarital property of one spouse, that spouse may hold title to the security in his or her name alone or in the name of a trustee or trustees of a revocable trust created by that spouse. If the estate plan adopted by the spouses includes a joint revocable trust designed to hold both marital property assets and nonmarital property assets, a security may be held in the name of the trustees of such trust, in which case either the form of holding or the trustees' records should reflect that the security is held as nonmarital property (for example: "Husband and Wife, as Trustees of the Husband and Wife Living Trust (Husband nonmarital account")).

Subchapter III of chapter 705 authorizes the registration of securities in beneficiary form by using a P.O.D. or T.O.D. designation. For a discussion of P.O.D. and T.O.D. designations, see section 10.71, *supra*.

For a discussion of the effect of a marital property agreement on the classification of, or the right of survivorship with respect to, securities registered in the names of spouses as joint tenants, see section 10.31, *supra*.

5. Brokerage Accounts and Mutual Funds [§ 10.93]

The alternative forms of holding title to a brokerage account or mutual fund account will depend on the options afforded by the particular brokerage firm or mutual fund company. For example, the Vanguard Group mutual fund company has offered four different forms of co-ownership registration, including "joint tenants with right of survivorship," "tenants in common," "tenants by the entirety" (available only to married persons), and "community property" (available only to married persons residing in one of the nine community property states). Because incidents of survivorship vary depending on the type of account used, the most straightforward approach in selecting a form of holding title is to choose a form consistent with the spouses' intent regarding incidents of survivorship.

Hence, if the desire is for an account to be owned as marital property without right of survivorship, for any brokerage account or mutual fund account there should be at least four options, as follows: (1) in the name of the husband alone; (2) in the name of the wife alone; (3) in the names of the husband and wife as "tenants in common," deemed by section 766.60(4)(b)1.bto constitute marital property if established after the spouses' determination date; or (4) in the name of one or both spouses or a third party as trustee(s) of a revocable trust that is designed to hold marital property assets. In addition, if the particular brokerage firm or mutual fund company offers the option, an account may be held as "marital property" or as "community property." As to the latter form of holding, it should be noted that chapter 766 does not per se recognize "community property" as a form of holding marital property assets. However, section 766.001(2) states the legislature's intent that marital property be regarded as "a form of community property." Hence, an account held by Wisconsin-domiciled spouses as "community property" should be regarded as marital property under chapter 766 (any uncertainty regarding this conclusion could be eliminated by a provision in a marital property agreement stating that any assets held as community property are classified as marital property). The choice selected for the form of holding title may depend on the spouses' wishes regarding management and control, rights of survivorship, avoidance of probate, or limiting exposure of the property to the creditors of one spouse. Any of the forms of holding title can be used to enable the first spouse to die to direct the disposition of his or her one-half interest, which is important in marital deduction/credit shelter planning. For a discussion of marital deduction/credit shelter planning, see sections 10.84–.86, *supra*.

If the spouses wish to hold a brokerage account or mutual fund account in a form that includes a right of survivorship, they may establish a "joint tenants with right of survivorship account" or its equivalent. If established after the spouses' determination date, this form of holding causes the account to be owned as survivorship marital property (absent a contrary provision in a marital property agreement). *See* Wis. Stat. § 766.60(4)(b)1.a. The same result can be achieved by holding title in the name of a revocable trust in which the terms of the trust provide that, upon the death of the first spouse, the survivor becomes the sole beneficiary of the trust with a continuing power of revocation. Such arrangement may be appropriate when estate tax planning is unnecessary and the spouses want to avoid probate at both deaths.

If a brokerage account or mutual fund account is the nonmarital property of one spouse, that spouse may hold title to the account in his or her name alone or in the name of a trustee or trustees of a revocable trust created by that spouse. If the estate plan adopted by the spouses includes a joint revocable trust designed to hold both marital property assets and nonmarital property assets, an account may be held in the name of the trustees of such trust, in which case either the form of holding or the trustees' records should reflect that the account is held as nonmarital property (for example: "Husband and Wife, as Trustees of the Husband and Wife Living Trust (Husband nonmarital account")).

Subchapter III of chapter 705 authorizes the registration of a "security" (which includes a security account, Wis. Stat. § 705.21(11)) in beneficiary form by using a P.O.D. or T.O.D. designation. For a discussion of considerations related to the use of P.O.D. and T.O.D. designations, see section 10.71, *supra*. Although subchapter III of chapter 705 includes provisions that may be applicable to brokerage accounts or mutual fund accounts, subchapter I of chapter 705, dealing with multiparty and agency accounts, is limited in application to "financial institutions," which does not include brokerage firms or mutual fund companies, as the statutes treat accounts under section 705.01(1) and brokerage accounts as separate. *See* Wis. Stat. § 766.01(9)(b), *but see supra* § 10.32 (discussing *Estate of Moccero*, 168 Wis. 2d at 321, in which the court equated a joint brokerage account with an account under chapter 705).

For a discussion of the effect of a marital property agreement on the classification of, or the right of survivorship with respect to, a brokerage account held by spouses jointly, see section 10.32, *supra*.

B. Tangible Personal Property [§ 10.94]

During a marriage spouses may accumulate significant amounts of tangible personal property, which can range in value from ordinary (such as clothing or appliances) to extraordinary (for example, valuable antiques or items of jewelry). Like all property of married persons domiciled in Wisconsin, items of tangible personal property are presumed to be marital property, Wis. Stat. § 766.31(2), and in most cases will be so classified unless they were received by one spouse by gift or transfer at death, *see* Wis. Stat. § 766.31(7)(a), are traceable to acquisition with nonmarital property funds, or are classified otherwise by a marital property agreement.

Because application of the item-by-item rule, *see supra* § 10.10, will require that one-half of each marital property asset be subject to administration at the death of the first spouse (unless subject to some nonprobate form of transfer), spouses may wish to simplify matters by excluding certain categories of tangible personal property from classification as marital property (e.g., personal effects) or by specifying that other kinds of tangible personal property are survivorship marital property (e.g., household furniture and furnishings). If one spouse wishes to leave a particular item to someone other than his or her spouse, that item should be classified as that spouse's individual property.

See also section 10.10, *supra*, describing the option of deviating from the item-by-item rule by virtue of the change made to section 766.31(3) by 2005 Wisconsin Act 216, section 42.

C. Income in Respect of a Decedent (IRD) Items [§ 10.95]

Income in respect of a decedent (IRD) items, such as U.S. savings bonds, IRAs, or deferred compensation arrangements (to name just a few) may be marital, nonmarital, or mixed property. Regardless of classification, however, IRD items are not eligible for an adjustment in basis upon the death of the owner. I.R.C. § 1014(c); *see supra* ch. 9. Moreover, IRD items generally are a poor choice for funding a credit shelter trust since some of the deceased spouse's applicable credit amount is "wasted" by the payment of income tax from the credit shelter trust. Even if classified as marital property, many IRD items are subject to the terminable interest rule under sections 766.31(3) and 766.62(5) such that, upon the death of the nonemployee spouse, the marital property interest of the nonemployee spouse terminates. Further, if the IRD item is an ERISA-qualified plan governed by the Retirement Equity Act, a predeceasing spouse has no power to make a testamentary disposition of his or her marital property interest in the plan.

Hence, there is generally little tax advantage to having an IRD item classified as marital property. Indeed, in some cases there may be a disadvantage; if the noncontracting spouse dies first, and his or her will makes a testamentary disposition of a one-half interest in the IRD item, the administration of the estate will be unnecessarily complicated.

- ***Example.*** A wife's non-rollover IRA is attributable entirely to contributions of marital property assets. Her husband dies first, leaving his residuary estate to a trust. Following the husband's death, the wife makes additional contributions to her IRA.

In this example, the husband's will is effective to transfer his one-half marital property interest in the wife's IRA to the trust. The husband's interest in the IRA should be inventoried as part of his estate, but access to the IRA assets may be deferred until distributions are made from the IRA since management and control of the IRA is with the surviving wife. To protect the estate's interest, the husband's personal representative would be well advised to obtain an order from the probate court declaring the estate's proportionate interest in future distributions from the wife's IRA. The wife's additional contributions to the IRA following the husband's death illustrate the complexity that can result in the absence of careful planning. The wife should avoid making additional contributions to the same IRA account following the husband's death and should instead make future IRA contributions to a separate account to avoid commingling.

The spouses in the example above could have prevented the testamentary disposition of the husband's marital property interest by including a provision in a marital property agreement that affirmatively applies the terminable interest rule to the wife's IRA. Similarly, by marital property agreement the spouses may agree to the application of the terminable interest rule to other types of IRD items.

For specific discussions of planning for various types of IRD items, see sections 10.96 (savings bonds), 10.98 (annuities), 10.99 (stock options), 10.132–.147 (deferred employment benefits), and 10.148–.160 (IRAs), *infra*.

D. U.S. Savings Bonds [§ 10.96]

Because the accrued interest in U.S. savings bonds is an element of income in respect of a decedent, there is no adjustment in the basis of savings bonds upon death. *See* I.R.C. § 1014(c). Hence, classifying savings bonds as marital property will not achieve the same potential income tax benefit as classifying capital assets as marital property.

Savings bonds may be registered in joint or P.O.D. beneficiary form. *See* 31 C.F.R. §§ 353.7 (Series EE and HH bonds); 31 C.F.R. § 360.6 (Series I bonds). If bonds are held in joint form by spouses, the surviving spouse succeeds to ownership upon the death of the other spouse, and classification is irrelevant. Likewise, if the holding spouse dies first and the survivor is the P.O.D. beneficiary, the survivor succeeds to ownership and the classification is irrelevant.

If the nonholding spouse dies first and the bonds are classified as marital property, as with any other asset classified as marital property, the decedent's personal representative succeeds to the ownership interest of the deceased spouse and may seek the assistance of the probate court in exercising management and control rights or obtaining the retitling of the bonds. *See* Wis. Stat. § 857.01.

If a savings bond is classified in whole or in part as marital property and is held by a spouse with a third party in joint form or with a third party named as P.O.D. beneficiary, federal regulations govern the succession of ownership of the bond upon the death of the holding spouse. *See supra* ch. 2. Notwithstanding the force of federal regulations, a successor owner may be required to account to the surviving spouse with respect to the survivor's marital property interest. *Id*.

E. Life Insurance [§ 10.97]

Chapter 766 provides special classification rules for certain life insurance policies under section 766.61. In some instances application of these rules makes it difficult to determine the classification of a policy and its proceeds. For example, if a policy insuring the life of one spouse under which that spouse is the designated owner was acquired before the spouses' determination date and marital property assets were used to pay at least one premium on the policy after the determination date, the ownership interest and proceeds of the policy are mixed property. Wis. Stat. § 766.61(3)(b). The determination of the marital property component requires an investigation of records of policy issuance and premium payments. From a planning standpoint, the application of these mixing rules can be avoided by classifying the policy as either marital property or individual property. If the spouses are entering into a marital property agreement, they can include a provision classifying life insurance policies. In some instances, however, it may be preferable to use a written consent if the spouses decide to classify a policy as the individual property of one spouse.

Whether a life insurance policy should be classified as marital property or individual property will depend on the facts in the particular case. If the insured spouse is the designated owner and the spouses do not reclassify the policy, the policy will typically be marital property from the outset, *see* Wis. Stat. § 766.61(3)(a), or will acquire a significant marital property component over time, *see* Wis. Stat. § 766.61(3)(b), depending when the policy was issued relative to the spouses' determination date. Since life insurance can be a useful means of funding a credit shelter trust, the classification of a policy as the individual property of the insured provides the ability to effectively use 100% of the proceeds to fund the credit shelter trust if the insured spouse dies first. If the same policy were instead classified as marital property, only the decedent's one-half interest in the proceeds could be used to fund the credit shelter trust, since the survivor would have a claim of ownership to the other half, *see* Wis. Stat. §§ 766.61(2), .70(6)(b), and allowing all of the proceeds to pass to the credit shelter trust would result in the estate tax inclusion of a portion of the trust in the survivor's estate under I.R.C. § 2036(a). *See supra* ch. 9.

On the other hand, reclassifying a policy of life insurance as individual property may deprive the noninsured spouse of valuable property rights. Hence, the planner (particularly in a joint representation) may wish to consult with the spouses regarding the relative advantages and disadvantages of the proposed classification. In some cases (particularly when sufficient assets exist to fund the credit shelter trust by other means), the better course may be to provide for the classification of a policy as marital property so that each spouse continues to have an ownership interest in the policy and proceeds.

When a life insurance policy is classified as marital property, a further question for the planner is whether to override the so-called *frozen interest rule* under section 766.61(7). For a discussion of the frozen interest rule, see chapters 2 and 7, *supra*. Under the rule, absent an express provision in a marital property agreement to the contrary, the interest of the estate of a predeceasing noninsured spouse in the marital property component of a policy insuring the life of the survivor is limited to a dollar amount; the estate does not succeed to a one-half interest in the policy itself. The purpose of the frozen interest rule is to prevent the inadvertent disposition of a marital property interest in life insurance if the noninsured spouse predeceases the insured spouse.

Spouses may override the frozen interest rule by express provision in a marital property agreement. Wis. Stat. § 766.58(7)(b). There are circumstances in which it could be beneficial to classify a life insurance policy as marital property with the frozen interest rule overridden. For example, the noninsured spouse may wish to utilize his or her unified credit or make a disposition to a child from a previous marriage. If the spouses classify the life insurance policy as marital property and override the frozen interest rule, the noninsured spouse can provide for a disposition of his or her marital property interest in the life insurance to a third person such as a child or a credit shelter trust. If the noninsured spouse wishes to make a disposition to a trust, the insured spouse should not have incidents of ownership over the life insurance as a fiduciary or beneficiary. *See* Rev. Rul. 84-179, 1984-2 C.B. 195.

Generally, if life insurance is classified as marital property and the insured spouse is the first to die, one-half of the value of the policy will be included in the insured's estate for federal estate tax purposes. However, if the insured transferred an interest in the policy to the noninsured spouse within the three-year period before the insured's death, the insured's proportionate interest at the date of transfer will be included in the insured's estate for federal estate tax purposes. I.R.C. § 2035; *see supra* ch. 9.

If life insurance under which a spouse is the insured is owned by a corporation, the classification of stock of the corporation as marital property may avoid the estate tax inclusion of life insurance proceeds under the controlling stockholder rule of Treas. Reg. § 20.2042-1(b)(6). Under the regulation, the proceeds of a life insurance policy owned by a corporation on the life of the controlling stockholder are includible in the deceased controlling stockholder's estate. A decedent is deemed a controlling stockholder if at death he or she owned stock possessing more than 50% of the total combined voting power of the corporation. The recognition of the noncontrolling status of a decedent's one-half community property interest in other contexts should apply for purposes of Treas. Reg. § 20.2042-1(b)(6) as well. *See, e.g.*, *Estate of Lee v. Commissioner*, 69 T.C. 860 (1978), *nonacq.*, 1980-1 C.B. 2, *nonacq. withdrawn and acq. substituted*, 1993-1 C.B. 202 (treating decedent's community property interest in 80% of stock of corporation as 40% minority interest); *Propstra v. United States*, 680 F.2d 1248 (9th Cir. 1982) (allowing discount in valuing decedent's one-half community property interest in real estate); *Estate of Bright v. United States*, 658 F.2d 999 (5th Cir. 1981) (rejecting family attribution and treating decedent's community property interest in 55% of a company's outstanding stock as a 27.5% minority interest); Rev. Rul. 93-12, 1993-1 C.B. 202 (rejecting aggregation of family interests in shares with transferred shares for purposes of determining whether transferred shares should be treated as a controlling interest).

For a discussion of planning considerations for life insurance held in an irrevocable life insurance trust, see section 10.117, *infra*.

F. Annuities [§ 10.98]

Chapter 766 provides no special classification rules for annuities, which it does for certain life insurance policies and deferred employment benefits (*see supra* ch. 2). Hence, the general classification rules under section 766.31 apply to annuities; however, the classification of an annuity provided as a deferred employment benefit is governed by the special classification rules under section 766.62.

An annuity policy typically permits the person designated as the owner of the policy to designate a beneficiary for any proceeds payable upon death. If the nonowner spouse survives and is designated as the beneficiary, the classification of the annuity is of little concern. If the nonowner spouse survives and is not designated as the beneficiary, the classification of a portion or all of the annuity policy as marital property will give rise to a remedy by the surviving spouse for his or her one-half interest in the marital property component. *See* Wis. Stat. § 766.70.

Unless an annuity is provided as a deferred employment benefit, the terminable interest rule under sections 766.31(3) and 766.62(5) will not apply to any portion of the annuity classified as marital property. Hence, if the nonowner spouse dies first, one-half of the marital property component of the annuity is subject to testamentary disposition by the decedent. This may be an undesirable result given the complexity of classifying the annuity and determining the portion of any annuity payments due the estate of the nonowner. Spouses wishing to avoid this result have essentially two options. First, the spouses can agree in a marital property agreement that the annuity is the individual property of the designated owner. The death of the nonowner will have no effect on the owner's continued rights in the policy. However, if the annuity was acquired with marital property assets, by classifying the annuity as individual property, the nonowner spouse has given up the right to claim a remedy if he or she survives and is not named as the beneficiary. The other option is for the spouses to allow the annuity to be classified as provided under chapter 766 but to specify in a marital property agreement that the terminable interest rule will apply in the same manner as it would to a deferred employment benefit. In this manner, the surviving nonowner does not give up his or her rights in the annuity, but the predeceasing nonowner has no power of testamentary disposition.

Although investment decisions regarding annuities often do not involve the estate planner, if the opportunity arises for input at the acquisition stage, the spouses should be advised to consider acquiring individually owned annuities rather than a single annuity of which only one spouse is the owner, particularly when marital property funds are used for the acquisition. In that case, the separate annuities should be classified in a marital property agreement as the individual property of the respective spouses.

From an estate tax planning standpoint, annuities are not a favored source for funding a credit shelter trust since they will constitute income in respect of a decedent (at least in part). Hence, like a deferred employment benefit or IRA, discussed at sections 10.132– 10.160, *infra*, the annuity should be one of the assets of last resort for funding a credit shelter trust.

G. Stock Options [§ 10.99]

The manner in which stock options are classified under marital property law is discussed in chapter 2, *supra*. As with life insurance or annuities, creating certainty regarding the classification of stock options is important from a planning standpoint if the option holder's spouse is not designated to receive the holder's interest in stock options upon the death of the holder. Further, it is important to consider whether the terminable interest rule should or should not apply to stock options classified as marital property when the nonholding spouse dies first. For a discussion of the terminable interest rule, see section 10.139, *infra*.

There is some uncertainty regarding whether stock options constitute "deferred employment benefits" within the meaning of subsections 766.01(3m) and (4). *See supra* ch. 2. If the spouses are entering into a marital property agreement, the agreement can specify whether stock options are to be regarded as deferred employment benefits. Generally, such treatment is advisable since the terminable interest rule will avoid a testamentary disposition of the nonholding spouse's marital property interest if he or she predeceases the holding spouse. In some instances, however, the nonholding spouse may have insufficient assets with which to fund a credit shelter trust should he or she die first. In that situation, providing specifically in a marital property agreement that the stock options are classified as marital property and that the terminable interest rule does not apply to the stock options may aid in funding the credit shelter trust if the nonholding spouse dies first.

In planning for stock options, the applicable instrument creating the stock option interest should be examined. In some instances, an interest in stock options passes by beneficiary designation. In others, the deceased holder's rights with respect to stock options may be exercised only by his or her personal representative. In the latter case, administration proceedings will be required to effectively exercise the stock option rights (and hence passing the stock options by will substitute agreement may be ill-advised).

H. Closely Held Business Interests [§ 10.100]

1. Sole Proprietorships [§ 10.101]

The item-by-item rule, under which the classification of assets is determined on an individual basis (rather than aggregate), *see supra* ch. 2 and § 10.10, may make classification an important issue in planning for spouses when one of them conducts business as a sole proprietor. Unless the estate plan of each spouse provides for all assets of the business to pass to the survivor, the assets making up the business may become owned as tenants in common by the survivor and a third party.

➢ ***Example.*** A wife operates a successful home-based business as a sole proprietor. She intends to leave the business to her daughter from a prior marriage upon her death and so provides in her will. The wife predeceases her husband. A number of the business assets are classified in whole or in part as marital property. As a result, the husband becomes a tenant in common with the wife's estate and eventually the wife's daughter with respect to a number of the business assets. Alternatively, if the husband were to predecease the wife and leave his estate to a third party, the husband's estate and eventually the third party would become a tenant in common with the wife as to those business assets classified as marital property.

To avoid these results, the spouses can reclassify (by marital property agreement or other means) the business assets as the wife's individual property, thereby giving only the wife the power to make a testamentary disposition of the business assets. A further step that might be taken to simplify the identification of the business assets would be for the wife to conduct her business as a single-member LLC, with her LLC interest then classified as her individual property. A single-member LLC is taxed in the same manner as a sole proprietorship, *see* Treas. Reg. § 301.7701-3, and there is the added benefit of limited liability that comes with operating as a limited liability entity.

Note that the classification problem in the above example is not necessarily solved by simply having the husband make a provision in his will leaving all of his marital property interest in the wife's business to her. Although this would eliminate the identified problem if the husband were to die first, the problem would remain if the wife died first, because the husband would continue to own a one-half interest in each marital property asset.

In the above example, if the spouses were unable to agree on classifying the wife's business assets as her individual property, she could still ensure that the business would pass to her daughter and not be subject to testamentary disposition by the husband by incorporating the business and then utilizing a directive as contemplated by section 857.015. *See* Wis. Stat. §§ 857.015, 766.70(3). For a discussion of section 857.015, *see* chapter 4, *supra*. (Of course, any business assets held by both spouses in the "and" form would require the husband's joining in a conveyance to the corporation.) Note that a directive authorized under section 857.015 is available in the case of a closely held corporation but not in the case of assets of an unincorporated business or an interest in an LLC (other than arguably a professional LLC, *see* Wis. Stat. § 766.70(3)(b)).

See section 10.10, *supra*, describing the option of deviating from the item-by-item rule by virtue of the change made to section 766.31(3) by 2005 Wisconsin Act 216, section 42.

2. Corporations [§ 10.102]

When one or both spouses' property includes an interest in a closely held corporation, a number of planning issues may be presented. Those applicable will depend on the spouses' particular goals and objectives. The following is a summary of some of the major issues that may apply.

Ascertaining the classification of the stock of the corporation is important for a thorough consideration of the planning alternatives. The task may be as simple as examining an existing marital property agreement or the form in which title is held (for example, if issued after 1986 while the spouses were domiciled in Wisconsin, title held in the names of husband and wife as "marital property," "survivorship marital property," "tenants in common," or "joint tenants" will determine the classification; *see* Wis. Stat. § 766.60). In other instances, ascertaining the classification may be a more difficult task, requiring consideration of the time, manner, or source of acquisition of the stock the extent of postdetermination date appreciation in the value of the stock and the extent to which a spouse working in the business received compensation during that period, the extent to which earnings have been retained in the corporation, and other factors. *See supra* ch. 2. Ultimately, to achieve certainty regarding the classification of corporate stock, it may be advisable for the spouses to enter into a marital property agreement that, among other things, classifies the stock either as marital property or individual property.

Deciding how to classify closely held stock in a marital property agreement requires consideration of a number of factors, which may include one or more of the following: (1) the effect of reclassification on the spouses' relative property rights during the marriage, in the event of dissolution, or upon the death of one spouse; (2) the potential impact of reclassification with respect to potential creditor claims; (3) the need to balance the spouses' respective estates for effective marital deduction/credit shelter planning; (4) the opportunity to obtain a full adjustment in the basis of the stock upon the death of either spouse if it is classified as marital property; (5) the extent to which classification as marital property would facilitate estate or gift tax valuation discounts with respect to transfers of the stock; and (6) other factors not listed.

In addition, to the extent there are multiple shareholders, the planner should examine any buy-sell arrangements already in place or the advisability of adopting a buy-sell arrangement to create certainty regarding succession of ownership. With respect to an existing arrangement, the planner should ascertain the extent to which it contemplates disposition of the stock not only upon the death of the stockholder spouse but also upon the death of the nonholding spouse if the stock is classified as marital property. See chapter 4, *supra*, for a discussion of buy-sell agreements and alternatives for addressing the disposition of the nonholding spouse's marital property interest if he or she dies first.

When the planner is representing only one spouse, the representation may include advice designed to maximize that spouse's management and control rights and power of disposition over stock of the corporation.

3. S Corporations [§ 10.103]

Planning issues for S corporations under I.R.C. §§ 1361–1379 are similar to those for C corporations, with some additional considerations relating to making and maintaining the S corporation election. As discussed in chapter 9, *supra*, each person having a community property interest in the stock or income of a corporation must consent to an S corporation election. In view of the income rule under section 766.31(4), which generally classifies the income from nonmarital property as marital property, both spouses should consent to the election even if the stock is the nonmarital property of one spouse.

If an effective S corporation election has been made and the stock is classified as marital property, consideration should be given to the effect the death of one spouse could have with respect to the continued validity of the election.

- ***Example.*** S corporation stock classified as marital property is given to an irrevocable trust designed to effect a completed gift for transfer tax purposes but to be "defective" for income tax purposes. The grantor trust rules under I.R.C. §§ 671–678 cause the income to be taxed to the husband and wife, and the trust (a grantor trust) is an eligible shareholder pursuant to I.R.C. § 1361(c)(2). The wife subsequently dies.

Upon the wife's death, as to one-half of the trust, the trust is no longer a grantor trust. While the trust would continue to qualify as an S corporation shareholder for two years, *see* I.R.C. § 1361(c)(2)(A)(ii), action will be required at some point to preserve the S corporation election (for example, the trustee's electing to treat the trust as an electing small business trust under I.R.C. § 1361(e)). For a further discussion of marital property considerations regarding intentionally defective grantor trusts, see section 10.124, *infra*.

4. Partnerships [§ 10.104]

Marital property issues in planning, with respect to a closely held partnership, are essentially the same as those in planning with respect to a closely held corporation. Note, however, that it may be necessary for the partnership to make certain elections to obtain the full basis adjustment for marital property assets held by the partnership. *See supra* ch. 9.

5. LLCs [§ 10.105]

Marital property issues in planning with respect to a multiple member LLC are essentially the same as those in planning with respect to a partnership when the LLC has elected under the "check-the-box" regulations to be taxed as a partnership. *See* Treas. Reg. § 301.7701-3. Note, however, that a directive authorized under section 857.015 is available in the case of a closely held corporation but not in the case of assets of an unincorporated business or an interest in a LLC (other than, arguably, a professional LLC, *see* Wis. Stat. § 766.70(3)(b)). *See* chapter 4, *supra*, for a discussion of the directive under section 857.015, sometimes referred to as a "statutory" buy-sell provision.

An LLC owned solely by a husband and wife as community property under the laws of a state can be regarded either as a disregarded entity or a partnership, at the taxpayer's option. Rev. Proc. 2002–69, 2002-44 I.R.B. 831, 2002-2 C.B. 831.

6. Professional Partnerships [§ 10.106]

The marital property issues in planning with respect to a professional partnership or other entity will depend, in part, on the manner in which it is organized (i.e., as a corporation, partnership, LLC, etc.). The above discussions relating to corporations, partnerships, or LLCs should be consulted depending on the form of organization. Specific provisions under Wisconsin law prohibit a person not licensed in a particular profession from holding an interest in a professional entity. *See, e.g.*, Wis. Stat. § 180.1911 (providing that each shareholder, director, and officer of a service corporation must be licensed, certified, or registered by a state agency in the same field of endeavor). It is particularly important in the case of such entities, therefore, that an appropriate buy-sell arrangement be in place that contemplates the disposition of an ownership interest not only upon the death of the professional but also upon the death of the professional's spouse when the ownership interest is marital property. See chapter 4, *supra*, and section 10.128, *infra*, for discussion of buy-sell agreements and alternatives for addressing the disposition of the nonholding spouse's marital property interest if he or she dies first.

I. Deferred Employment Benefits and IRAs [§ 10.107]

The marital property issues involved in planning with respect to deferred employment benefits and IRAs are of considerable complexity and therefore are addressed separately at sections 10. 132–.147 and 10.148–160, respectively, *infra*.

J. Assets Acquired by Gift or Transfer at Death [§ 10.108]

Assets acquired by a spouse as a gift or transfer at death are classified as individual property. Wis. Stat. § 766.31(7)(a). In a joint representation the planner should consider whether that classification should be changed. Reasons for changing the classification from individual property to marital property include balancing the spouses' estates for estate tax planning reasons and making the assets eligible for a full basis adjustment upon the death of either spouse. However, before reclassifying assets received by a spouse by gift or transfer at death, the estate planner should carefully consider the potential adverse effects on the spouse who received the gift or transfer at death.

First, by reclassifying such assets as marital property, the owning spouse gives up valuable property rights, including the right to make a testamentary disposition of 100% of the assets. Even if the owning spouse retains management and control of the assets, he or she is bound by a duty of good faith toward the other spouse with respect to such assets, and any transfer of the assets may be subject to the remedies under section 766.70. For a discussion of these remedies generally, see chapter 8, *supra*.

Second, if the assets are reclassified as marital property, their availability to satisfy obligations incurred by either spouse is expanded. *See* Wis. Stat. § 766.55(2). For a discussion of creditors' rights with respect to marital property assets, see chapter 6, *supra*, and sections 10.171–.177, *infra*.

Third, assets received by gift or transfer at death that are reclassified as marital property may be part of the divisible estate in the event of dissolution, whereas otherwise they would have been nondivisible (except in the case of hardship) under section 767.255. 2005 Wisconsin Act 443 renumbered the property division statute from section 767.255 to section 767.61.

K. Non-Wisconsin Real Estate [§ 10.109]

Spouses who are domiciled in Wisconsin (and thus are governed by chapter 766) may own real estate in another jurisdiction (for example, a second residence). The extent to which such non-Wisconsin real estate may be affected by the classification rules of Wisconsin's marital property law is not always clear because of the vagaries of conflict-of-laws analysis. For a general analysis of conflict of laws as relating to community property law, see chapter 13, *infra*.

Because traditional conflict-of-laws analysis generally favors a legal characterization in accordance with the law of the situs, *see infra* ch. 13, the manner in which spouses acquire title to real property in another jurisdiction may create questions regarding its classification, notwithstanding the use of marital or community property funds to acquire the property. *See, e.g.*, Rev. Rul. 68-80, 1968-1 C.B. 348 (Virginia property acquired by spouses as tenants in common using proceeds from sale of New Mexico community property did not qualify for full adjustment in basis under I.R.C. § 1014(b)(6)); *see supra* ch. 9. For example, if Wisconsin-domiciled spouses purchase real property in Florida using marital property funds and take title to that property as tenants by the entireties, their ownership rights in the property may be governed by Florida law, not Wisconsin's marital property law. While some states have given a level of recognition to community property rights by adopting the Uniform Disposition of Community Property

Rights at Death Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1971 [hereinafter Uniform Disposition Act], such recognition may be incomplete. *See, e.g.*, Fla. Stat. § 732.218 (Uniform Disposition Act as adopted in Florida not applicable to property owned by spouses as tenants by the entireties). For a discussion of the Uniform Disposition Act, see chapter 13, *infra*.

On the other hand, if marital property funds have been used to acquire non-Wisconsin real estate and the title has been taken in the name of one spouse alone, the property should be classified as marital property. See chapter 13, *infra*, for a discussion of possible procedural solutions for the difficulties that might be faced in convincing the court in another state to recognize Wisconsin marital property interests in real estate located there.

Because spouses will often want their interests in real property located in another jurisdiction to be treated as community property for purposes of the full adjustment of basis rule under I.R.C. § 1014(b)(6), it is useful to consider ways to accomplish that result that will prevent the uncertainties associated with a potentially conflicting form of title in the situs state. One way is to convert the spouses' interest in real property to an interest in intangible personal property by, for example, contributing the non-Wisconsin real estate to a partnership or LLC of which the spouses are the owners. A partnership interest or an LLC membership interest is personal property, not real property. *See* Wis. Stat. §§ 178.22, 183.0703. Generally the law of the spouses' domicile (in this case Wisconsin) governs ownership rights in intangible personal property. *See infra* ch. 13. Hence, by converting the real property interest to an interest in personal property, the spouses should be able to specify application of Wisconsin law and classify their partnership or LLC interests as marital property. For a discussion of tax basis adjustment rules applicable to partnership interests (or LLC interests) and the underlying partnership (or LLC) property, see chapter 9, *supra*.

If spouses are acquiring non-Wisconsin real estate using marital property funds, another way to preserve community property treatment for federal tax purposes is to acquire the non-Wisconsin real property in a revocable living trust designed to hold marital property assets of the spouses. Title to the non-Wisconsin real property will be held by the trustees (likely the spouses) and the terms of the trust instrument can provide for continued recognition of the spouses' respective ownership rights with respect to marital property assets held by the trust. For a discussion of the IRS's position with respect to community property held in a revocable living trust, see chapter 9, *supra*.

Another question is whether Wisconsin-domiciled spouses may reclassify non-Wisconsin real estate as marital property when the property was not acquired with marital property assets.

➢ ***Example.*** A husband inherits his parents' condominium, located in a common law property jurisdiction that has adopted the Uniform Disposition Act. The husband and his wife, who are domiciled in Wisconsin, later enter into a marital property agreement classifying all their assets, however titled and wherever situated, as marital property.

Would the condominium thereafter be classified as marital property? Under the facts in the example, the Uniform Disposition Act would not apply to the property, since it only applies to "real property situated in this [the situs] state which was acquired with the rents, issues or income of, the proceeds from, or in exchange for, property acquired as, or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property." Uniform Disposition Act, § 1(2), 8A U.L.A. 121 (1983). On the other hand, under conflict-of-laws analysis, Wisconsin law might govern the classification since Wisconsin arguably would have a greater interest in the property rights of the spouses. *See* Introductory Note to Topic 2, Chapter 9 of the Restatement (Second) Conflict of Laws, reproduced in part in chapter 13, *infra*. Wisconsin's marital property law does not purport to place a jurisdictional limitation on the situs of property that may be classified as marital property. Hence, a strong argument can be made that Wisconsin law should apply and govern the classification of the non-Wisconsin real estate. From a planning standpoint, without the Uniform Disposition Act to provide support in recognizing the marital property status of the reclassified asset, the spouses could facilitate the future recognition of their respective marital property rights by transferring title of the property to a revocable trust that includes provisions requiring the trustees to treat the property in the same manner as other marital property assets.

L. Intellectual Property Rights [§ 10.110]

Spouses' property interests may include intellectual property rights (e.g., patents, copyrights, or trademarks). Wisconsin's marital property law provides no special classification rules for intellectual property rights, but the general classification rules under section 766.31 should provide a sufficient basis for allowing intellectual property interests to be classified as marital property. However, as discussed in this section, there are significant issues relating to federal preemption, particularly in the case of copyrights and patents.

Subject to the federal preemption concerns noted below, a general opt-in marital property agreement that classifies spouses' assets as marital property could reclassify intellectual property rights as marital property, or it may merely confirm that classification if the property interests at issue were accrued during the marriage. In some instances, however, the spouse who holds the property interest (for example, a copyright to a book that he or she wrote) may want to maintain complete ownership and control of the asset under all circumstances, including the death of the other spouse. In that case, reclassification of the copyright as marital property could undermine the objective of the holding spouse.

From an estate tax planning standpoint, the classification of an intellectual property right as a marital property asset may facilitate the use of both spouses' applicable credit amount. See sections 10.84–.86, *supra*, for a discussion of unified credit/marital deduction planning.

From an income tax planning standpoint, the question arises whether the full basis adjustment rule for community property under I.R.C. § 1014(b)(6) is applicable to intellectual property rights classified as marital property. I.R.C. § 1221(a)(3) provides in part that a "copyright, literary, musical or artistic composition, a letter or memorandum, or similar property" is not a capital asset if held by a taxpayer who personally created the property. If the asset is not a capital asset, it cannot receive a basis adjustment. On the other hand, if a patent or copyright is treated as a capital asset in the hands of a decedent (i.e., if it was purchased by the decedent), there is no reason the basis adjustment rule would not apply.

Whether state community property laws are preempted by the federal copyright law has been the subject of litigation, with conflicting results. In *Worth v. Worth*, 241 Cal. Rptr. 135 (Ct. App. 1987), the California

Court of Appeals concluded that federal law did not preempt California's community property law with respect to the ownership of a copyright. In *Rodrigue v. Rodrigue*, 55 F. Supp. 534 (E.D. La. 1999), *aff'd* 218 F.3d 432 (5th Cir. 2000), the U.S. District Court for the Eastern District of Louisiana specifically rejected the analysis in *Worth* and held that the federal copyright law preempts Louisiana community property law on the question of ownership of copyrights. The district court in *Rodrigue* did not consider, however, whether spouses could voluntarily classify a copyright as community property. On appeal, the Fifth Circuit Court of Appeals reversed, concluding that although the author-spouse retains exclusive management and control of a copyright, the economic benefits of the copyright belong to the community. *Rodrigue*, 218 F.3d at 435.

Unlike retirement plan assets governed by ERISA, copyrights are assignable, and the copyright law specifically recognizes joint ownership of copyrights. *See* 17 U.S.C. § 201. Hence, while the litigation in *Rodrigue* and *Worth* creates some uncertainty regarding the effect of community property laws on copyright ownership, the federal law would appear to accommodate planning by spouses who wish to voluntarily adopt community property as the form of ownership of a copyright. Patents, which share the same constitutional foundation as copyrights, *see* U.S. Const. Art. I, § 8, cl. 8, and which likewise are subject to assignment and joint ownership, *see* 35 U.S.C. §§ 261 and 262, arguably should be treated in the same manner.

For a general discussion of estate planning for intellectual property rights, see David H. Melnick et al., "Intellectual Property Issues in Estate Planning," Practising Law Institute, 29th Annual Estate Planning Institute, 267 PLI/Est 371 (1998).

M. Planning Trust Interests for Beneficiaries [§ 10.111]

Parents often are concerned with the marital property implications for property received from them by their children, either as a lifetime gift or a transfer at death. Assuming the application of Wisconsin law to the child, property received by gift or transfer at death is classified under chapter 766 as individual property. Wis. Stat. § 766.31(7)(a). Similarly, for purposes of property division in the event of dissolution, property received by gift or transfer at death from a third party is nondivisible, absent hardship. Wis. Stat. § 767.61. Hence, if the child takes the necessary steps to segregate the donated or inherited property, its classification under chapter 766 and its character under chapter 767 can be preserved. But income from the property will be classified as marital property under chapter 766 (absent an effective marital property agreement or unilateral statement providing otherwise) and will be divisible upon dissolution under chapter 767 (absent an effective marital property agreement providing otherwise).

Parents making lifetime gifts or transfers at death to children can provide a greater level of protection under both chapter 766 and 767 by creating trust interests for their children. Under section 766.31(7)(a), both the principal and income of a trust created by a third party are classified as the individual property of the donee. Similarly, under chapter 767, the court of appeals held in *Friebel v. Friebel*, 181 Wis. 2d 285, 510 N.W.2d 767 (Ct. App. 1993), that income accumulated in and distributed from a discretionary trust created by a third party was not divisible upon dissolution. Deciding whether to use a trust for this purpose involves balancing a number of considerations, including the loss of flexibility on the part of the child beneficiary and the income and transfer tax implications of creating a long-term trust interest.

Other means of insulating assets and enhancing the ability to identify them as having their source in a gift or transfer at death is to make the subject of the gift or transfer at death an interest in a partnership, LLC, or other interest.

It should be observed, of course, that not all spouses who are governed by Wisconsin's marital property laws have married children governed by the same laws: married children may reside in other jurisdictions that have other laws respecting marital property rights in gifts or inheritances, whether made outright, in trust, or in the form of an entity interest. A discussion of the laws of various jurisdictions that could apply to the donees or legatees of married Wisconsin spouses is beyond the scope of this book.

XII. Specific Estate Planning Techniques and Situations [§ 10.112]

A. Annual Exclusion Gifts [§ 10.113]

Gifts qualifying for the gift tax annual exclusion under I.R.C. § 2503(b) may be made with marital property assets or nonmarital property assets by the spouse (or spouses) having management and control. *See* Wis. Stat. § 766.51(4). If marital property assets are the subject of the gift and one spouse acts alone, the other spouse may have a remedy under section 766.53, although for wealthier spouses a gift exceeding the $1,000 statutory amount in section 766.53 but within the annual exclusion amount under I.R.C. § 2503(b) may be considered "reasonable in amount considering the economic position of the spouses." Wis. Stat. § 766.53. For a discussion of remedies relating to gifts of marital property assets, see chapter 8, *supra*.

A spouse making a gift of his or her nonmarital property assets over which he or she has management and control need not be concerned with lifetime remedies by the other spouse. However, if the donor spouse dies within two years of making the gift and the subject of the gift was deferred marital property under section 851.055, the augmented deferred marital property estate includes the value of the property. Wis. Stat. § 861.03(4).

If one spouse acting alone gives assets to a third-party donee, it is important to know the classification of the assets to identify the donor or donors for federal gift tax purposes. If the assets given are nonmarital property, the spouse making the gift is the only donor for federal gift tax purposes. If the assets given are marital property, both spouses are deemed donors for federal gift tax purposes even though only one spouse acted in making the gift. *See supra* ch. 9. Thus, for example, one spouse may make a gift of marital property assets having a value of $22,000 to a third party donee and, provided no other gifts are made to the same donee during the calendar year by either spouse, the gift would be within the annual exclusion amount for each spouse, thereby making the filing of a gift-splitting election on IRS Form 709 unnecessary. Note, however, that if the subject of the gift is a difficult-to-value asset (such as closely held stock), it may nonetheless be advisable to file gift tax returns in order to commence the running of the gift tax statute of limitation. *See* I.R.C. §§ 6075, 6501; Treas. Reg. § 301.6501(c)-1.

B. Taxable Gifts [§ 10.114]

Gifts that exceed the amount of the federal gift tax annual exclusion or that do not qualify for the annual exclusion because of failure to meet the "present interest" requirement under I.R.C. § 2503(b) are referred to in this section as *taxable gifts*. Taxable gifts may or may not result in the payment of federal gift tax depending on whether or not the donor has fully used the $1 million federal gift tax exemption under I.R.C. § 2505.

Taxable gifts may be made with marital property assets or nonmarital property assets by the spouse (or spouses) having management and control. *See* Wis. Stat. § 766.51(4). If marital property assets are the subject of the gift and one spouse acts alone, the other spouse may have a remedy under section 766.53, although the gift is a completed transfer by reason of section 766.51(4). *See supra* ch. 9. For a discussion of remedies relating to gifts of marital property assets, see chapter 8, *supra*.

If a donor spouse makes a gift of nonmarital property assets that are deferred marital property under section 851.055 and dies within two years of making the gift, the augmented deferred marital property estate includes the value of the assets given. Wis. Stat. § 861.03(4).

If one spouse acting alone gives assets to a third-party donee, it is important to know the classification of the assets to identify the donor or donors for federal gift tax purposes. If the assets given are nonmarital property, the spouse making the gift is the only donor for federal gift tax purposes. If the assets given are marital property, both spouses are deemed donors for federal gift tax purposes even though only one spouse acted in making the gift. *See supra* ch. 9. Thus, for example, if one spouse makes a gift of marital property assets having a value of $200,000 to a third-party donee, each spouse is deemed to have made a gift of $100,000 to the donee. Each spouse must file a federal gift tax return since each is a donor and the gift exceeds the amount of the gift tax annual exclusion under I.R.C. § 2503(b). If the amount of the gift exceeds the amount of a spouse's gift tax exemption under I.R.C. § 2505, that spouse owes federal gift tax.

C. Generation-skipping Transfers [§ 10.115]

For transfers during lifetime, a donor for federal gift tax purposes is treated as the transferor for purposes of the federal GST tax. *See* I.R.C.

§ 2652(a)(1)(B). Hence, when marital property assets are the subject of a gift, for GST tax purposes each spouse is deemed to be the transferor of one-half of the transferred assets. *See supra* ch. 9. Thus, for purposes of determining qualification for the GST tax annual exclusion under I.R.C. § 2642(c), the allocation of the GST exemption under I.R.C. §§ 2631 and 2632, or liability for GST tax under I.R.C. § 2603, consideration must be given to the classification of the property transferred. If the subject of a transfer is nonmarital property and spouses make a gift-splitting election pursuant to I.R.C. § 2513, for GST tax purposes each spouse is treated as a transferor with respect to one-half of the gift. I.R.C. § 2652(a)(2).

For transfers taking effect at death, the decedent is treated as the transferor for GST tax purposes for any property subject to the estate tax. *See* I.R.C. § 2652(a)(1)(A). Thus, for example, the decedent is the transferor for GST tax purposes of his or her one-half interest in former marital property assets passing at death, since such assets are includible in the decedent's estate under I.R.C. § 2033. It is important, therefore, in the case of residuary dispositions that involve generation skipping (either direct skips or transfers in trust that could ultimately result in a taxable termination) to understand the full extent of the property interests over which the decedent has a power of disposition—including his or her one-half marital property interest in assets titled in the name of his or her spouse. The use of formula provisions based on the available GST exemption often are used to ensure that transfers make optimal use of the GST exemption but do not result in the imposition of GST tax.

D. Disclaimers [§ 10.116]

The use of a disclaimer following the death of a decedent can be a useful postmortem estate planning technique. The requirements of Wisconsin law must be considered for the disclaimer to be effective for property law purposes, and the requirements of federal law must be considered for the transaction to be nontaxable for gift tax purposes. Further, at the pre-death planning stage, consideration must be given to the classification of assets to maximize flexibility for the possible later use of a disclaimer.

Section 854.13 governs disclaimers with respect to all types of transfers of property. For a general discussion of the statute, see Howard S. Erlanger, *Wisconsin's New Probate Code* § 4.03 at 133 (1998). Section 854.13 is drafted broadly to authorize disclaimer with respect to virtually any kind of gratuitous transfer of property, including by a "beneficiary under a governing instrument." Wis. Stat. § 854.13(1)(a), (2). The term *governing instrument* is defined broadly under section 854.01 to include a myriad of instruments that can effect a transfer of property, both during life and at death, including a will substitute provision under section 766.58(3)(f). For a discussion of transfers by will substitute provisions in a marital property agreement, see chapter 7 and sections 10.64–.69, *supra*. Section 854.13 also includes a specific provision authorizing a surviving spouse to disclaim a deceased spouse's interest in survivorship marital property, Wis. Stat. § 854.13(2)(c), as well as a specific provision authorizing a surviving joint tenant to disclaim a survivorship interest in joint tenancy property, Wis. Stat. § 854.13(2)(b). In addition, while the statute does not specifically refer to disclaimers with respect to joint accounts under chapter 705, the term *governing instrument* under section 854.01 includes "an instrument under ch. 705," and although the term *instrument* is not defined in chapter 705, the reference in section 854.01 has been interpreted to include joint or P.O.D. bank accounts. *See* Erlanger, *supra*, § 4.01 at 86.

For a disclaimer to be qualified and therefore not treated as a gift for federal gift tax purposes, it must comply with the requirements of I.R.C. § 2518 and the regulations thereunder. There are five basic requirements for a disclaimer to be qualified under I.R.C. § 2518: (1) it must be irrevocable and unqualified; (2) it must be in writing; (3) the writing must be delivered in a timely manner (generally within nine months of the event creating the property interest); (4) the disclaimant must not have accepted the interest disclaimed or any of its benefits; and (5) the interest disclaimed must pass either to the spouse of the decedent or a person other than the disclaimant without any direction on the part of the disclaimant. Treas. Reg. § 25.2518-2(a).

Final regulations adopted in 1997 regarding the disclaimer of joint interests have settled any concerns that may have existed with respect to the time in which a qualified disclaimer of a decedent's interest in survivorship marital property must be made. Although the final regulations do not mention survivorship marital property (or its analogue, community property with right of survivorship), they do settle, in a manner favorable to taxpayers, the timing issue with respect to disclaiming the survivorship interest in jointly owned property that is not unilaterally severable. Like tenancy by the entirety property, marital property (including survivorship marital property) is not unilaterally severable. *See supra* ch. 2. Treas. Reg. § 25.2518-2(c)(4)(i) provides:

"A qualified disclaimer of a survivorship interest to which the survivor succeeds by operation of law upon the death of the first joint tenant to die must be made no later than 9 months after the death of the first joint tenant to die regardless of whether such interest can be unilaterally severed under local law…." Example 8 of Treas. Reg. § 25.2518-2(c)(5) extends the application of the quoted section to tenancy-by-the-entirety property. The same rationale should apply to a disclaimer by a surviving spouse of the deceased spouse's interest in survivorship marital property.

The regulations also address the timing and extent to which a surviving spouse or other co-owner of a joint bank, brokerage, or other investment account may make a qualified disclaimer of a deceased joint owner's interest. Under the regulations, if a surviving joint owner wishes to disclaim contributions to an account made by a deceased co-owner, the disclaimer must be made within nine months of the deceased co-owner's death, and the surviving co-owner may not disclaim any portion of the joint account attributable to considerations furnished by the surviving co-owner. Treas. Reg. § 25.2518-2(c)(4)(iii). Of course, if the property in the account were classified as marital property, then the disclaimer would be limited to one-half of the value of the account at the death of the deceased co-owner.

The regulations under I.R.C. § 2518 do not contemplate the timing or extent to which a disclaimer may be made with respect to property passing under a will substitute agreement as authorized by section 766.58(3)(f) or by the laws of the state of Washington. However, in Private Letter Ruling 95-07-017 (Feb. 17, 1995), the IRS considered a disclaimer with respect to property passing to the surviving spouse under a Washington community property agreement and concluded that "for purposes of section 2518(a)(2), the 9-month period for making the disclaimer of the decedent's one-half community property interest passing to [surviving spouse] under the community property agreement commences on the date of death."

When an estate plan contemplates that property will pass to the surviving spouse but that the surviving spouse might disclaim the property so that it can pass to another person or entity (e.g., a child or a credit shelter trust), consideration should be given to the classification of the property at issue. If an asset is classified as marital property, the surviving spouse already owns an undivided one-half interest in the property; hence, he or she cannot disclaim more than the decedent's one-half interest in the property. *See* Treas. Reg. § 25.2518-2(c)(5), example

11. The following illustrates the application of the regulation in the case of Wisconsin spouses:

> ➤ ***Example.*** A husband is the owner and insured of a $700,000 face-amount life insurance policy acquired after the spouses' determination date. Under section 766.61(3)(a), the policy is classified as marital property. The husband designates his wife as primary beneficiary and a credit shelter trust of which the wife is a beneficiary as the contingent beneficiary of any death proceeds. Upon the husband's death, the wife may make a qualified disclaimer of no more than one-half of the death proceeds since she already has a one-half ownership interest in the proceeds.

Note that in this example, the insurer will likely be unaware of any classification issues and will simply follow its ownership records in administering the policy and its proceeds. *See* Wis. Stat. § 766.61(2)(b). If the wife were to submit a complete (as opposed to a partial) disclaimer, the insurer would pay the proceeds to the designated contingent beneficiary. If the wife thereafter failed to recover her one-half interest in the proceeds, adverse transfer tax consequences could result. *Whiteley v. United States*, 214 F. Supp 489 (W.D. Wash. 1963). Careful drafting of the disclaimer to make it clear that the disclaimer relates only to the decedent's one-half marital property interest in the proceeds (and not to the interest of the surviving spouse) will avoid such adverse transfer tax consequences.

E. Irrevocable Life Insurance Trusts [§ 10.117]

The acquisition of life insurance by an irrevocable trust established by the insured is a popular technique for transferring wealth without estate tax. Careful drafting is required to avoid having the insured possess any incidents of ownership in the policy that could cause estate tax inclusion under I.R.C. § 2042.

If the insured's spouse is a life beneficiary of the irrevocable life insurance trust, particular attention must be given to the classification of the assets used to fund the trust. As noted in section 9.92, *supra*, for federal tax purposes, the husband and wife are treated as equal grantors when community property assets are transferred. Thus, if the husband gives marital property assets to an irrevocable trust and the wife is a beneficiary of the trust, she will be treated as having made a transfer of one-half of the assets given by the husband. If the wife has a beneficial interest in the trust, upon her death, the portion of the trust attributable to her one-half interest in the assets transferred to the trust is vulnerable to inclusion under I.R.C. § 2036 as a transfer with a retained interest. *See supra* ch. 9.

The best solution to this problem is to have the donor-insured use only individual property funds for the initial and periodic gifts to the trust. If such individual property assets exist, they should be maintained as a segregated fund with measures taken to ensure that they retain their classification as individual property (such as the owner's executing and delivering a unilateral statement under section 766.59 or the spouses' entering into a marital property agreement under section 766.58).

In many instances, however, there will be no existing pool of individual property assets to serve as the source of periodic gifts by the insured to the irrevocable life insurance trust. In that case, the spouses could agree in a marital property agreement that certain assets that otherwise would be classified as marital property will be classified as individual property, or the reclassification could be accomplished by a gift from one spouse to the other. The reclassified assets could then be used as the source of the gifts by the insured to the trust. Or, the spouses could agree in a marital property agreement that any assets transferred to the trust are classified as the individual property of the insured. Although there is no direct authority on point, these techniques should be effective to avoid a transfer with a retained interest. However, some commentators have expressed the need for caution in this area. *See, e.g.*, Price, *supra* § 10.1, at § 6.23.6. Notwithstanding the risk, the survivor's estate will still be better off from an estate tax standpoint, because the portion of the trust attributable to the donor-insured's one-half interest will not be subject to inclusion in the gross estate of the surviving spouse.

The question may arise regarding the extent to which a written consent under section 766.61(3)(e) may be a useful means of avoiding the complications of marital property classification in the context of an irrevocable life insurance trust. Section 766.61(3)(e) provides that a written consent in which a spouse consents to the use of property to pay premiums on a policy is effective, "to the extent that the written consent provides, to relinquish or reclassify all or a portion of that spouse's interest in property used to pay premiums on the policy or in the ownership interest or proceeds of the policy without regard to the classification of property used by a spouse or another person to pay premiums on that policy." It is arguable that a contribution to an irrevocable life insurance trust is not property used to pay a premium at the time of the gift to the trust (since the trustee is not obliged to invest the contributed funds in life insurance premiums). Subject to the issues noted above, a marital property agreement is a more flexible and comprehensive way to accomplish the reclassification.

If the insured's spouse is not a beneficiary of the irrevocable life insurance trust (for example, if the trust is solely for the benefit of the insured's descendants), there is no concern that part of the trust will be a transfer with a retained interest under I.R.C. § 2036, even if marital property assets are used as the source of periodic gifts to the trust. Other concerns can exist, however. For example, if the donor-insured directly pays the premiums on a policy owned by the irrevocable life insurance trust with marital property funds, consideration must be given to the effect of section 766.61(3)(d) if the insured's spouse survives the insured. That section provides that, in the case of a policy that designates a person other than either spouse as the owner, if no premium on the policy is paid from marital property after the determination date, chapter 766 does not affect the ownership interest and proceeds of the policy. The section goes on to provide, however, that if a premium on the policy is paid from marital property funds after the determination date, the ownership interest and proceeds of the policy are in part the property of the designated owner of the policy and in part marital property of the spouses, regardless of the classification of property used to pay premiums on that policy after the initial payment of a premium on it from marital property funds. Read literally, this means in the context of an irrevocable life insurance trust that the surviving spouse has a right to claim a portion of the proceeds of the policy. Moreover, the failure of the surviving spouse to assert his or her claim within the time period specified by section 766.70(6) could result in the surviving spouse being treated as having made a taxable gift to the trust. *See supra* ch. 9.

The application of section 766.61(3)(d) will most likely be avoided if the donor-insured does not pay the premiums on the policy directly but instead makes periodic gifts to the trustee of the irrevocable life insurance trust, who in turn pays the premiums on the policy. Even if the periodic gifts to the trust are made with marital property funds, once given to the trust the funds are no longer marital property, and hence the trustee does not pay premiums with marital property funds. In that instance, however, there is still the possibility that the spouse could have a remedy under section 766.70 with respect to the gift of marital property assets, if the amount given exceeds the limits under section 766.53. *See supra* ch. 8. These concerns are eliminated, of course, if the funds used by the donor-insured to make gifts to the trust are classified as individual property. For a more detailed discussion of section 766.61(3)(d), *see* chapter 2.

So-called second-to-die life insurance, which pays a death benefit upon the death of the second to die of two insureds, has become a popular means of creating a source of liquidity at the death of the surviving spouse. Such insurance is often acquired by the trustee of an irrevocable life insurance trust with funds contributed to the trust by the insureds. Since both spouses are insureds, neither is a beneficiary of the trust and thus there should be no problem with the spouses' contributing marital property assets to the trust. For the reasons discussed previously relating to section 766.61(3)(d), it is advisable that insurance premiums not be paid with marital property funds directly by the donors but instead by the trustee with funds given to the trust by the donors.

F. Valuation Discount Planning [§ 10.118]

1. In General [§ 10.119]

The marital property system offers opportunities for valuation discount planning in a variety of contexts. Appraisers and the IRS recognize that the valuation of closely held stock and partnership interests often must be discounted because of a general lack of marketability or when the interest being valued constitutes only a minority interest. Further discounts may be available for built-in capital gains or when a key person is necessary to the business. When real estate is involved, discounts will reflect the limitations of holding fractional undivided interests.

A discount for lack of marketability is given when it is difficult to reduce an asset to cash. More time is needed for the sale of stock in a closely held company, and transactional costs generally are higher than those applicable in a sale of an interest in a publicly traded company. A lack-of-marketability discount can be given even when a controlling interest in a company is involved.

In the context of a business entity such as a corporation or partnership, a discount of a minority interest takes account of the interest holder's lack of control and lack of a right to participate in management decisions, compensation decisions, decisions involving distributions of income, such as declarations of dividends, and the ultimate disposition of business assets through sale, merger, or liquidation.

Discounts for minority interests and fractional interests in an asset are inherent in a community property system. If an asset is entirely marital property, the most a spouse can own is 50%. At the death of a spouse, assets can be retitled to reflect the former marital property interests, and during the lifetimes of the spouses marital property interests can be reclassified as individual property interests to take advantage of certain estate planning opportunities.

The subject of valuation and discounts is discussed at chapter 9, *supra*. Also, see Price, *supra* § 10.1, at §§ 2.44 and 11.1.2, regarding valuation discounts generally.

2. Discounts at Death of First Spouse [§ 10.120]

The leading case is *Estate of Bright v. United States*, 658 F.2d 999 (5th Cir. 1981). Mr. and Mrs. Bright lived in a community property state. Together they owned 55% of the outstanding stock in two closely held companies and their affiliates. At Mrs. Bright's death, her husband was appointed executor of her estate. The IRS attempted to value Mrs. Bright's interest as part of one 55% interest through a "family attribution" argument. The court rejected that argument, treated her 27.5% interest as the only asset to be valued, and granted a discount for a minority interest.

Subsequently, in Rev. Rul. 93-12, 1993-1 C.B. 202, the IRS conceded that the reasoning in *Bright* is correct, and that the family attribution argument is incorrect. In the situation underlying the ruling, the donor, who owned all the stock of a closely held company, gave each of his five children a 20% interest. Despite total loss of control by the donor, each gift was valued separately with discounts for lack of marketability and minority interest.

Using a marital property agreement that classifies closely held stock or partnership interests as marital property, Wisconsin spouses can put themselves into precisely the position of the Brights. The interests of the deceased spouse and surviving spouse will not be aggregated for valuation purposes. The interest of the deceased spouse, therefore, can be discounted for lack of control.

The size of a block of stock can influence valuation. If all outstanding stock in a closely held company is marital property, the first spouse to die holds a 50% interest. A 50% interest is more than a minority interest but less than full control and is entitled to some discount. There is a potentially deeper discount if the deceased spouse's interest is less than 50%. It may be desirable, therefore, to give some shares to children (or other desired beneficiaries) during the lifetimes of the spouses.

What of the swing-vote argument adopted by the IRS in Technical Advice Memorandum 9436005 (Sept. 9, 1994)? In that ruling, the IRS took the position that a 30% block of stock could not be discounted significantly because it could combine with another 30% block to control the company. The IRS had raised that issue in *Bright*, but the court rejected the issue because the IRS had not raised it in the district court and "no miscarriage of justice [would] result." In *Furman v. Commissioner*, 75 T.C.M. (CCH) 2206 (1998), the Tax Court rejected the IRS's swing-vote argument in a case in which a husband and wife each gave a 6% interest in a closely held business to their son, who already owned a 40% interest. The Tax Court nonetheless allowed a combined minority interest/lack of marketability discount of 40% for each 6% block. *See also Estate of Davis v. Commissioner*, 110 T.C. 530 (1998) (rejecting swing-vote theory).

3. Death of Second Spouse [§ 10.121]

Another significant case involving a community property state is *Estate of Bonner v. United States*, 84 F.3d 196 (5th Cir. 1996). In this case, real estate was held as community property when Mrs. Bonner predeceased her husband. At Mrs. Bonner's death, Mr. Bonner took ownership of his half of the community property real estate. Mrs. Bonner's estate plan provided for her half to pass to a QTIP marital trust. When Mr. Bonner later died, the IRS attempted to aggregate the interests in his estate and in the QTIP marital trust for valuation purposes, noting that both were included in his estate for federal estate tax purposes albeit under separate sections of the I.R.C., section 2033 for his ownership interest and section 2044 for the interest in the QTIP marital trust. The court rejected the IRS's position and held that the case was controlled by the reasoning of *Estate of Bright*, 658 F.2d 999 (5th Cir. 1981). The court held that the QTIP interest had to be valued separately, because neither of the I.R.C. sections cited by the IRS required or logically contemplated that the QTIP assets would merge with other assets. Further, Mr. Bonner had no control over their ultimate disposition. Thus, the QTIP assets could pass as Mrs. Bonner directed. The court would not consider evidence regarding who actually received the assets.

In *Estate of Mellinger v. Commissioner*, 112 T.C. 4 (1999), the Tax Court followed the Fifth Circuit's reasoning in *Bonner*, concluding that two blocks of approximately 28% each in the publicly traded stock of Frederick's of Hollywood, Inc. should not be aggregated for valuation purposes when one block was includible in the surviving spouse's estate under I.R.C. § 2033 and the other was includible under § 2044. *See also Estate of Nowell v. Commissioner*, T.C.M. (RIA) 99, 015; *Estate of Lopes v. Commissioner*, 78 T.C.M. (CCH) 46 (1999).

Thus, marital property can be arranged so as to obtain discounts at the deaths of both spouses—in the first estate because of the inherent minority or fractional aspect of the asset being valued, and in the second by having placed the one-half interest of the first spouse to die in a QTIP marital trust. Caution dictates that a surviving spouse not be given a general power of appointment over the marital property interest owned by the first spouse to die and that there may be some risk in a special power as well. Naming the surviving spouse as sole trustee of the QTIP marital trust should not create a problem because of the fiduciary duties of a trustee and the trustee's lack of power of ultimate disposition at the surviving spouse's death.

4. Fractional Interests [§ 10.122]

Fractional interests in the same asset are discounted for valuation purposes below the price the asset itself would bring if sold in its entirety to a willing buyer. Issues involving this discount often arise in connection with real estate. Usually the issue is the method of calculating the discount. The IRS has taken the position that the discount should be limited to the cost of partition. *See, e.g.*, Tech. Adv. Mem. 9336002 (Sept. 10, 1993). The courts, however, have allowed discounts based on the time it takes to partition, the lesser value that may be obtained because the partitioned parcel is smaller in size, the inability to borrow using an undivided interest as collateral, and the fact that it may be necessary to deal with the other owner in operating the real estate. In *Estate of Williams v. Commissioner*, 75 T.C.M. (CCH) 1758 (1998), the Tax Court allowed an unprecedented discount of 44% for gifts of undivided interests in Florida timberland. *See also LeFrak v. Commissioner*, 66 T.C.M. (CCH) 1297 (1993) (in valuing undivided interests in real property, Tax Court allowed combined discount of 30% for fractional interest and lack of marketability).

Questions regarding the extent of the discount aside, there are clear implications for marital property. Fractional interest discounts will likely be available in connection with any parcel of marital property real estate because the ownership is inherently fractionalized between the spouses. At the death of a spouse, the asset is divided between the deceased spouse's estate and the surviving spouse. *See Propstra v. United States*, 680 F.2d 1248 (9th Cir. 1992) (allowing 15% fractional interest discount when interest transferred was decedent's one-half community property interest).

During the spouses' lifetimes, management and control will depend on how the real estate is titled. If the parcel is titled in the name of only one spouse, that spouse can manage and control the asset, and the other spouse has no authority of disposition over the interest he or she owns (note, however, in the case of homestead real property, both spouses must join in any conveyance, regardless of how title is held, *see* Wis. Stat. § 706.02(1)(f)). Note, however, that a valid waiver of homestead rights in a marital property agreement eliminates the need for the nontitled spouse's signature. *See Jones v. Estate of Jones*, 2002 WI 61, 253 Wis. 2d 158, 646 N.W.2d 280. The nature of management and control poses no difficulty in connection with gifts of interests to third parties in which both spouses participate. The gift of an interest should be discounted under normal principles.

G. Personal Residence Trusts [§ 10.123]

A personal residence trust under I.R.C. § 2702 can be a powerful planning technique to transfer value to the next generation at reduced transfer tax cost. For a general discussion of personal residence trusts, see Price, *supra* § 10.1, at §§ 9.44–.44.4.

Under the governing regulations, a personal residence is defined as either the principal residence of the trust term holder under I.R.C. § 1034 or one other residence that would be treated as the term holder's dwelling under I.R.C. § 280A(d)(1) (without regard to § 280A(d)(2)) or an undivided fractional interest in either). Treas. Reg. § 25.2702-5(b)(2). A trust of which the term holder is a grantor is not a personal residence trust if at the time of the transfer, the term holder already holds a term interest in two trusts that are personal residence trusts of which the term holder was the grantor. Treas. Reg. § 25.2702-5(a). Hence, a husband and wife together could participate in up to three personal residence trusts, one for their principal residence (whether owned by the husband, the wife, or both), one that is the wife's separate property, and one that is the husband's separate property.

➢ ***Note.*** I.R.C. § 1034 was repealed by Public Law 105-34, 111 Stat. 788 (1997), although Treas. Reg. § 25.2702-5 has not been amended to reflect that repeal.

Given the above rules, consideration should be given to the classification of property transferred to a personal residence trust. If a personal residence is owned as marital property and the spouses wish to establish a personal residence trust arrangement for that residence, there are three alternatives.

First, the spouses together may create a joint personal residence trust and transfer the property to the trust. The governing regulations provide that spouses may transfer their interests in a residence to the same personal residence trust if the trust instrument prohibits anyone other than a spouse from holding a term interest in the residence concurrently with the other spouse. Treas. Reg. § 25.2702-5(b)(2)(iv). While this alternative would not require the spouses to reclassify the property before transferring it to the trust, given the complexity of drafting a joint personal residence trust, this is not the most straightforward alternative.

Second, the spouses may first reclassify the property as the individual property of one spouse, and then the owner spouse may transfer the property to a personal residence trust of which that spouse is the term holder (the other spouse must join in the conveyance if the property is homestead property). If the spouses intend to create personal residence trusts with both a principal residence and a second residence, this is the most straightforward arrangement, with each spouse creating a personal residence trust with his or her own individual property. This method also preserves the spouses' ability to create a third personal residence trust.

Third, the spouses may wish to create separate personal residence trusts, to which each transfers a fractional interest in the same residence. This approach reduces the risk that the arrangement will completely fail to achieve the desired tax objective (because of the term holder's death before the end of the trust term). Since marital property is not unilaterally severable, *see supra* ch. 2, a residence owned as marital property by the spouses should be reclassified as tenancy-in-common property before conveyance to the spouses' respective personal residence trusts—otherwise, each spouse could arguably be treated as a grantor of each trust. *See* Priv. Ltr. Rul. 99-31-028 (tenancy-by-the-entirety property reclassified as tenancy-in-common property before spouses' conveyance to their respective personal residence trusts). *But see* Priv. Ltr. Rul. 199908032 (Feb. 26, 1999) (approving separate personal residence trusts (one for each spouse) when spouses conveyed one-half interests in community property residence to respective trusts). The fractional interest passing into each personal residence trust should be entitled to a fractional interest discount.

Regardless of how a personal residence is classified or titled, if it is the homestead of the spouses, both spouses must join in the conveyance of the property to the personal residence trust for the transfer to be effective. *See* Wis. Stat. § 706.02(1)(f). *But see* Priv. Ltr. Rul. 199908032 (Feb. 26, 1999) (approving separate personal residence trusts (one for each spouse) when spouses conveyed one-half interests in community property residence to respective trusts).

H. Intentionally Defective Grantor Trusts [§ 10.124]

The grantor trust rules under I.R.C. §§ 671 and 678 require that, under certain circumstances, the grantor of a trust (or a beneficiary, in the case of I.R.C. § 678) be treated as the owner of all or a portion of a trust for income tax purposes as long as the grantor is living. As a result of differences between the income and transfer tax provisions of the I.R.C., it is possible to create an irrevocable trust that constitutes a completed transfer for gift and estate tax purposes but that will nonetheless result in the grantor being taxed on the income under the grantor trust rules. The use of such a trust can provide tax benefits from an estate planning standpoint by allowing the assets of an irrevocable trust to accumulate on an effectively income tax-free basis, since the income tax is paid by the grantor. Such trusts often are referred to as *intentionally defective grantor trusts*. For a general discussion of this planning technique, *see* Price, *supra* § 10.1, at §§ 10.32–.32.8. For a discussion of grantor trust issues raised by the transfer of marital property, see chapter 9, *supra*.

When community property assets are transferred, the husband and wife are treated as equal grantors for federal tax purposes. Thus, if a husband gives marital property assets to an irrevocable trust for the benefit of his descendants, both he and his wife are treated as the grantors of the trust for federal tax purposes. If the trust is a grantor trust under I.R.C. §§ 671 or 678 and one spouse dies, as to that spouse, the grantor trust rules would cease to apply and the trust thereafter would have a dual character for income tax purposes—one-half of the income would be taxed to the surviving spouse, and the other one-half would be taxed to the trust. This result may lead to unnecessary complications in income tax reporting or, worse, could result in the unanticipated termination of S corporation status if S corporation stock is held by the trust and Subpart E status (treating grantors as substantial owners) was the basis for treating the trust as an eligible shareholder. *See* I.R.C. § 1361(c)(2)(A)(i).

To avoid such complications or unanticipated results, nonmarital property assets are a better subject of a gift to an intentionally defective grantor trust. If necessary, an asset can be reclassified as an individual property asset before its contribution to the trust. For a discussion of the various means of reclassifying assets, see chapter 2, *supra*.

I. Grantor Retained Annuity Trusts (GRATs) [§ 10.125]

In the right circumstances a grantor retained annuity trust (GRAT) can produce significant estate tax benefits. A GRAT is much like the qualified personal residence trust described in section 10.123, *supra*, except that assets other than a personal residence are used (for example, closely held stock), and the grantor retains an annuity of a set dollar amount from the trust for its term. The retained annuity interest is valued based on IRS tables and subtracted from the value of the property placed in the trust on the date of transfer, with only the difference subject to gift tax. If the grantor dies during the term of the trust, the value of the trust assets at the date of death is included in the grantor's estate for federal estate tax purposes, but if he or she survives the term, the trust assets and all appreciation pass to the beneficiaries without further tax. GRATs are specifically sanctioned by I.R.C. § 2702 as an exception to special valuation rules providing that, for most gifts with a retained interest, the retained interest of the donor is to be valued at zero (thereby increasing the amount of the gift for gift tax purposes).

Neither I.R.C. § 2702 nor the corresponding regulations provide authority for a joint transfer of property by spouses to a GRAT. For that reason alone, it is advisable to avoid transferring marital property assets to a GRAT. Moreover, it is important that a GRAT be treated as a grantor trust for income tax purposes pursuant to the grantor trust rules under I.R.C. §§ 671–678. Grantor trust treatment is important if a portion of the property transferred to the GRAT (for example, shares of stock) must be transferred back to the grantor in satisfaction of the annuity payment. Generally, satisfaction of a pecuniary obligation by transferring appreciated property causes recognition of gain; however, if the transaction is between an individual and a trust of which the individual is treated as the owner for income tax purposes, no gain is recognized. When marital property assets are transferred to a GRAT, each spouse is deemed to have transferred one-half of the assets to the trust. If the trust is treated as a grantor trust for income tax purposes and one spouse dies, one-half of the trust ceases to have grantor trust status. *See supra* ch. 9. Other complications can arise as well relating to the inclusion of one-half of the value of the trust in the deceased spouse's estate for estate tax purposes under I.R.C. § 2036.

These concerns can be addressed by reclassifying the marital property interests as the spouses' individual property so that each can create a GRAT, or reclassifying all interests as the individual property of one spouse so that he or she can create the GRAT. The choice will depend on the circumstances, such as the relative ages of the spouses. For a discussion of the various means of reclassifying assets, see chapter 2, *supra*.

In T.D. 9181, 2005-1 C.B. 717, the Treasury announced final regulations conforming the gift tax regulations defining a qualified interest for purposes of I.R.C. § 2702 to the Tax Court's decision in *Walton v. Commissioner*, 115 T.C. 589 (2000), *acq. in result*, I.R.S. Notice 2003-72, 2003-2 C.B. 964. *See* Qualified Interests, 70 Fed. Reg. 9222 (Feb. 25, 2005). In *Walton*, the court declared example 5 of Treas. Reg. § 25.2702-3(e) to be invalid in regard to the valuation of an interest includible in a donor's estate with respect to a failed GRAT (a failed

GRAT is one as to which the grantor did not survive past the specified term of the GRAT).

J. Charitable Remainder Trusts [§ 10.126]

A trust that qualifies as a charitable remainder trust under either I.R.C. § 664(d)(1) (as a charitable remainder annuity trust) or under I.R.C. § 664(d)(2) (as a charitable remainder unitrust) can provide a tax-advantageous way for a donor or donors (provided they are husband and wife) to make lifetime or testamentary gifts that benefit one or more individuals and charities. For a general discussion of charitable remainder trusts, see Price, *supra* § 10.1, at §§ 8.20 to 8.29.

When an inter vivos charitable remainder trust is established by a married donor, it is important to consider the classification of the assets contributed to the trust. Generally, marital property complications can be avoided if individual property is contributed to the trust. If the subject of the gift to the trust is a marital property asset, the spouses can reclassify the asset as individual property before the transfer to the trust.

It is possible, however, to establish a charitable remainder trust using marital property assets. When marital property assets are contributed to a charitable remainder trust, the better approach is to have both spouses designated as grantors of the trust. Having both spouses act as grantors eliminates any questions regarding whether the spouses have joined in the gift or the availability of a remedy by the nondonor spouse. For a discussion of gifts and remedies generally, see chapter 8, *infra*.

Moreover, when both spouses are designated as grantors of the charitable remainder trust, each can reserve under the trust instrument the power, exercisable by will, to revoke the survivor's interest with respect to one-half of the trust. *See* Treas. Reg. § 1.664-2(a)(4). While the reservation of such power is unnecessary to avoid gift tax upon establishment of the trust (because of the availability of the gift tax marital deduction, as set forth in Treas. Reg. § 25.2523(g)-1), if the spouses were to subsequently divorce, the reserved power could be exercised by each spouse so that, upon the death of the first spouse, one-half of the value of the trust would pass to the charitable remainder beneficiary and qualify for the estate tax charitable deduction in the deceased spouse's estate. For a sample form of a charitable remainder trust established jointly by spouses with community property, see 2 Conrad Teitell, *Deferred Giving* (1971) 10-35, ¶ 10.01[A].

K. Charitable Lead Trusts [§ 10.127]

Charitable deductions are allowed for income, gift, and estate tax purposes for a gift to charity of a current interest in a trust that pays a guaranteed annuity or unitrust interest for a fixed term or for the life or lives of persons in being at the creation of the interest. I.R.C. §§ 170(f)(2)(B), 2522(c)(2)(B), 2055(e)(2)(B). For a general discussion of charitable lead trusts, see Price, *supra* § 10.1, at § 8.31.

A charitable contribution for income tax purposes is allowed only when the donor will be taxed on the income of the trust under the grantor trust rules. I.R.C. § 170(f)(2)(B). This would occur if the trust reverts to the grantor after the charitable term. When the remainder is not retained by the grantor but rather is vested in other noncharitable beneficiaries, the value of the charity's annuity or unitrust interest is not deductible for income tax purposes, and accumulated income (including capital gains) is taxed to the trust.

If the noncharitable remainder is not retained by the grantor, there should be no problem with giving marital property assets to a charitable lead trust. The net gift for gift tax purposes (i.e., the difference between the value of the property given and the present value of the charitable annuity or unitrust interest), is deemed to have been transferred one-half by each spouse. *See supra* ch. 9.

If the noncharitable remainder is retained by the grantor, such that the trust is taxed as a grantor trust, transferring marital property assets to the charitable lead trust could lead to unnecessary complications. When the trust is a grantor trust under I.R.C. §§ 671–678 and one spouse dies, the grantor trust rules cease to apply to that spouse and the trust thereafter has a dual character for income tax purposes—one-half of the income is taxed to the surviving spouse, and the other one-half is taxed to the trust.

These complications can be avoided by reclassifying the marital property interests as the spouses' individual property so that each can create a charitable lead trust, or reclassifying all interests as the individual property of one spouse so that he or she can create a charitable lead trust. The choice will depend on the circumstances, such as the relative ages of the spouses.

L. Buy-sell Agreements [§ 10.128]

If the spouses' property includes a closely held business interest (whether in the form of stock, partnership interest, or LLC interest), the estate planner should review any buy-sell agreement affecting the interest. If the interest is the nonmarital property of one spouse, no particular marital property issues are implicated. However, if the interest is classified as marital property, the agreement should be examined with respect to its effect at the deaths of both the holding spouse and the nonholding spouse, since each spouse owns an undivided one-half interest in the item.

If the holding spouse dies first, the terms of a buy-sell agreement, to the extent applicable, will be operative with respect to the entire business interest held by that spouse (i.e., both the deceased holding spouse's one-half interest and the surviving nonholding spouse's one-half interest). *See* Wis. Stat. § 766.51(10).

If the nonholding spouse dies first, the disposition of the deceased spouse's one-half interest will be controlled by the agreement to the extent the agreement so provides. Wis. Stat. § 766.51(10). However, some buy-sell agreements do not include provisions that address the disposition of the nonholding spouse's interest if he or she dies before the holding spouse. They may also fail to address such circumstances as the insolvency of the nonholding spouse or dissolution of the marriage. If the agreement does not address these situations, and the objective is to have the titled spouse maintain management and control regardless of a change in circumstances, several courses of action should be considered.

The most comprehensive approach is for the buy-sell agreement to be amended by the principals (e.g., the shareholders if a corporation) to include provisions such as those described in section 4.82, *supra*, so that, for example, if the nonholding spouse predeceases the holding spouse, the holding spouse will have the first option to acquire the deceased nonholding spouse's shares, with successive options in the other shareholders or corporation. This course of action has the advantage of "fixing" the problem not only for the spouses who are the planner's clients, but also for the other shareholders, which may be important to maintaining control of the entity within an identified class of individuals or their family members. It also has the advantage of addressing not only the nonholding spouse's dying first but also circumstances of insolvency or divorce.

In some instances, the planner or his or her clients may not be in a position to effect a change in the buy-sell agreement. As between the spouses, at least in the context of the nonholding spouse's dying first, the transfer to the surviving holding spouse of the deceased spouse's one-half marital property interest can be ensured by including a provision in a will substitute agreement that provides for the nonholding spouse's interest to pass to the holding spouse without probate. See chapter 7, *supra*, and sections 10.64–69, *supra*, for a discussion of will substitute agreements. A less certain approach (because of the revocable nature of wills) is to include in the nonholding spouse's will a specific bequest of the interest to the holding spouse.

The disposition of the nonholding spouse's interest directly to the survivor, however, may be inconsistent with the spouses' estate tax planning—that is, the value of the predeceasing nonholding spouse's interest may be needed to fund a credit shelter trust. Or, in some instances, the nonholding spouse may choose not to leave his or her interest to the holding spouse. In either situation, the surviving holding spouse can use a directive under section 857.015 to require that the nonholding spouse's marital property interest in the closely held business interest be satisfied from other property. Note, however, that the types of entities to which a directive under section 857.015 applies are those listed in section 766.70(3)(a), (b), and (d), which do not include an LLC (although arguably a professional association organized as an LLC would be included within subsection (3)(b) as a "similar entity").

For a more detailed discussion of buy-sell agreements, see chapter 4, *supra*.

M. Planning for the Incapacitated Spouse [§ 10.129]

Mentally disabled spouses may be in need of estate planning. In some states, a guardian for an incompetent person may take some estate planning actions for the incompetent person under the "doctrine of substituted judgment." However, this doctrine is not always applied by the Wisconsin courts. *See Michael S.B. v. Berns (In re Guardianship of*

Stanley B.), 196 Wis. 2d 920, 540 N.W.2d 11 (Ct. App. 1995); *Kellogg-Citizens Nat'l Bank of Green Bay v. Borden (In re Guardianship of Hougard)*, 107 Wis. 2d 599, 321 N.W.2d 313 (Ct. App. 1982).

Some estate planning may be possible under such a power of attorney if the power is executed before the person becomes incompetent. For example, an agent under a durable power of attorney may make gifts on behalf of the principal if the power of attorney document grants such authority. No reported decision in Wisconsin has considered whether an agent under a durable power of attorney may enter into or amend a marital property agreement on behalf of an incapacitated spouse, even when that authority is specifically granted in the durable power of attorney document.

Under section 766.51(7), a court may appoint a guardian or conservator under chapter 54 to exercise a disabled spouse's right to manage and control marital property. *Management and control* is defined broadly in section 766.01(11). Moreover, section 766.51(4) provides that the right to manage and control marital property includes the power to make gifts, subject to the remedies under chapter 766 (*see* Wis. Stat. § 766.53). In that regard, section 54.20(2)(h) may assist some estate planning actions, not only with regard to marital property assets but also with regard to nonmarital property assets. That section provides that a guardian of the estate, may exercise, with the court's approval, any management and control right over property, whether or not marital property, that the married person could exercise under chapter 766 if the person were not under guardianship. Section 54.20(2)(h) also provides that the guardian may act together or join in any transaction for which consent or joinder of both spouses is required, or may execute a marital property agreement with the other spouse. Section 54.20(2)(h) expressly provides, however, that the guardian may not make, amend, or revoke a will.

In *V.D.H. v. Circuit Court (In re Guardianship of F.E.H.)*, 154 Wis. 2d 576, 453 N.W.2d 882 (1990), the Wisconsin Supreme Court set forth standards for the application of section 880.173 (the predecessor to section 54.20). In that case, the co-guardians for the incompetent husband petitioned the court to permit the transfer of the husband's interest in the homestead (owned in joint tenancy with the spouse) to his spouse and daughter. The circuit court denied the petition, saying that the transfer might require that the husband be supported by the Wisconsin taxpayers. If that happened, the circuit court stated, it would be approving something contrary to public policy. The court of appeals affirmed. The supreme court reversed. It noted that section 880.173 codified the common law doctrine of substituted judgment and stated:

> [T]he Wisconsin legislature intended to authorize the guardian of the estate of a married ward to exercise, with the approval of the court, any property right which the ward could exercise on his or her own behalf if he or she were of full capacity, except the power to make, amend, or revoke a will. We therefore hold that the legal standard which the circuit court is to apply in deciding whether to approve the exercise of power by the guardian of the estate under sec. 880.173 is whether the exercise of power will benefit the ward, his or her estate, or members of his or her immediate family….
>
> Moreover, the circuit court's determination that public policy precludes the proposed transfer is erroneous. In fact, public policy as expressed in the statutes and regulations dealing with the administration of the medical assistance program specifically endorses this type of transfer, regardless of its possible adverse effect on the availability of assets to pay for the care of an institutionalized ward.

Id. at 589–90.

For a number of examples of actions that can be taken by a guardian with the approval of the court, see Nontax Provisions of the Marital Property Implementation Law: Original and Supplemental Explanatory Notes (1985 Wisconsin Act 37), Wisconsin Legislative Council Staff Information Memorandum 85-7, Part I, at 118–19 [hereinafter 1985 Trailer Bill Original Nontax Note to § xxx.xx or 1985 Trailer Bill Supplemental Nontax Note to § xxx.xx, as appropriate]. The uncaptioned original and supplemental notes can also be found in Wisconsin Statutes Annotated following the pertinent statutory section.

N. Planning for Spouses Moving from Wisconsin [§ 10.130]

Wisconsin's marital property law applies only when both spouses are domiciled in Wisconsin. *See* Wis. Stat. §§ 766.01(8), .03(2). If one or both spouses moves from Wisconsin, the marital property law ceases to apply, although property rights acquired and obligations incurred while the law applied continue. Wis. Stat. § 766.03(3). There may be significant advantages to spouses in preserving the classification of marital property assets after a move from Wisconsin, including the preservation of equalized estates for estate tax planning purposes and the preservation of the potential for a full adjustment in basis upon the death of one spouse.

The fact that assets were at one time held as marital or community property does not ensure that they will receive favorable treatment for basis adjustment purposes at death, as indicated in Rev. Rul. 68-80, 1968-1 C.B. 348. Under the facts of the ruling, the husband and wife owned real property in New Mexico as community property. In 1965 they moved to Virginia and traded their community property in New Mexico for real property in Virginia, to which they took title as tenants in common. The husband died in 1966 and by will left his undivided one-half interest in the Virginia property to the wife. The wife then sold the property. The question in the ruling was whether the wife was entitled to claim a step-up in basis to the value at the husband's death for her one-half interest in the property pursuant to I.R.C. § 1014(b)(6). The IRS ruled that the wife's basis in her undivided one-half interest was her cost, stating: "There is nothing in the Internal Revenue Code or regulations that would indicate that section 1014(b)(6) of the Code relating to 'community property held' was intended to include separate property that had previously been converted from community property to separate property."

Revenue Ruling 68-80 should not discourage attempts to preserve the classification of marital property assets when there is a change of domicile to a common law property state. The problem for the taxpayer in the ruling was the state property law conclusion reached by the IRS, which dictated the federal tax result—the spouses failed to preserve the asset's community property character. Community property character for federal tax purposes has been recognized in the case of a change of domicile to a common law property state. *See, e.g.*, *Johnson v. Commissioner*, 88 F.2d 952 (8th Cir. 1937) (following move from community property state, ordinary income and capital gain from community property assets continued to be recognized as owned equally by spouses for purposes of filing separate income tax returns).

The keys to preserving the classification of marital property assets after either spouse is no longer domiciled in Wisconsin are (1) adequately segregating marital property assets from nonmarital property assets acquired either before or after terminating the Wisconsin domicile; and (2) avoiding titling of marital property assets in a manner that, under local law, destroys the incidents of marital property or disqualifies the property from application of the Uniform Disposition Act.

After establishing the new domicile, spouses should avoid taking title to marital property assets in a co-tenancy form of ownership such as tenancy in common, joint tenancy with right of survivorship, or tenancy by the entireties. Avoidance of the tenancy-in-common form of ownership is warranted by reason of Rev. Rul. 68-80, *see supra* § 10.109, although the Uniform Disposition Act was not in effect in Virginia at the time of the ruling, and hence the application of the ruling under similar facts when the new state of domicile has adopted the Uniform Disposition Act is uncertain. However, as for co-tenancy forms of ownership that include a right of survivorship, the Uniform Disposition Act offers little support, as it provides that title taken in a form that includes a right of survivorship is presumed to be property to which the uniform act does not apply. Uniform Disposition Act, § 2(2), 8A U.L.A. 121 (1983). Of course, if the new jurisdiction of domicile is another community property jurisdiction, local law may provide that property held in the name of both spouses is community property. When the new state is a common law property jurisdiction, unless a revocable trust is used to segregate and identify marital property assets, marital property assets should be held in the name of one spouse or the other, not jointly, and should not be commingled with newly acquired assets.

A joint funded revocable trust is an excellent vehicle for segregating and identifying marital property assets, particularly if it has been drafted in contemplation of holding marital property assets. A sample form for a joint revocable living trust can be found in section 10.177, *infra*. Note, however, that the provisions of the form relating to the classification of income from nonmarital property assets held by the trust will need to be modified upon a change of domicile, since after Wisconsin's marital property law no longer applies, income from nonmarital property in a common law jurisdiction will most likely be classified under local law as some form of separate property.

It is uncertain whether income from marital property will continue to be regarded as marital property after spouses terminate their Wisconsin domicile. When either spouse is no longer domiciled in Wisconsin, section 766.31(4), which classifies income from property as marital property, no longer applies. *See* Wis. Stat. § 766.03(3). Under general choice-of-laws rules, local law—that is, the law of the new domicile—will govern the classification of income from personal property and real estate in the new domicile. Where applicable, the Uniform Disposition Act treats the "rents, issues and income of" community property in the same manner as the underlying property. Uniform Disposition Act, § 1, 8A U.L.A. 121 (1983). This is essentially a recognition under local law that the income of an asset has the same characteristics as the asset itself. In addition, if the spouses while domiciled in Wisconsin entered into an opt-in marital property agreement classifying income from marital property as marital property regardless of a change of domicile, further support is available under the Restatement (Second) of Conflict of Laws. Restatement § 258, Comment d, states: "The rule of this Section [that the law of the spouses' domicile at time of acquisition controls] is not applicable if a valid contract between the spouses provides otherwise." Hence, an argument can be made, particularly in states that have adopted the Uniform Disposition Act or in the case of spouses who have a marital property agreement with supporting provisions, that even after terminating a Wisconsin domicile, the income from marital property assets is classified as marital property. The most cautious approach, however, is to segregate post-Wisconsin-domicile income from the underlying marital property assets to avoid an argument that there has been a commingling of marital and nonmarital property assets.

If spouses planning a move from Wisconsin have entered into a marital property agreement (such as an opt-in agreement), the agreement should be reviewed to make sure it adequately expresses an intent to have the classification provisions continue to apply in the case of marital property acquired while both spouses were domiciled in Wisconsin. Further, if the marital property agreement contains a will substitute provision under section 766.58(3)(f), consideration should be given to eliminating the provision because of questions regarding the extent to which such provisions will be given effect in another jurisdiction and the extent to which such provisions may be amended following termination of a Wisconsin domicile. *See infra* ch. 13.

O. Planning for Noncitizen Spouses [§ 10.131]

Absent careful planning, adverse transfer tax consequences can result when property interests are transferred between spouses and the transferee spouse is a not a U.S. citizen. A community property regime in which the reclassification of property interests is possible (for example, Wisconsin's marital property law) presents a trap for the unwary.

The application of Wisconsin's marital property law to spouses does not take into account the spouses' citizenship. While both spouses must be domiciled in Wisconsin for the law to apply, *see supra* ch. 2, neither is required to be a U.S. citizen. However, if one or both of the Wisconsin domiciled spouses is not a U.S. citizen (but rather is a resident alien), specific estate and gift tax provisions must be considered in the estate planning process. *See supra* ch. 9.

The I.R.C. generally taxes resident aliens the same as U.S. citizens with respect to estate, gift, and generation-skipping transfer taxes. However, in the case of both the estate tax and the gift tax, there are limitations on the availability of the marital deduction, and in the case of the estate tax, there is a special rule regarding the inclusion of joint tenancy or tenancy by the entireties property in the deceased spouse's gross estate.

For gift tax purposes, the marital deduction is allowable (subject to general limitations in the case of terminable interests) if the donee spouse is a U.S. citizen, regardless of the citizenship or residency of the donor spouse. If the donee spouse is not a U.S. citizen, the marital deduction is denied. However, the gift tax annual exclusion under I.R.C. § 2503(b) is increased to $100,000 for gifts to a spouse so long as the gift is of a present interest and otherwise would qualify for the gift tax marital deduction. I.R.C. § 2523(i).

With regard to the estate tax, if the surviving spouse is a U.S. citizen, the marital deduction is available to the deceased spouse's estate irrespective of the deceased spouse's citizenship or residency. However, if the surviving spouse is not a U.S. citizen, the marital deduction is not available regardless of the deceased spouse's citizenship and residency, with two exceptions. *See* I.R.C. § 2056(d)(1). First, the marital deduction is available if the surviving spouse was a U.S. resident continuously after the decedent's death and became a U.S. citizen before the estate tax return was due (including extensions). I.R.C. § 2056(d)(4). Second, the marital deduction is available if the property passes to a "qualified domestic trust" meeting the requirements of I.R.C. § 2056A(a) and regulations thereunder. I.R.C. § 2056(d)(2)(A).

Another consequence of the surviving spouse's not being a U.S. citizen relates to the includability of property owned by spouses as joint tenants or as tenants by the entireties. The general rule under I.R.C. § 2040(b) is that only one-half of property owned between a husband and wife as joint tenants with right of survivorship or as tenants by the entirety is includible in the deceased spouse's gross estate. This general rule is altered by I.R.C. § 2056(d)(1)(B), which provides that, if the surviving spouse is not a U.S. citizen, I.R.C. § 2040(a) governs instead—that is, the gross estate includes the entire value of such property to the extent that the surviving spouse did not provide consideration.

There are potential adverse tax consequences of reclassifying assets when either spouse is a noncitizen, and thus extreme caution should be used in reclassifying property as part of the estate planning process. As discussed in section 9.109, *supra*, the reclassification of an asset *from* individual property of one spouse *to* marital property is deemed a gift of one-half of the value of the asset for federal gift tax purposes. Likewise, reclassifying an asset *from* marital property *to* individual property of one spouse is deemed a gift. If on an annual basis the amount of the deemed gift to the noncitizen spouse is less than $100,000, no gift tax is payable as long as the subject of the gift is a present interest and not a terminable interest. But if the amount of the deemed gift exceeds $100,000 in any year, gift tax may be payable or the donor's applicable credit amount may be partially or completely used, or both.

Moreover, when one spouse is a noncitizen, caution should be used regarding the manner in which title to assets is acquired. Taking title in a particular form (e.g., as joint tenants or as survivorship marital property) can effect a reclassification, *see supra* ch. 2. For example, when both spouses are domiciled in Wisconsin, if nonmarital property funds of one spouse are used to acquire assets for which title is taken by the spouses as tenants in common or joint tenants, the nonmarital property becomes marital property or survivorship marital property. *See* Wis. Stat. § 766.60(4)(b). Moreover, certain forms of title (e.g., survivorship marital property, joint tenancy or joint account ownership) include a right of survivorship that causes property to pass outright to the surviving spouse. For citizen and noncitizen spouses alike, this result can undermine marital deduction/credit shelter planning; for a surviving noncitizen spouse, it includes the added complication of not qualifying for the marital deduction (although the property passing to the surviving noncitizen spouse will be treated as having passed to a qualified domestic trust if the property is transferred or irrevocably assigned to a qualified domestic trust before the decedent's estate tax return is filed. I.R.C. § 2056(d)(2)(B)).

On the other hand, a community property system provides more opportunity to shift wealth to a noncitizen spouse: if property is acquired while both spouses are domiciled in Wisconsin, it is classified as marital property absent the ability to identify a reason why it should be classified as individual property (e.g., by showing that it was inherited). Hence, if the noncitizen spouse survives, he or she claims one-half of each marital property asset without concern for the marital deduction limitations under the I.R.C. The surviving noncitizen spouse may subsequently be able to remove his or her half of former marital property assets from the U.S. transfer tax system—something a U.S. citizen spouse could not do.

➢ ***Practice Tip.*** If spouses decide not to enter into a marital property agreement because of the concerns about interspousal transfers noted in this section, it may be useful for them to sign a memorandum verifying the source of acquisition of their assets, particularly when assets may have been acquired while the spouses were domiciled in a community property jurisdiction (for example, France). The memorandum could provide valuable evidence of classification later for a spouse's personal representative or the surviving spouse.

XIII. Planning for Deferred Employment Benefits [§ 10.132]

A. In General [§ 10.133]

Wisconsin's marital property law gives special treatment to deferred employment benefits. The term *deferred employment benefit* is defined in section 766.01(3m) as "a benefit from a deferred employment benefit plan." The term *deferred employment benefit plan* in turn is defined broadly in section 766.01(4) to include an arrangement under which compensation from employment is deferred until a later date or the happening of a future event. For a discussion of deferred-employment-benefit plans, see chapter 2, *supra*.

There are at least six aspects of deferred-employment-benefit plans that require that such plans be given special consideration in estate planning (although not all six necessarily apply to every deferred-employment-benefit plan). Several of these considerations also apply to

IRAs, although IRAs are not deferred-employment-benefit plans under the marital property law. *See supra* ch. 2.

First, the marital property law provides special classification rules for deferred employment benefits. *See* Wis. Stat. § 766.62; *see supra* ch. 2. However, as with other assets, the classification of deferred employment benefits can be altered by a marital property agreement. *See* Wis. Stat. § 766.17. In the estate planning process, the planner will confront two questions: (1) whether particular deferred employment benefits be classified in a marital property agreement; and, if so, (2) how they should be classified.

Second, a special survivorship rule, the *terminable interest rule*, applies to deferred employment benefits. Under the terminable interest rule, the nonemployee spouse's marital property interest in a deferred-employment-benefit plan terminates at the death of the nonemployee spouse if he or she predeceases the employee spouse. Wis. Stat. §§ 766.31(3), 766.62(5); *see supra* ch. 2. The same rule applies to an IRA if marital property assets in the IRA are traceable to the rollover of a deferred-employment-benefit plan. Wis. Stat. §§ 766.31(3), .62(5)(b). In the estate planning process, the planner will confront the question whether the terminable interest rule should be overridden by a provision in a marital property agreement with respect to a particular deferred-employment-benefit plan or rollover IRA. *See* Wis. Stat. § 766.58(7)(a). As discussed in section 10.136, *infra*, there is, in effect, a federal terminable interest rule that applies in the case of some deferred-employment-benefit plans governed by ERISA and that cannot be overridden by a marital property agreement. A related question in the case of IRAs not attributable to the rollover of a deferred-employment-benefit plan is whether a marital property agreement should affirmatively apply the terminable interest rule (IRAs are not deferred-employment-benefit plans and hence are not governed by the terminable-interest rule, with the exception of IRA assets that are traceable to the rollover of a deferred-employment-benefit plan). In the absence of a provision in a marital property agreement that treats all IRAs in the same manner relative to the terminable interest rule, a plan participant rolling benefits into an IRA should keep the rollover IRA segregated from any IRAs not traceable to a rollover from a deferred-employment-benefit plan to avoid a mixing issue.

Third, generally, deferred employment benefits are a form of deferred compensation for services that is not subject to income tax until the benefits are ultimately paid to the employee or the employee's designated beneficiary. Thus, deferred employment benefits are worth less than 100 cents on the dollar to either the employee or the employee's beneficiary, because of the deferred income tax liability. This makes these assets a poor choice for funding a credit shelter trust since the deferred income tax liability will be borne by the trust and the portion of the applicable credit amount attributable to the income tax liability will be wasted. The deferred tax status of deferred employment benefits also gives rise to administrative and income tax issues if the nonemployee spouse dies first and the terminable interest rule does not apply (because it has been overridden by the terms of a marital property agreement) and when ERISA's preemption provisions do not apply.

Fourth, for most deferred-employment-benefit plans, and for IRAs (other than Roth IRAs), federal income tax law requires that distributions from the plan or account commence upon retirement or when the employee or account holder attains a specified age. These rules are extensive, complex, and beyond the scope of this book. For a discussion of planning for distributions from retirement plans and IRAs generally, *see* Price, *supra* § 10.1, at §§ 13.1–.21.

Fifth, for certain deferred employment benefit plans governed by ERISA, the Retirement Equity Act of 1984 (REA) provides for certain mandatory benefits for a surviving spouse that can be waived only at certain times and only with the consent of the participant's spouse in accordance with the terms of the plan and ERISA. *See* I.R.C. § 417(a)(1), (2). Hence, irrespective of marital property law considerations, if the estate plan provides for benefits under a plan governed by REA to pass to anyone other than the participant's spouse, the technical requirements of the plan and federal law must be satisfied for there to be an effective waiver of the surviving spouse's federal rights in such retirement benefits.

Sixth, as a result of the U.S. Supreme Court's decision in *Boggs v. Boggs*, 520 U.S. 833 (1997), *see supra* ch. 2, the extent to which spouses may affect the distribution of assets held in a qualified plan governed by ERISA is limited. Because of the Court's conclusion that ERISA's anti-alienation provisions preempt state community property laws to the extent such laws would give the nonparticipant spouse a power of disposition over undistributed plan assets, marital property planning is restricted—but only as long as benefits are held in the plan. IRAs established by individuals for their own benefit are not subject to the same restrictions.

B. ERISA Qualified Plans vs. Deferred Compensation Plans and Arrangements [§ 10.134]

A detailed discussion of ERISA and deferred compensation plans and arrangements is beyond the scope of this book. For a discussion of planning for distributions from retirement plans and IRAs generally, see Price, *supra* § 10.1, at §§ 13.1–.21. For planning under the marital property law, however, qualified plans governed by ERISA should be distinguished from qualified plans not governed by ERISA and nonqualified plans.

As used in this chapter, the term *qualified plan* means an employer-sponsored plan qualified under I.R.C. § 401(a) that is also governed by ERISA. A trust created under such a plan is exempt from income taxation under I.R.C. § 501(a), and contributions to the plan are tax-deductible by the employer but not taxed to the employee until actually distributed. From an estate planning standpoint, it is important to recognize that qualified plans governed by ERISA are subject to the anti-alienation provisions of ERISA § 206(d) and I.R.C. § 401(a)(13) (in contrast, for example, to government plans or non-electing church plans, which may be qualified under I.R.C. § 401(a) but are exempt from the anti-alienation provisions under ERISA § 4(b)). In addition, qualified plans governed by ERISA are subject to REA's mandatory spousal benefit provisions.

The term qualified plan used in this chapter excludes nonqualified plans, IRAs, 403(b) tax-sheltered annuities and arrangements, and governmental and church plans. Thus, the term *qualified plan benefit* as used here is narrower than the term deferred employment benefit in section 766.01(3m), which includes, among others, qualified plans, SEP-IRAs, nonqualified plans, 403(b) arrangements, and governmental and church plans. Wis. Stat. § 766.01(3m), (4).

Marital property planning considerations with respect to qualified plans governed by ERISA are discussed in this section and sections 10.135–.45, *infra*; marital property planning considerations with respect to other deferred-employment-benefit plans are discussed at in sections 10.146–.147, *infra*.

C. Qualified Plans Governed by ERISA [§ 10.135]

1. Classification Choices and Federal Preemption [§ 10.136]

As discussed in chapter 2, *supra*, although *Boggs v. Boggs*, 520 U.S. 833 (1997), leaves open whether ERISA preemption applies to assets distributed from a qualified plan, the probable answer is that it does not. Under the most logical reading of *Boggs*, ERISA merely preempts one right from the bundle of rights incident to community property—in this case, the predeceasing nonparticipant spouse's power of disposition over assets in the plan (i.e., it imposes in effect a federal terminable interest rule with respect to undistributed plan assets). Hence, notwithstanding *Boggs*, it should be the case that assets in a qualified plan and assets distributed from a qualified plan have whatever classification state law provides, either by operation of law or, if applicable, pursuant to the terms of a marital property agreement. The holding in *Boggs* merely preempts state law to the extent it would allow a predeceasing nonparticipant spouse a power that is contrary to the purpose of ERISA.

Thus, from a planning standpoint, if spouses wish to adopt marital property generally as the classification of their assets, they could specify in a marital property agreement that the classification of assets as marital property extends to distributions from a deferred employment benefit plan governed by ERISA (note, however, that if qualified plan assets are rolled over to an IRA, further tax and nontax considerations should be considered and addressed). A provision in a marital property agreement generally classifying assets as marital property should be sufficient to achieve this result even without specific reference to plan distributions.

On the other hand, if spouses wish to adopt individual property generally as the classification of their assets (or for specific assets, including qualified plans), they could specify in a marital property agreement that the classification of assets as individual property extends to distributions from a deferred-employment-benefit plan governed by ERISA (note, however, that such classification will not preclude the applicability of the REA's survivor benefits, which must be addressed specifically in accordance with the requirements of the plan and federal law. *See* I.R.C. § 417(a)(1), (2); *supra* ch. 7.

To the extent a participant's spouse is designated as the primary beneficiary of a plan's benefits, the classification of assets distributed from the plan to the surviving spouse upon the participant's death will be irrelevant. *See infra* § 10.143.

2. Death of Nonparticipant Spouse Before Participant Spouse [§ 10.137]

a. In General [§ 10.138]

Estate planning for spouses often includes estate tax planning designed to take maximum advantage of the applicable credit amount against estate taxes available to each spouse, which translates into a federal estate tax exclusion amount in 2004 and 2005 of $1.5 million, with scheduled increases thereafter, a repeal year, and a sunset provision causing a reversion to the law as it existed prior to major tax cuts enacted in 2001. Wisconsin's "decoupled" estate tax, scheduled to be in effect through the end of 2007, limits the estate tax exclusion amount to $675,000. See chapter 9, *supra* for a discussion of federal and Wisconsin estate tax laws. Whether the applicable credit amount can be fully utilized depends on the availability of assets over which the first spouse to die has a power of disposition. In many situations, spouses' assets are not evenly divided, and in some cases, a large part of the spouses' wealth is in the form of one of the spouse's retirement plan assets. In such a situation, if the nonparticipant spouse dies first, the question arises whether the nonparticipant spouse can dispose of a part of the participant spouse's plan assets by reason of a marital or community property interest. As discussed in section 10.140, *infra*, in the case of qualified plans governed by ERISA, such disposition is not possible, at least while assets are still in the plan.

b. Wisconsin Terminable Interest Rule [§ 10.139]

Wisconsin's marital property law includes the terminable interest rule in the case of deferred-employment-benefit plans. Under the terminable interest rule, the nonemployee spouse's marital property interest in a deferred-employment-benefit plan terminates at the nonemployee spouse's death if he or she predeceases the employee spouse. Wis. Stat. §§ 766.31(3), 766.62(5). The terminable interest rule can be overridden by a specific provision in a marital property agreement. *See* Wis. Stat. § 766.58(7)(a). However, as discussed below, such a provision would have no effect in the case of a qualified plan governed by ERISA in view of the *Boggs* decision.

c. Limitations Resulting from Boggs Decision [§ 10.140]

The U.S. Supreme Court's decision in *Boggs v. Boggs*, 520 U.S. 833 (1997) is discussed in detail in chapter 2, *supra*. The effect of *Boggs* in the case of ERISA qualified plans is essentially the same as that of Wisconsin's terminable interest rule—that is, if the nonparticipant spouse predeceases the participant spouse, the nonparticipant spouse has no power of disposition (testamentary or otherwise) over the participant's qualified plan. Unlike the Wisconsin terminable interest rule, which can be overridden by a provision in a marital property agreement, *see* Wis. Stat. § 766.58(7)(a), spouses cannot contractually alter the effect of *Boggs* because of the anti-alienation provisions of ERISA.

Hence, unless assets held in a qualified ERISA plan are removed from the plan, those assets will be unavailable for planning in the context of the nonparticipant spouse's predeceasing the participant spouse. Depending on the provisions of the particular plan, there may be ways to remove assets from the plan. One way to remove assets from a qualified plan is to simply have them distributed to the participant. However, this will result in the recognition of ordinary income (in some cases involving employer-issued securities, the recognition will be limited, *see* I.R.C. § 402(e)(4)). To avoid recognizing income, the participant spouse can roll the assets from the qualified plan into an IRA held in his or her name, if the plan permits a lump-sum withdrawal. IRAs generally are not governed by ERISA and hence are not subject to the holding in *Boggs*. For a discussion of planning considerations in the context of an IRA when the spouse of the contracting party dies first, see sections 10.154–.159, *infra*. Note that if the assets are rolled over into an IRA, the nonparticipant spouse will no longer have the survivor rights provided under REA. However, the remedy provisions of section 766.70 will nonetheless be available to the nonparticipant spouse with respect to his or her marital property interest if the nonparticipant survives the participant. The planner advising spouses in a joint representation arrangement should discuss the impact of a decision to roll over assets from a qualified plan to an IRA with his or her clients.

3. Death of Participant Spouse Before Nonparticipant Spouse [§ 10.141]

a. In General [§ 10.142]

Assets in a qualified ERISA plan pass at the death of the participant spouse in accordance with whatever beneficiary designation has been made by the participant, subject to the limitations of REA, as discussed below. In many instances, the participant's spouse is the logical beneficiary because of favorable provisions in the I.R.C. that permit a surviving spouse to roll over a distribution from a qualified plan into an IRA without having to recognize income at the time of the distribution. *See* I.R.C. § 408(d)(3)(C). In other instances, the spouse may not be the beneficiary, in which case both the limitations of the REA and the classification of the plan assets must be addressed.

b. Surviving Spouse as Designated Beneficiary [§ 10.143]

If the participant's spouse is to be the beneficiary of the qualified plan, the classification of the plan assets is of little consequence. The surviving spouse receives the benefits regardless of classification, and the assets received are IRD and thus are not eligible for a basis adjustment. *See* I.R.C. § 1014(c). In such instance there is no tax reason to include special provisions in a marital property agreement to classify the plan assets either as marital property or as individual property. If the spouses are entering into a marital property agreement, generally the best approach is to simply provide in the agreement that plan assets are classified as provided under the marital property law, so that the agreement does not purport to make any adjustment in the ownership rights of the spouses with respect to the plan assets.

c. Surviving Spouse as Designated Beneficiary, with Disclaimer to Contingent Beneficiary Contemplated [§ 10.144]

In some cases, spouses may want the surviving nonparticipant to be able to roll the plan benefits into an IRA and to be able to disclaim all or a portion of the benefits in favor of a contingent beneficiary (for example, a credit shelter trust). This might be the case, for example, if the ability to fully utilize the participant's applicable credit amount with non-IRD items were in question so that the survivor might choose to disclaim as a means of more fully utilizing the credit. In that situation, the classification of the plan assets should be considered. If the spouses want to give the survivor the flexibility to effect a qualified disclaimer of up to 100% of the plan assets in favor of the contingent beneficiary, the qualified plan should be classified as the participant's individual property, since the surviving spouse would not be able to make a qualified disclaimer of his or her own marital property interest. *See supra* ch. 9 (regarding qualified disclaimers). Note, however, that if the plan is reclassified as the participant's individual property, the nonparticipant no longer has a marital property interest in the assets. In addition, while the REA may protect the nonparticipant while assets are still in the plan, once the assets are distributed, that protection is gone (unless the distribution is made in the form of a joint and survivor annuity). See sections 10.20–.27, *supra*, for a discussion of considerations involved in adjusting the spouses' relative property rights to achieve shared tax and nontax objectives.

d. Nonspouse as Designated Beneficiary [§ 10.145]

If someone other than the spouse is to be the beneficiary of the qualified plan, the planner must consider both the REA spousal annuity rules and the classification of the qualified plan. Under the REA, for a beneficiary designation naming someone other than the spouse to be valid, the REA-mandated spousal annuity or death benefit provisions of the qualified plan must be waived by the participant and consented to by the spouse in accordance with the requirements of ERISA and the plan. *See* I.R.C. § 417(a)(1), (2). In addition, to avoid potential adverse gift or estate tax consequences, the qualified plan should be classified as the individual property of the participant. If it is not so classified (but rather is classified in whole or in part as marital property), upon the participant's death the beneficiary designation becomes irrevocable and passes all of the benefits (including the surviving spouse's one-half marital property interest) to the designated beneficiary. If the surviving spouse fails to recover his or her interest from the beneficiary, he or she may be deemed to have made a gift to the extent of his or her interest. *See supra* ch. 9. Moreover, if the designated beneficiary of the qualified plan is a trust in which the survivor is a beneficiary, a portion of the trust may be included in the survivor's estate under I.R.C. § 2036 upon the spouse's later death. *See supra* ch. 9. Note, however, that if the plan is reclassified as the participant's individual property, the nonparticipant no longer has a marital property interest in the assets of the plan. See sections 10.20–.27, *supra*, for a discussion of considerations involved in adjusting the spouses' relative property rights to achieve shared tax and nontax objectives.

D. Nonqualified Plans and Arrangements Generally [§ 10.146]

Many of the considerations applicable to planning for qualified plans, particularly those related to the terminable interest rule, are likewise applicable to planning for nonqualified plans and arrangements. However, in the case of nonqualified plans, the planner generally is not limited by ERISA's anti-alienation provisions and hence there may be more flexibility in planning for the disposition of the nonparticipant spouse's marital property interest if he or she dies first. In that regard, many of the same considerations applicable to planning for IRAs are applicable in planning for nonqualified plans. See sections 10.154–.159, *infra*, for a discussion of planning for disposition of the noncontracting spouse's marital property interest in an IRA if he or she dies first. In addition, in the case of nonqualified plans, the REA's mandatory spousal benefit provisions generally are not applicable. This may give the participant spouse more flexibility in directing the disposition of plan benefits at death (subject, however, to the surviving spouse's remedies in the case of benefits classified as marital property and not paid to the survivor).

Nonqualified plans vary widely in structure and terms. Before adopting a particular strategy for the disposition of benefits under a nonqualified plan, it may be helpful for the planner to obtain and review a copy of the employee's contract or other governing plan document.

This may disclose relevant provisions such as an anti-assignment provision precluding the participant from making certain transfers or may affect the amount of benefits payable under different circumstances (such as death, disability, termination of employment, etc.). Such a contractual prohibition should not affect the spouses' ability to adopt a particular classification for the plan benefits, but the terms of the contract with the participant's employer will continue to control timing and amount of distributions. This is true even if the nonparticipant spouse dies first owning a marital property interest, the terminable interest rule having been overridden by the terms of a marital property agreement.

Hence, subject to a review of the applicable plan provisions, the basic considerations in planning for nonqualified plans and arrangements are: (1) the participant spouse may designate the beneficiary of his or her choice, but if he or she dies first and the surviving nonparticipant spouse is not named as the beneficiary, the survivor may have a remedy to the extent of the survivor's marital property interest, *see Jackson v. Employe Trust Funds Bd.*, 230 Wis. 2d 677, 602 N.W.2d 543 (Ct. App. 1999) (discussed at section 10.147, *infra*); (2) if the existence of such a remedy by the surviving nonparticipant spouse is undesirable for tax planning or other reasons, the classification of the plan can be addressed in a marital property agreement; (3) if the nonparticipant spouse dies first, he or she has no power of testamentary disposition over any marital property interest in the plan on account of the terminable interest rule, unless the rule has been overridden by specific provisions in a marital property agreement; and (4) if the spouses wish to override the terminable interest rule so that the nonparticipant has a power of testamentary disposition, this must be accomplished by marital property agreement, but this planning strategy has limited application in joint tax planning.

E. State of Wisconsin Retirement System [§ 10.147]

As noted in chapter 2, *supra*, the Department of Employee Trust Funds early on issued a document suggesting that chapter 766 had no application to Wisconsin Retirement System (WRS) benefits. However, in *Jackson v. Employe Trust Funds Board*, 230 Wis. 2d 677, 602 N.W.2d 543 (Ct. App. 1999), the court noted the parties' lack of dispute on the application of section 766.62(1)(a) to the WRS benefits at issue. The issue in the case was whether the department was prohibited by chapter 766 from giving effect to the deceased wife's beneficiary designation, which named her sister as beneficiary to the exclusion of her surviving husband, who claimed a marital property interest in the benefits. The court concluded that the department had no obligation to consider the potential marital property rights of the surviving spouse, noting that the remedy provisions under section 766.70 allow a surviving spouse to enforce a claim to his or her share of marital property assets passing to a third party.

ERISA does not apply to government retirement plans such as the WRS. Hence, the mandatory spousal benefit provisions of the REA do not apply. Nor does *Boggs v. Boggs*, 520 U.S. 833 (1997), which held that federal law preempts state community property law to the extent it gives a predeceasing nonparticipant spouse a power of disposition over assets in a qualified plan. Note, however, that because a WRS plan is a deferred-employment-benefit plan under section 766.01(4), the terminable interest rule of sections 766.31(3) and 766.62(5) applies unless overridden by specific provisions in a marital property agreement. Many of the same considerations applicable to planning for IRAs are applicable to planning for WRS benefits. See sections 10.148–.160, *infra*, for a discussion of planning for IRAs.

XIV. Planning for IRAs [§ 10.148]

A. Classification and Federal Preemption [§ 10.149]

With the exception of SEP-IRAs, IRAs are not deferred-employment-benefit plans under section 766.01(4). See *supra* ch. 2. As a result, the special classification rules for deferred-employment-benefit plans under section 766.62 do not apply to IRAs; rather, the general classification rules of section 766.31 apply to IRAs. However, if the assets in an IRA are traceable to the rollover of a deferred-employment-benefit plan, the terminable interest rule applies. Wis. Stat. §§ 766.31(3), .62(5). Given this different treatment for IRAs whose assets are traceable to a rollover from a deferred-employment-benefit plan, it is advisable to avoid mixing rollover and nonrollover IRAs. For a discussion of the terminable interest rule, see chapter 2, *supra*.

Several considerations applicable in planning for deferred employment benefits apply to IRAs as well. For traditional IRAs (in contrast to Roth IRAs, discussed at section 10.157, *infra*), federal income tax law requires that distributions from the IRA commence when the account holder attains a specified age. These rules are extensive, complex, and beyond the scope of this book. For a discussion of estate planning for retirement plans and IRAs generally, see Price, *supra* § 10.1, at §§ 13.1–.21.

Although the tax-qualified nature of IRAs is determined by federal law, the management and disposition of IRAs is a matter of state law. To be federally tax qualified, an IRA must be either a trust, *see* I.R.C. § 408(a), or a custodial account, *see* I.R.C. § 408(h). In either case, to be qualified for federal tax purposes the governing instrument must include certain provisions and must be administered in accordance therewith. However, the property rights created by the trust or custodial arrangement are a matter of state law and are not governed by ERISA. The spousal benefit requirements imposed by the REA, discussed in section 10.32, *supra*, are not applicable to IRAs. Moreover, the most logical reading of the *Boggs* decision, *see supra* ch. 2, limits the holding regarding preemption of state community property laws to "undistributed pension plan benefits" and thus is not by its terms applicable to IRAs (although dicta in *Boggs* may suggest otherwise). The IRS has recognized in a number of private rulings that an IRA may be composed in whole or in part of community property. *See, e.g.*, Priv. Ltr. Rul. 8040101 (July 15, 1980) (concluding that classification of IRA interest is question of state law); Priv. Ltr. Rul. 9234014 (Aug. 21, 1992) (approving apportionment of community property IRAs between spouses); Priv. Ltr. Rul. 9321035 (May 28, 1993) (involving division of community property IRA between decedent's surviving spouse and QTIP trust); Priv. Ltr. Rul. 9427035 (July 8, 1994) (survivor's interest in community property IRA allocable to revocable survivor's trust was directly transferred to new IRA of survivor as qualified rollover); Priv. Ltr. Rul. 9439020 (Sept. 30, 1994) (agreement to divide community property IRA into two separate property IRAs not a distribution); Priv. Ltr. Rul. 9630034 (July 26, 1996) (involving qualified disclaimer by wife of husband's portion of community property IRA); Priv. Ltr. Rul. 9633043 (Aug. 16, 1996) (surviving spouse deemed beneficiary as to her community property interest in IRA for purposes of qualified rollover); Priv. Ltr. Rul. 9937055 (Sept. 17, 1999) (acknowledging marital property interest of spouse in IRA by virtue of marital property agreement and concluding that reclassification of IRA as marital property by agreement is not considered a taxable distribution under I.R.C. § 408(d)(1)).

Moreover, state court decisions in other jurisdictions have recognized the community property ownership rights of spouses in IRAs when the noncontracting spouse dies first. *See Estate of MacDonald v.*

MacDonald, 794 P.2d 911 (Cal. 1990); *In re Estate of Mundell*, 857 P.2d 631 (Idaho 1993) (children of deceased husband successful in claiming husband's one-half community property interest in surviving wife's IRA). The state of Washington expressly recognizes, by statute, the community property rights of a noncontracting spouse in a community property IRA, including his or her right to dispose of that interest by will. Wash. Rev. Code § 6.15.020 (2004). In Wisconsin, if an IRA is not subject to the terminable interest rule, it likewise should be the case that the predeceasing noncontracting spouse has a testamentary power of disposition over one-half of the marital property interest in the IRA.

Thus, while there are similarities in planning for qualified plans and IRAs (due to their similar minimum-distribution requirements and their deferred-income status), given the absence of ERISA preemption of state community property rights and the absence of the REA's spousal annuity rights, there are significant differences as well.

B. Contracting Spouse Dies First [§ 10.150]

1. Surviving Spouse as Designated Beneficiary [§ 10.151]

If the contracting party with respect to an IRA designates his or her spouse as the beneficiary of the IRA, the classification of the IRA is of little consequence if the spouse survives. At the contracting spouse's death, the surviving spouse receives the IRA assets regardless of their classification, and the assets received are IRD and thus are not eligible for a basis adjustment. *See* I.R.C. § 1014(c). In that instance there is no tax reason to include special provisions in a marital property agreement to classify the IRA either as marital property or as individual property. If the spouses are entering into a marital property agreement, generally the best approach is to simply provide in the agreement that the IRA is classified as provided under the marital property law, so that the agreement does not make any adjustment in the spouses' ownership rights with respect to the IRA.

2. Surviving Spouse as Designated Beneficiary, with Disclaimer to Contingent Beneficiary Contemplated [§ 10.152]

In some cases, spouses may want the surviving noncontracting spouse to be able to roll the contracting spouse's IRA proceeds into an IRA and to be able to disclaim all or a portion of the IRA assets in favor of a contingent beneficiary (for example, a credit shelter trust). This might be the case, for example, if the ability to fully utilize the noncontracting spouse's applicable credit amount with non-IRD items were in question so that the survivor might choose to disclaim as a means of more fully utilizing the credit. In that situation, the classification of the IRA assets should be considered. If the spouses want the survivor to be able to effect a qualified disclaimer of up to 100% of the IRA assets in favor of the contingent beneficiary, the IRA should be classified as the contracting spouse's individual property, since the surviving spouse would not be able to disclaim his or her marital property interest. Note, however, that if the IRA is reclassified as the contracting spouse's individual property, the noncontracting spouse no longer has a property interest in the asset (however, there may be "property rights" under the trust or custodial agreement in the absence of a valid beneficiary designation). See sections 10.20–.27, *supra*, for a discussion of the considerations involved in adjusting the spouses' relative property rights to achieve shared tax and nontax objectives.

3. Nonspouse as Designated Beneficiary [§ 10.153]

If someone other than the contracting party's spouse is to be the beneficiary of an IRA, the planner must consider the IRA's classification. To avoid potential adverse gift or estate tax consequences, the IRA should be classified as the contracting spouse's individual property. If it is not so classified (but rather is classified in whole or in part as marital property), upon the contracting spouse's death the beneficiary designation becomes irrevocable and passes all of the benefits (including the surviving spouse's one-half marital property interest) to the designated beneficiary. If the surviving spouse fails to recover his or her interest from the beneficiary, he or she may be deemed to have made a gift to the extent of his or her interest. Moreover, if the designated beneficiary of the IRA is a trust of which the survivor is a beneficiary, a portion of the trust may be included in the survivor's estate under I.R.C. § 2036 upon the survivor's later death. *See supra* ch. 9. Note, however, that if the IRA is reclassified as the contracting spouse's individual property, the noncontracting spouse no longer has a property interest in the asset (however, there may be "property rights" under the trust or custodial agreement in the absence of a valid beneficiary designation). See sections 10.20–.27, *supra*, for a discussion of the considerations involved in adjusting the spouses' relative property rights to achieve shared tax and nontax objectives.

C. Noncontracting Spouse Dies First [§ 10.154]

1. Certain IRAs Subject to Terminable Interest Rule [§ 10.155]

If the assets in an IRA are traceable to the rollover of a deferred-employment-benefit plan, the terminable interest rule applies. Wis. Stat. §§ 766.31(3), .62(5). For a discussion of the terminable interest rule, see chapter 2, *supra*. If the noncontracting spouse dies before the contracting spouse, the noncontracting spouse has no power of disposition over the portion of the contracting spouse's IRA classified as marital property unless the terminable interest rule has been overridden by a provision in a marital property agreement.

2. IRAs Not Subject to Terminable Interest Rule [§ 10.156]

a. Alternative Dispositions of Noncontracting Spouse's Interest [§ 10.157]

If the assets of an IRA are classified in whole or in part as marital property and are not traceable to the rollover of a deferred-employment-benefit plan, the terminable interest rule does not apply to the IRA. Moreover, spouses may agree in a marital property agreement to expressly override the terminable interest rule even when assets of an IRA are traceable to the rollover of a deferred-employment-benefit plan. *See* Wis. Stat. § 766.58(7)(a). In either case, if the noncontracting spouse predeceases the contracting spouse, the deceased spouse's marital property interest in the IRA is subject to disposition under the deceased spouse's will (or intestate succession rules). *See supra* §§ 10.154–.159.

If the surviving spouse (the contracting party) is named as the beneficiary of the deceased spouse's interest (either as a specific legatee or as residuary beneficiary under the deceased spouse's will, or by intestate succession), as a practical matter, there will be no change in ownership of the IRA.

On the other hand, if the terminable interest rule does not apply to an IRA, the noncontracting spouse dies first, and the deceased spouse's marital property interest in the IRA passes under his or her will to someone other than the surviving spouse, a more complicated analysis ensues. It should first be noted that this result, which is probably not desirable, can be avoided through planning. One alternative would be to classify the IRA as the individual property of the contracting spouse. This will eliminate any power of testamentary disposition over the IRA by the noncontracting spouse if he or she dies first, but it will also eliminate the noncontracting spouse's ownership rights in the IRA. If the IRA is classified as individual property, the contracting spouse is free to designate any beneficiary he or she chooses, and the surviving noncontracting spouse has no remedy if the designation makes no provision for him or her. In some instances this may be necessary—when, for example, the adopted plan contemplates the contracting spouse designating a child or a credit shelter trust as the beneficiary of the IRA; in that case, individual property classification is necessary to avoid adverse gift tax or estate tax consequences for the surviving spouse or the surviving spouse's estate.

When adopting individual property classification is unnecessary for planning purposes, however, the noncontracting spouse's power of testamentary disposition can be eliminated by having the spouses include in a marital property agreement a provision stating that all IRAs will be treated as if traceable to the rollover of a deferred-employment-benefit plan (thereby imposing the terminable interest rule). This eliminates any power of testamentary disposition by the noncontracting spouse, but if the noncontracting spouse is the survivor, any marital property rights in the IRA remain intact.

There may be instances in which the spouses do not want the terminable interest rule to apply to an IRA, even one that is traceable to the rollover of a deferred-employment-benefit plan. This may be the case, for example, if the spouses' assets are unbalanced and there are insufficient other assets over which the noncontracting spouse has a power of disposition at death, thereby placing the spouses at risk of "wasting" the opportunity to fully fund a credit shelter trust if the noncontracting spouse dies first.

➢ ***Example.*** Wisconsin domiciled spouses have two assets, a house owned as survivorship marital property, valued at $600,000, and the husband's IRA, valued at $3 million. The assets of the IRA are traceable to the rollover of a qualified plan. Neither spouse has used any part of his or her applicable credit amount.

This example highlights the planner's dilemma. On the one hand, if each spouse's credit can be fully utilized, the amount subject to estate tax in the survivor's estate can be greatly reduced. On the other hand, it is not possible to know which spouse will die first or when, and, in any event, to achieve the intended full use of each spouse's applicable credit amount, it will be necessary to use the IRA in part. As an IRD asset, the IRA is worth less than 100 cents on the dollar and therefore is generally not the best asset for funding a credit shelter trust. In the example, however, it is the only available asset, other than the house, to fund a credit shelter trust.

The course of action ultimately adopted by the spouses in the example depends on their intentions and how they prioritize those intentions. It is likely that one of their goals will be to provide for the survivor and that another will be to provide for children in a tax-efficient manner following the survivor's death. However, the best estate tax planning result (which will benefit the children) may compromise the best course of action to benefit and protect the surviving spouse (i.e., leaving assets in the husband's IRA, or in the wife's rollover IRA, as long as possible). Thus there is no one "right" solution to the planning dilemma, but rather a number of trade-offs to be considered, with the result in each case driven by the spouses' priorities.

If the spouses' priority in the example is to maximize the benefits available to the survivor, the husband would designate the wife as the primary beneficiary of the IRA with a credit shelter trust (of which the spouse is the primary beneficiary) named as the contingent beneficiary. No special provisions regarding the IRA would need to be included in a marital property agreement (even if classified 100% as marital property, the predeceasing contracting spouse's one-half interest, valued at $1.5 million, could be the subject of a qualified disclaimer). If the husband died first, the wife could roll over the IRA proceeds (both her own one-half interest and her husband's) into her own IRA. Alternatively, the wife could disclaim part or all of the husband's marital property interest in the IRA and allow that interest to pass to the contingent beneficiary (whether the wife would choose this alternative would depend on the circumstances at the time). If the wife in the example died first, the terminable interest rule would terminate her marital property interest in the IRA. Thus, the IRA would belong solely to the surviving husband, and no part of the IRA would be available to fund the credit shelter trust (the planning might also include reclassifying the residence as the wife's individual property to have a significant asset with which to fund the credit shelter trust in the event she were to predecease her husband).

On the other hand, if the spouses in the example conclude that their priority is to minimize estate taxes, more aggressive planning involving the husband's IRA could be considered to allow more full utilization of each spouse's applicable credit amount. The spouses could agree by marital property agreement that the IRA (1) is marital property and (2) is not governed by the terminable interest rule. *See* Wis. Stat. § 766.58(7)(a); *see supra* §§ 10.154–.155 (regarding overriding the terminable interest rule by marital property agreement). If the terminable interest rule were overridden and the wife died first, the provisions of her will would control the disposition of her one-half marital property interest in the IRA, although there are questions about the timing and income taxation of such disposition. In Private Letter Ruling 80-40-101 (July 15, 1980), the IRS allowed the noncontracting spouse's community property interest in the contracting spouse's IRA to be distributed in accordance with the terms of the noncontracting spouse's will and further concluded that the resulting distribution would be taxed to the recipients (and not to the surviving contracting spouse). Under the ruling, the IRA custodian was able to recognize the probate court's order to distribute the deceased spouse's interest in the IRA to the beneficiaries designated in the deceased spouse's will.

In the example, to reserve a "second look" and the opportunity for IRS approval of the testamentary disposition of the wife's one-half marital property interest to a credit shelter trust, the wife's will could contain a specific bequest of her interest in the IRA to the husband, with the husband having the right to disclaim in favor of the credit shelter trust. If the wife died first and the husband were inclined to disclaim the bequest in whole or in part, the personal representative of the wife's estate could seek a ruling from the IRS regarding the tax consequences of the proposed disclaimer before committing to that course of action.

A possible alternative to waiting until the death of one spouse would be to seek IRS approval for a "partition" of the contracting spouse's IRA. In Private Letter Ruling 94-39-020 (July 7, 1994), the IRS considered whether a taxpayer's community property IRA could be "partitioned" into separate equal shares within the contracting spouse's IRA, with one share subject to disposition by each spouse. Under the facts of the ruling, the spouses intended to enter into an agreement pursuant to which the IRA would be divided equally between them with each spouse's share thereafter being owned as separate property, and with each spouse having the right to designate the beneficiary of his or her share. Each spouse intended to revocably designate the other as beneficiary of his or her share, with the survivor having the right to disclaim in favor of a testamentary trust. The IRS concluded: "Such reclassification, alone, is not tantamount to an actual distribution or payment from an IRA. Furthermore, such reclassification will not cause the IRA to fail to meet the requirements under section 408(a) so as not to be for the exclusive benefit of the involved taxpayer(s)." The IRS hence concluded that the partition was not a taxable event.

The term *partition* used in the ruling appears to mean a contractual reclassification from community property to separate property by agreement. Although the term partition is not typically used this way in Wisconsin, the same technique should be available to Wisconsin spouses. It should further be noted that Private Letter Ruling 94-39-020 does not address the income tax consequences of the distribution of the noncontracting spouse's interest in the IRA if he or she were to die first. Requesting a ruling on this aspect of the proposed transaction would be advisable.

➢ ***Note.*** It must be emphasized that this type of planning is appropriate for joint tax planning only in those circumstances, such as in the example above, in which there are insufficient assets with which to plan for use of the noncontracting spouse's applicable credit amount and the only reasonable alternative is to use the contracting spouse's significant IRA assets as a potential source of funding for the credit shelter trust if the noncontracting spouse dies first.

In Private Letter Ruling 9937055 (Sept. 17, 1999), the IRS concluded that a lifetime transfer of a noncontracting spouse's marital property interest to her own IRA would constitute a taxable distribution under I.R.C. § 408(d)(1). This is consistent with the U.S. Tax Court's rulings in *Rodoni v. Commissioner*, 105 T.C. 29 (1995), and *Bunney v. Commissioner*, 114 T.C. 259 (2000).

b. Mechanics of Disposition and Income Tax Issues [§ 10.158]

If the noncontracting spouse dies first and the contracting spouse's IRA is not subject to the terminable interest rule, the noncontracting spouse has a power of testamentary disposition over one-half of the portion of the IRA classified as marital property. If the contracting spouse is named as the beneficiary under the noncontracting spouse's will (either by way of a specific bequest of the noncontracting spouse's marital property interest in the IRA or as the residuary beneficiary), the deceased spouse's interest will remain in the IRA and hence there should be no income tax consequences to the disposition. Moreover, the deceased spouse's interest arguably remains exempt from creditor claims pursuant to the exemption afforded retirement benefits under section 815.18(3)(j).

If, on the other hand, the contracting spouse is not the beneficiary under the noncontracting spouse's will with respect to the noncontracting spouse's marital property interest in the IRA (for example, if the noncontracting spouse's will pours over to a residuary trust, or if the contracting spouse disclaims a specific bequest of the noncontracting spouse's interest in the IRA in favor of a credit shelter trust), the analysis is more complicated.

The initial question in that instance is how the personal representative of the noncontracting spouse's estate asserts a claim of right to the decedent's interest in the contracting spouse's IRA. If the contracting spouse's IRA is a trust (*see* I.R.C. § 408(a)), section 766.575, relating to the protection of trustees dealing with spouses, provides the mechanism. Section 766.575(2) provides:

> Except as provided in sub. (3), in a court order or in the terms of a trust, the classification of property in the possession or control of a trustee shall not affect the trustee's right and duty to administer, manage and distribute the property in accordance with the terms of the governing instrument and the trustee may rely on and act in accordance with those terms.

Subsection (3) goes on to specify a notice of claim procedure that may be used by a surviving spouse, or by a person claiming under a deceased spouse's disposition at death, to establish a claim to a portion of the assets held in the trust. Section 766.575 does not address the timing of distributions from the trust in satisfaction of a claim established pursuant to the notice of claim procedure.

If the contracting spouse's IRA is a custodial account, *see* I.R.C. § 408(h), rather than a trust, section 766.575 technically may be inapplicable. Section 766.575(1)(e) defines *trustee* by cross-reference to section 701.01(8), which in turn defines trustee to mean "a person holding in trust title to or holding in trust a power over property." A custodian of an IRA qualified under I.R.C. § 408(h) may not be considered a trustee under this definition. Nonetheless, a custodian receiving a notice of claim similar to the one contemplated in section 766.575(3) would be well advised to seek direction from the probate court regarding the disposition of IRA assets.

Whether the IRA is a trust or a custodial account, the marital property component of the account may be established by a proceeding to determine the classification of property pursuant to section 857.01. The relief sought under section 857.01 may (though need not) include a decree requiring that property be titled in accordance with its classification.

With respect to income tax consequences when the contracting spouse is not the beneficiary of the noncontracting spouse's marital property interest in the IRA, some commentators have suggested that the result may be current income taxation of the decedent's marital property interest, and, in some circumstances, imposition of the 10% excise tax imposed by I.R.C. § 72(t) on premature distributions if the surviving contracting spouse has not attained age 59½. *See, e.g.*, S. Andrew Pharies, *Community Property Aspects of IRAs and Qualified Plans*, Prob. & Prop. Sept./Oct. 1999 at 33, 37–38. This analysis assumes, however, that the noncontracting spouse's marital property interest in the contracting spouse's IRA is distributed because of the noncontracting spouse's death. A more practical approach may be to obtain an order from the probate court directing the IRA trustee or custodian to make payments to the noncontracting spouse's beneficiary as distributions are made in accordance with the surviving contracting spouse's continued exercise of management and control rights with respect to the IRA. Given the uncertainty of the income tax results, however, the surviving spouse or personal representative of the deceased spouse may wish to obtain a private ruling from the IRS regarding the income tax consequences of this approach.

➢ ***Note.*** If the noncontracting spouse dies first and has a power of testamentary disposition over the contracting spouse's IRA, the contracting spouse should not make additional contributions to that IRA. Rather, any IRA contributions made by the surviving spouse following the death of the noncontracting spouse should be made to a different IRA to avoid mixing issues.

c. Non-Pro Rata Distribution [§ 10.159]

Two private letter rulings suggest that use of non-pro rata distributions following death may facilitate funding a credit shelter trust using the value of spouses' marital property interest in an IRA. In both Private Letter Ruling 99-25-033 (June 25, 1999) and 99-12-040 (December 18, 1998), the deceased spouse's IRA was owned as community property and was payable upon death to the spouses' joint revocable trust. Under the facts of each ruling, the trustees proposed to allocate the entire amount of the IRA proceeds (both the one-half community property interest of the decedent and the one-half community property interest of the surviving spouse) to the survivor's trust and to allocate the entire interest in other community property assets of equal value (determined as of dates of distribution) exclusively to the decedent's one-half share of the former community property. In both rulings, the IRS ruled that the non-pro rata distribution was not a sale or exchange under I.R.C. § 1001. In both cases, local law and the governing trust instrument authorized non-pro rata distributions. Finally, in each ruling, the surviving spouse rolled the IRA proceeds into the survivor's own IRA without recognition of income.

Planners wishing to follow the planning strategy described in these rulings should include a provision in the governing trust instrument authorizing non-pro rata distributions. Even if such provision is absent, however, Wisconsin law specifically authorizes non-pro rata distributions by way of exchanging marital property assets following death, albeit with court approval in the probate context. *See* Wis. Stat. § 857.03(2). 2005 Wisconsin Act 216, section 169, renumbered section 857.03(2) as section 766.31(3)(b)3. and amended the statute to coordinate its provisions with changes made by 2005 Wisconsin Act 216, section 42, discussed in section 10.10, *supra*.

Although the above rulings involved situations in which the contracting spouse died first, the non-pro rata distribution strategy may have application when the noncontracting spouse dies first. The steps would include the following:

1. The spouses classify an IRA as marital property (and as necessary override the terminable interest rule by provisions in their marital property agreement).

2. The noncontracting spouse by will specifically bequeaths any marital property interest in the contracting spouse's IRA to the contracting spouse, with a provision permitting the contracting spouse to disclaim in favor of his or her estate.

3. The will further provides that, to the extent possible, any interest of the decedent in the surviving spouse's IRA will be allocated to the surviving spouse as part of a non-pro rata distribution of the estate assets.

4. If the noncontracting spouse dies first, the surviving spouse disclaims the amount necessary to fund the credit shelter trust. The IRA could then be allocated back to the surviving spouse in a non-pro rata distribution in exchange for the surviving spouse's interest in other marital property assets.

As in the above-cited private letter rulings, the non-pro rata distribution should not be regarded as a sale or exchange. Of course, the cited rulings are limited to the taxpayers to whom they were issued and therefore do not serve as precedent. A provision authorizing non-pro rata distributions is not necessary if they are permitted by governing state law. *See, e.g.*, Priv. Ltr. Rul. 2003-34-030 (May 19, 2003) (non-pro rata distribution of assets upon the termination of a trust did not involve recognition of gain or loss because the divisions were authorized by state law). For further discussion of this issue, see section 9.20, *supra*.

D. Roth IRAs [§ 10.160]

Unlike a traditional IRA, the distributions from which are subject in whole or in part to income taxation in all events at some point in the future, a Roth IRA established by a qualifying taxpayer (by way of nondeductible contributions or a qualified conversion) can ultimately be distributed to the taxpayer or his or her beneficiary free of income tax if the distributions satisfy certain requirements. For a discussion of Roth IRAs and the rules that govern contributions, conversions, and distributions, see generally Mervin M. Wilf, "Roth IRAs: Distribution Planning Issues Arising from the Final Regulations and Other Guidance," Q284 ALI-ABA 121 (1999). Unlike traditional IRAs, during the contracting spouse's lifetime, minimum distribution rules do not apply to Roth IRAs (though such rules apply following the death of the contracting spouse). *See* I.R.C. § 408A(c)(5).

Because a Roth IRA, unlike a traditional IRA, is not an item of IRD, a Roth IRA is a more suitable asset for funding a credit shelter trust. As with any asset that is earmarked to pass to a credit shelter trust, the planner must consider its classification. The same considerations applicable to a traditional IRA that may be used to fund a credit shelter trust are applicable to a Roth IRA that will serve that purpose. *See supra* § 10.159. If an estate plan contemplates that a Roth IRA will fund a credit shelter trust upon the contracting spouse's death, classification of the Roth IRA as the contracting spouse's individual property will make it possible for the entire Roth IRA to pass to the credit shelter trust without adverse gift tax or estate tax consequences for the surviving spouse or the surviving spouse's estate.

The considerations for disposition of a Roth IRA classified as marital property upon the death of the noncontracting spouse are essentially the same as those for a traditional IRA. Whether a Roth IRA may be "partitioned" in the same manner as a traditional IRA is untested.

XV. Alternatives in Representing One Spouse [§ 10.161]

A. In General [§ 10.162]

While in most cases spouses will retain the same counsel in a joint representation relationship for their estate planning, in some cases the planner may be advising only one spouse, whose objectives may include minimizing the impact the marital property law has on the other spouse's ability to assert property rights. This circumstance may arise, for example, following the representation of a spouse or prospective spouses in connection with an opt-out form of marital property agreement. Sections 10.160–.167, *infra*, consider some of the issues and strategies that may be applicable in the context of such sole representation.

B. Opt-out (or Partial Opt-out) Marital Property Agreements [§ 10.163]

Wisconsin's marital property law is based on a partnership theory of marriage, in which the contribution of each spouse to the marriage and the spouses' mutual responsibilities are recognized in the presumption that assets acquired by either spouse are classified as marital property. *See supra* ch. 1. At the same time, however, chapter 766 recognizes that spouses are free to adopt their own property regime, with limited exceptions. Wis. Stat. § 766.17. For counsel representing only one spouse, the principal means to effect that spouse's ability to exercise exclusive ownership rights with respect to an asset, both during lifetime and upon the death of either spouse (or in the event of the marriage's dissolution), is a marital property agreement. For a discussion of planning considerations with respect to marital property agreements, including drafting considerations, see chapter 7, *supra*.

C. Unilateral Actions to Preserve Classification of Nonmarital Property Assets [§ 10.164]

1. Segregation and Tracing of Nonmarital Property Assets [§ 10.165]

A spouse who owns assets not classified as marital property (for example, predetermination date property assets or individual property assets acquired by gift or transfer upon death) must be disciplined in segregating and accounting for such assets to avoid the inadvertent reclassification of part or all of them as marital property. Further, even if a marital property agreement is in place that classifies spouses' assets generally as individual property, the agreement's effect on a creditor is limited by section 766.55(4m). Hence, notwithstanding the agreement, a spouse concerned about potential creditor claims may be well advised to segregate and account for assets on a dual basis—that is, both as if there were a marital property agreement in place and as if there were not. This would involve keeping property classified as individual property under the agreement segregated from property classified as marital property under the agreement, and then further segregating the individual property assets that would be classified as individual property absent the agreement from those that would be classified as marital property absent the agreement.

In addition, given the differences between the manner in which property is characterized as either divisible or nondivisible under chapter 767, which governs dissolution, and the manner in which property is classified as either marital property or individual property under chapter 766, which governs classification of property during marriage and upon death, the spouse concerned about possible divorce should be mindful of the rules under both chapters.

> ➢ ***Example.*** At the time of his marriage in 1986 (when both spouses are domiciled in Wisconsin), a husband has significant assets, including a substantial bank account, the source of which was savings from premarriage employment. Upon marriage, he signs and delivers to his wife a unilateral statement under section 766.59. The husband thereafter is careful to avoid adding funds to the account that represent earnings from employment after the date of marriage. In 1988, the husband inherits significant assets from his mother. Since these assets, like the assets in his individual property bank account, are also classified as individual property, the husband commingles his inherited individual property funds with his premarriage individual property funds, and makes a number of withdrawals from the account and deposits of other premarriage funds. In 2010, the spouses file a petition for dissolution.

In the example, while the facts show that the entire account is classified as individual property under chapter 766, the division of property upon dissolution is governed by chapter 767. Chapter 767 generally treats as nondivisible only property acquired by gift or transfer at death from a third party. Wis. Stat. § 767.61. Income from nondivisible property is divisible. *See infra* ch. 11. The unilateral statement is a vehicle recognized under chapter 766, but not under chapter 767. Moreover, while the fact that property was owned by a spouse before the marriage is a factor for a court to consider in determining an equitable distribution of property at divorce, *see* Wis. Stat. § 767.61(3)(b), premarriage property not attributable to a gift or transfer at death is part of the divisible marital estate. The husband has the burden of identifying and tracing the nondivisible assets, which, under the facts in the example, will be quite difficult.

The point, therefore, is that careful segregation and accounting to reflect classification solely under chapter 766 may be insufficient in many instances to provide the level of segregation and accounting necessary to adequately identify and trace assets for purposes of chapter 767, unless a marital property agreement is in place that in effect adopts the property classification scheme under chapter 766 as the means for dividing property in the event of divorce. And even when there is such a marital property agreement in place, out of an abundance of caution (because of the potential unenforceability of the agreement), a spouse may wish to also segregate and account for property as if there were no agreement.

A revocable trust may be a useful means of segregating and accounting for nonmarital property assets. It should be noted, however, that merely transferring property to a revocable trust does not suspend the classification rules under chapter 766 or the characterization rules under chapter 767. Hence, to the extent a dual system of segregation and accounting is advisable under circumstances like those in the example above, such segregation and accounting should be accomplished by the use of separate accounts within the revocable trust.

2. Unilateral Statement [§ 10.166]

A spouse may unilaterally cause the income from nonmarital property to be classified as individual property by executing and delivering a unilateral statement under section 766.59 to his spouse (or prospective spouse). A unilateral statement is effective for purposes of chapter 766 as between the spouses, but it has no application in determining the division of property upon divorce under chapter 767, and its effect with respect to creditors is limited by the provisions of sections 766.55(4m) and 766.59(5).

3. Payment of Reasonable Compensation for Application of Labor to Nonmarital Property Assets [§ 10.167]

Under section 766.63(2), the so-called *industry mixing* or *labor mixing* provision, a marital property component may be created in a nonmarital property asset if the property substantially appreciates as a result of the application of substantial effort by either spouse when that spouse does not receive reasonable compensation for his or her effort. A spouse who owns a nonmarital property asset (for example, inherited stock in a family business) should ensure that either spouse working in the business receives reasonable compensation for services.

What constitutes *reasonable compensation* for purposes of section 766.63(2) will depend on the facts and circumstances of the particular case. The most conservative approach to rebuffing a challenge by the other spouse or a third party (e.g., a family-purpose creditor when the other spouse incurred the obligation) under the labor-mixing statute is to contemporaneously document the bases upon which "reasonable compensation" is determined. Depending upon the amount at issue and the client's tolerance for the time and expense involved, this may include retaining the services of an independent consultant familiar with the particular industry and the responsibilities and performance of the spouse working in the business.

> ➢ ***Note.*** Section 766.63(2) is applicable only for purposes of classifying property under chapter 766. A different rule has developed through case law regarding the appreciation of nondivisible property under chapter 767. For the appreciation in value to be divisible at divorce, there is no requirement that it be "substantial," that the effort supplied by a spouse be "substantial," or that reasonable compensation not have been received. *See infra* ch. 11.

For further discussion of section 766.63(2), see section 3.42, *supra*.

D. Preserving Management and Control Rights of Marital Property Assets [§ 10.168]

Management and control of marital property assets is governed by section 766.51. A spouse acting alone may manage and control marital property assets that are held in that spouse's name alone, marital property assets held in the names of both spouses in the "or" form, and marital property assets not held in the name of either spouse. Wis. Stat. § 766.51(1).

A spouse wishing to achieve or preserve exclusive management and control of marital property assets without interference from his or her spouse has several tools available to accomplish this. If assets are held jointly by the spouses in the "or" form, each spouse has the power to change the title or withdraw funds (depending on the type of assets) and retitle the asset in his or her name alone. If the assets are not held by either spouse (i.e., untitled assets), one spouse acting alone has the power to convey the assets into a titled entity held in that spouse's name alone (e.g., a single-member LLC held by that spouse).

The management and control provisions under section 766.51 must be read in conjunction with section 766.70(3), the so-called add-a-name remedy provision, which allows a spouse to petition the court for an order to have his or her name "added to marital property or to a document evidencing ownership of marital property held in the name of the other spouse alone," with certain notable exceptions. The exceptions to the availability of the remedy relate to an interest in various kinds of entities often associated with the operation of a closely held business (e.g., an interest in a partnership or joint venture, membership in an LLC, an interest in a professional corporation or association or similar entity, or stock in a closely held corporation). The exception also applies in the case of an unincorporated business if the other spouse is the only one spouse involved in the operating or managing the business, but it is significant to note that this is the only one of the various exceptions that even mentions an operating business. Thus, for example, it would be possible for a spouse having sole management and control of a brokerage account held in his or her name alone to preclude the availability of a remedy by the nonholding spouse under section 766.70(3) by transferring title of the brokerage account into the name of a single member LLC in which the holding spouse is the sole member.

Another means of sheltering marital property assets from the add-a-name remedy may be through the use of a revocable trust established by the spouse seeking exclusive management and control. Under section 766.51(3), the right to manage and control marital property transferred to a trust is determined by the terms of the trust. Hence, a spouse having sole title to marital property assets could transfer them into a trust of which that spouse is the sole trustee. Although a revocable trust is not listed in the statute as an exception to the add-a-name remedy, the operative language of the statute authorizing the remedy in the first instance specifies its application to "marital property … held in the name of the other spouse." Wis. Stat. § 766.70(3). It may be argued that property held in the name of the other spouse *as trustee* is distinguishable from property held directly by the other spouse for purposes of the statute. Whether a court would be so persuaded is uncertain.

For further discussion of the add-a-name remedy, see chapter 8, *supra*.

> ➢ ***Note.*** Even if a spouse is successful in maintaining exclusive management and control of marital property assets, he or she continues to owe a duty of good faith to his or her spouse in matters involving such property. *See* Wis. Stat. § 766.15.

For a discussion of management and control rights generally, see chapter 4, *supra*.

E. Limiting Elective Rights at Death [§ 10.169]

Under chapter 861, the amount of the deferred marital property elective share that may be claimed by a surviving spouse is determined by reference to (1) the value of the "augmented deferred marital property estate" as defined in sections 861.018(1) and 861.02(2), and (2) the extent to which the elective share is deemed satisfied by property retained by or transferred to the surviving spouse under section 861.06. Hence, the important points in limiting the amount recoverable by the surviving spouse as a deferred marital property elective share are (1) to reduce the size of the augmented deferred marital property estate when possible, and (2) to structure interests passing to or for the benefit of the surviving spouse so that they are "counted" toward satisfaction of the elective share.

The most effective way to reduce the size of the augmented deferred marital property estate is to make lifetime transfers of assets that would constitute deferred marital property at death. Hence, for example, if a spouse wants to make a substantial gift to his or her children from nonmarital property assets and he or she owns both individual property assets and predetermination date property assets that would be classified as deferred marital property upon death, the gift should be made from the predetermination date property assets. While the determination of the value of the augmented deferred marital property estate includes a two-year look-back period for gifts of deferred marital property assets, if the donor spouse survives the transfer for two years, the transferred assets are no longer part of the equation.

With regard to having assets considered "property transferred to the surviving spouse" in satisfaction of the deferred marital property elective share, it should be observed that the value of a trust interest created for the survivor is within the definition of *property* used in chapter 861, which incorporates by reference the definition of property under section 851.27. *See* Wis. Stat. § 851.27 (defining property to include an equitable interest and rights of a beneficiary under a contractual arrangement). Note, however, that a disclaimed transfer in trust is not considered "property transferred to the surviving spouse" for purposes of satisfying the elective share unless the surviving spouse had a general power of appointment over the trust during his or her lifetime or an interest in the trust after the disclaimer. *See* Wis. Stat. § 861.06(1). Hence, the survivor's disclaimer of a QTIP marital trust would eliminate consideration of the value of the trust interest in determining the extent to which the elective share has been satisfied.

F. Planning Strategies to Maximize Spouse's Power of Management and Disposition [§ 10.170]

A spouse who has management and control of a marital property asset has the authority vis-a-vis third parties to "deal with [such] property as if it were property of an unmarried person." Wis. Stat. § 766.01(11). With respect to his or her spouse, however, a spouse has a duty of good faith in matters involving marital property. Wis. Stat. § 766.15(1). The term *good faith* is not defined in chapter 766. Whether a spouse's management of marital property assets in a manner that enhances that spouse's power of disposition over the asset violates the duty of good faith must be determined on a case-by-case basis. *Id*. Some of the strategies discussed in this section must be considered in that context.

During an ongoing marriage, a spouse can avoid application of the marital property law altogether (at least with respect to assets acquired in the future) by moving from Wisconsin, since chapter 766 applies only "during marriage" as that term is defined. *See* Wis. Stat. §§ 766.01(8), .03(2).

Assuming that both spouses continue to be domiciled in Wisconsin, if one spouse is terminally ill, the other spouse may be able to limit the terminally ill spouse's power of testamentary disposition over certain marital property assets within the management and control of the non-terminally ill spouse by retitling the assets so that they include a right of survivorship.

> ➢ ***Example.*** A husband is incompetent and terminally ill. His will leaves his entire estate to his son, who recently entered treatment for drug addiction. The wife has assets titled in her name alone classified as marital property. She retitles the assets as survivorship marital property. After the husband's death, the wife places the assets representing the husband's share of former survivorship marital property into a trust for the benefit of his son.

Another possible way to limit a spouse's power of testamentary disposition over certain kinds of marital property assets is to cause them to be subject to the terminable interest rule applicable to deferred employment benefits. *See* Wis. Stat. § 766.62(5). Thus, the employee spouse who has the ability to enter into deferred compensation arrangements with his or her employer can cause marital property compensation to fall within the definition of a "deferred employment benefit" under section 766.01(3m) so that his or her spouse's marital property interest in the asset ceases upon death. *See supra* ch. 4. Whether the deceased spouse's estate may have a claim against the survivor depends on all of the facts and circumstances.

Forcing the nonholding surviving spouse to affirmatively pursue his or her marital property interest in assets passing at death is another way of potentially limiting the nonholding spouse's interest. If the holding spouse leaves no estate subject to administration, but rather disposes of all property over which he or she had management and control by nontestamentary means (such as beneficiary designations or transfers by revocable trust), the surviving spouse has a remedy under section 766.70, but one with a relatively short statute of limitation (one year from date of death, *see* Wis. Stat. § 766.70(6)(b)). If an action is not commenced within that period, the remedy is barred. *See Jackson v. Employe Trust Funds Board*, 230 Wis. 2d 677, 602 N.W.2d 543 (Ct. App. 1999).

Similarly, lifetime gifts of marital property assets to third parties can limit the nonholding spouse's interest in such assets. For a gift made within the amounts specified in section 766.53, the nonholding spouse has no remedy. If the gift exceeds the amount specified in section 766.53, the nonholding spouse has a remedy under section 766.70, but as noted with respect to transfers at death, the burden is on the nonholding spouse to institute an action within a relatively short statute of limitation (for lifetime gifts, within the earliest of one year after notice of the gift, one year after dissolution, or by the deadline for filing claims under section 859.01 after the death of either spouse, Wis. Stat. § 766.70(6)(a)).

Finally, lifetime gifts of property that would be classified as deferred marital property upon death may limit the amount that the survivor can recover by exercising deferred marital property rights under section 861.02.

XVI. Asset Protection Planning: Considerations Relating to Creditor Rights [§ 10.171]

A. In General [§ 10.172]

In some cases, estate planning includes consideration of how to best shield the spouses' assets from creditors' potential claims. Much has been written on the use of "off-shore" trusts for this purpose, and, more recently, "on-shore" trusts in such states as Alaska and Delaware. *See, e.g.*, Allan J. Claypool, "Asset Protection Overview: Techniques in the United States and Offshore," *ACTEC Notes*, Vol. 24, No. 4 (Spring 1999). Discussion of such asset protection planning techniques is beyond the scope of this book. However, for some clients, given the expanded ability of creditors to reach assets under Wisconsin's marital property law, the planner may need to consider planning techniques under the marital property law in an effort to reduce the availability of assets to creditors.

B. Creditor Rights Generally Under the Marital Property Law [§ 10.173]

When only one spouse incurs an obligation but the obligation has been incurred in the interest of the marriage or family, all marital property is available to satisfy the obligation. Wis. Stat. § 766.55(2)(b). Moreover, a family-purpose creditor is not bound by the terms of a marital property agreement classifying as individual property assets that, absent the agreement, would have been classified as marital property, unless the creditor had actual knowledge of the applicable provision of, or was provided with a copy of, the agreement before the obligation was created or incurred. *See* Wis. Stat. § 766.55(4m).

As discussed in section 10.174, *infra*, for clients with potential creditor issues, opting in to marital property classification (by marital property agreement or other available means) can have an adverse impact on the nonincurring spouse. In addition, opting out of marital property classification by means of a marital property agreement can prove ineffective to shield assets from a creditor if the creditor has not been provided with a copy of the agreement in advance or does not have advance actual knowledge of the pertinent provisions of the agreement.

When potential creditor claims are an issue and one spouse has significant individual property assets, careful record keeping to avoid reclassification by mixing under section 766.63 is important. Even if the owning spouse has executed and delivered a unilateral statement under section 766.59 or the spouses have entered into a marital property agreement classifying income from individual property assets as individual property, a creditor without knowledge of the document will not be bound by its terms, even though the document is effective as between the spouses.

C. Potential Adverse Impact of Opt-in Marital Property Agreement [§ 10.174]

Chapter 766 describes the type of property (i.e., marital or nonmarital) that is available to satisfy various types of obligations when only one spouse incurs an obligation (if both spouses incur an obligation—such as by co-signing a note—all property of both spouses, regardless of classification, is available to satisfy the debt except for property specifically exempt by statute). From a planning standpoint, it is important to recognize that, while opting in to marital property treatment can be helpful in some cases for income tax or estate tax planning purposes, opting in may enhance creditors' recovery rights. See chapters 5, 6 and 7, *supra*, for further discussion.

> ➢ ***Example.*** A wife has inherited property from her mother that has appreciated significantly in value since her mother's death. Her husband is in poor health and, while death is not imminent, likely will die within the next several years. The husband's estate is considerably smaller than the wife's (mainly due to a series of bad business deals, some of which are ongoing and for which the husband has executed personal guaranties to a bank). For tax planning purposes, the husband and wife enter into an opt-in marital property agreement, which has the effect of classifying the wife's inherited property as marital property. Later, the bank obtains a judgment against the husband on the guaranties.

While in the above example, entering into an opt-in marital property agreement could provide potential income tax benefits (a stepped-up basis for the wife's inherited assets upon the husband's death) and estate tax benefits (equalized estates for fully utilizing the husband's applicable credit amount and lower estate tax brackets), the adverse creditor situation is the predominant concern. By adopting marital property classification for the wife's inherited assets, the spouses made those assets available to satisfy the judgment against the husband, both during lifetime, *see* Wis. Stat. § 766.55(2), and upon and after the death of either spouse, *see* Wis. Stat. § 859.18.

Hence, the planner should consider each spouse's own outstanding or potential obligations for which marital property ultimately could become available. While many potential tort obligations can be covered adequately by insurance so as to minimize the potential adverse impact of marital property classification, other potential tort obligations, potential commercial obligations, fines, or other liabilities incurred by only one spouse may make opting in to marital property classification inadvisable.

D. Reclassification to Limit Amount of Marital Property Assets [§ 10.175]

Because of the potential adverse impact of creditor claims on marital property, when one spouse has high liability risk, the spouses may wish to avoid classifying assets as marital property or to affirmatively reclassify marital property assets as the individual property of the spouse who is not "high risk" (subject, however, to concerns regarding applicable fraudulent-transfer laws). The manner in which assets are reclassified as individual property may have a significant impact on whether the strategy succeeds. If a marital property agreement is used to classify property that would otherwise have been classified under the law as marital property, the agreement will be effective as between the spouses to cause a reclassification, but a creditor cannot be adversely affected by the agreement unless it has been provided in advance with a copy of the agreement or has advance actual knowledge of the pertinent provisions of the agreement. Wis. Stat. § 766.55(4m).

- ***Example.*** A wife is the owner and insured of a life insurance policy having a cash surrender value of $50,000. The policy was issued in 1986 following a relocation by the wife and her husband to Wisconsin. As part of their estate planning in 1994, the husband and wife enter into a marital property agreement that provides, among other things, that the life insurance policy insuring the wife's life is classified as her individual property. In 2009, ABC Bank (which never had knowledge of or received a copy of the marital property agreement) acquires a judgment against the husband on a guaranty he signed with respect to a now-defunct business venture. Thereafter, the bank seeks to execute on its judgment against the cash value of the life insurance policy.

Absent reclassification, the policy would be classified as marital property under section 766.61(3)(a). The reclassification of the life insurance policy as the wife's individual property by marital property agreement will be effective as between the spouses but ineffective against the bank, since the bank lacked knowledge of the agreement when the husband incurred the guaranty obligation. Assuming the guaranty agreement included a separately signed marital-purpose statement or in fact was entered into in the interest of the marriage or family, the bank may satisfy its judgment against the cash value of the life insurance policy, subject to the limited protection afforded by section

815.18(3)(f) (which provides a limited exemption against execution for life insurance). The bank is entitled to regard the policy as marital property since, in the absence of the marital property agreement, the law would classify the policy as marital property of the spouses.

If the husband and wife had instead reclassified the life insurance policy as her individual property by written consent under section 766.61(3)(e), the bank could not regard the policy as marital property for the purpose of collecting on its judgment. This is because section 766.55(4m) limits the effect of a reclassification with respect to creditors without knowledge only in the case of a reclassification by marital property agreement or decree under section 766.70 (and by cross-reference, a unilateral statement, *see* Wis. Stat. § 766.59(5)). The reclassification by written consent is binding on creditors, even those without knowledge of the written consent (subject, of course, to a creditor's ability to invalidate a transfer under fraudulent-transfer laws, where applicable).

Other ways to reclassify property that, like a written consent, are not subject to the limitation imposed by section 766.55(4m) include reclassification by gift, conveyance (as defined in section 706.01(4)) signed by both spouses, and, in the case of a security, an instrument signed by both spouses that conveys an interest in the security. Each of these methods is an authorized means of reclassifying property under section 766.31(10).

E. Potential Benefit of Holding Assets as Survivorship Marital Property or Joint Tenancy Property [§ 10.176]

Survivorship marital property is not a separate classification but is simply marital property with a right of survivorship upon the death of the first spouse to die. *See supra* ch. 2. During the spouses' joint lifetime, a family-purpose creditor has the ability to reach survivorship marital property assets owned by the spouses. *See* Wis. Stat. § 766.55(2)(b). However, upon the death of a spouse who was the only obligated or incurring spouse with respect to an obligation, a survivorship marital property asset is not available to satisfy the obligation unless the property was secured by a consensual lien or execution on a judgment lien was issued before the spouse's death. Wis. Stat. §§ 766.60(5), 859.18(4)(a).

Holding assets as joint tenancy property gives the same protection from estate claimants, *see* Wis. Stat. § 859.18(4)(a)2., although joint tenancy property has the additional advantage of not being completely available to a family-purpose creditor of one spouse during the spouses' joint lifetime. Hence, if an asset is predetermination date joint tenancy property, preserving that form of ownership may be beneficial to spouses from a creditor protection standpoint both during their joint lifetime and upon the death of the indebted spouse.

Joint bank accounts do not enjoy the same protection from creditors at death as do survivorship marital property assets or joint tenancy assets. Section 859.18(5)(c) provides that a creditor's ability to reach an account under chapter 705 is governed by section 705.07. Section 705.07(2) cross-references chapter 242, which provides creditors with remedies in the case of fraudulent transfers. Section 705.07(2) treats a transfer of an account by reason of death as being fraudulent if the decedent's estate is insolvent under section 242.02 (liabilities in excess of assets). Thus, if marital property assets or nonmarital property assets pass to a surviving spouse by reason of the death of an indebted spouse, and the assets of the decedent's estate are insufficient to pay the creditor's claim, the creditor may pursue a fraudulent transfer remedy under chapter 242.

Hence, seemingly insignificant differences in the manner in which assets are held during lifetime can lead to strikingly different results upon the death of one spouse.

➢ ***Example.*** A husband is the only incurring spouse with respect to a family-purpose obligation that results in a creditor obtaining a substantial judgment against him. Before the creditor has an opportunity to execute on the judgment, the husband dies leaving no assets subject to administration. At death, the only significant assets in which he has an interest are (1) a joint savings account with his wife at ABC Bank and (2) a money-market mutual fund with XYZ Mutual Fund Company held in the names of the husband and wife as "joint tenants," which was established by the husband and wife after their determination date.

In this example, because the husband's estate is insolvent, under sections 859.18(5)(c) and 705.07(2) the creditor may pursue a fraudulent transfer remedy under chapter 242 against the wife with respect to the joint bank account. The money-market mutual fund, however, is survivorship marital property under section 766.60(4)(b)1.a. The wife therefore succeeds to ownership of the mutual-fund account free of any claim by the creditor. Wis. Stat. §§ 766.60(5), 859.18(4)(a)1.

Assets passing by will substitute agreement do not enjoy the same exemption from creditor claims as survivorship marital property assets. *See* Wis. Stat. § 859.18(6). *See also* Wis. Stat. § 705.10(2) (use of nonprobate transfer at death under section 705.10 does not limit rights of creditors under other laws).

F. Terminating Applicability of Chapter 766 by Change of Domicile [§ 10.177]

For clients planning in a hostile creditor environment (e.g., when a creditor has already obtained a judgment and is pursuing collection), avoiding the ongoing accumulation of marital property assets may require a change of domicile by at least one spouse.

- ***Example.*** A husband and wife are domiciled in Wisconsin. The wife makes a substantial income from her business as a sales representative for a pharmaceutical company. The husband has recently become a judgment debtor as a result of a failed business venture. The creditor garnishes the wife's wages. The spouses never entered into a marital property agreement of which the judgment creditor had knowledge or receipt.

Under the example, reclassifying the wife's employment earnings as individual property by marital property agreement would be ineffective to prevent the creditor from garnishing her wages, since the creditor would not have had knowledge of the agreement when the obligation was incurred. However, if either the husband or wife or both cease to be domiciled in Wisconsin, the marital property law will cease to apply. *See* Wis. Stat. §§ 766.03(2), .01(8). While the cessation of domicile in Wisconsin will not prevent the creditor from reaching previously accumulated marital property assets, *see* Wis. Stat. § 766.03(3), the wife's future earnings will not be marital property reachable by husband's judgment creditor.

XVII. Selected Forms [§ 10.178]

A. In General [§ 10.179]

The forms used in estate planning in a community property jurisdiction are generally the same as those used in common law jurisdictions. Nevertheless, estate planning differs significantly under the two systems because the ownership of assets by spouses is much different. Occasionally under a community property system, some forms based on common law concepts will need to be modified to account for marital property. The forms in this part of the book will primarily be the ones that must be modified.

For other forms of wills and trusts with an emphasis on marital property, see *Eckhardt's Workbook for Wisconsin Estate Planners*, *supra* § 10.1.

B. Revocable Trust Created by Both Spouses for Marital and Nonmarital Property [§ 10.180]

One of the forms that must be modified in Wisconsin is the revocable trust form designed to hold marital property. If marital property is transferred to a revocable trust, both spouses will be grantors for tax purposes. The spouses may or may not be co-settlors for purposes of section 701.01(5).

The following form assumes that the spouses join in the creation of the trust. Both are settlors. It also assumes that nonmarital property may also be transferred to the trust.

This book is not a general forms book. The purpose of this form is to illustrate some of the matters that must be considered when a revocable trust for marital property is prepared.

(husband and wife)

REVOCABLE TRUST AGREEMENT

This is a trust agreement between *(husband and wife)*, the Settlors, and *(trustee's name)*, the Trustee. The trust created by this agreement may be referred to as the *(husband and wife's surname)* REVOCABLE TRUST.

> ➤ ***Comment.*** The husband and wife are both settlors. Section 766.31(5) provides that the transfer of property to a trust does not by itself reclassify the property. One spouse may have exclusive management and control of marital property under section 766.51(1)(am). If so, that spouse may fund the revocable trust alone, in the exercise of his or her management powers. After the assets are transferred to the trust, section 766.51(3) provides that the right to manage and control the marital property is determined by the terms of the trust. However, the assets remain marital property after the transfer to the trust under section 766.31(5). *See supra* ch. 2. The Comment to UMPA § 4 states that "a trust created by one spouse would necessarily be measured by the good faith provisions of [section 766.15]." If the trust is created by one spouse alone, and the other spouse does not want the property in the trust, the other spouse may pursue a remedy provided under section 766.70. For a discussion of remedies, see chapter 8, *supra*.

I. Administration During Our Lifetimes

A. Initial Principal and Additions. We hereby deliver to the trustee as the initial principal of the trust the property described in the attached Schedules A and B. Marital property is described on Schedule A and nonmarital property is described on Schedule B. Each settlor's ownership interest is indicated on Schedule B. We may transfer additional property or rights to receive property to the trustee from time to time, and the trustee will accept the same.

Marital property assets transferred to the trust by us (or either of us), as it may be invested and reinvested from time to time, together with the income from such marital property, shall retain its character as marital property under section 766.31(5) of the Wisconsin Statutes, subject, however, to the terms of this agreement.

Assets of either settlor that are other than marital property (*nonmarital property*), as it may be invested and reinvested from time to time, shall retain their character as the property of the settlor who transferred such property to the trustee, subject, however, to the terms of this agreement. The income of nonmarital property assets transferred to this trust shall be marital property under section 766.31(4) of the Wisconsin Statutes, unless classified as individual property by a marital property agreement or unilateral statement classifying income from nonmarital property as individual property.

If marital property assets such as life insurance proceeds or retirement benefits are payable to the trustee of this trust after the death of one of us, nothing in this agreement shall be construed as in any way limiting the rights of either of us.

➢ ***Comment.*** The form contemplates that marital and nonmarital property will be transferred to the trust. This will impose additional record keeping responsibilities on the trustee.

I.R.C. § 1014(b)(6) provides that both halves of community property receive a full adjustment in basis on the death of one spouse. This form assumes that the spouses want I.R.C. § 1014(b)(6) to apply. See chapter 9, *supra*, for a discussion of I.R.C. § 1014(b)(6) as it applies to assets in a trust.

The final paragraph in the part of the form above is intended to apply to nonprobate assets that are made payable to the trustee. Since these assets may not be transferred to the trust during the marriage, the language in the form providing that marital property retains its character may not apply. The proceeds will be received by the trustee after the death of a spouse and, since the marriage will have terminated, will no longer be marital property. Generally, if the decedent spouse with management powers makes a nonprobate disposition of the surviving spouse's marital property interest, the surviving spouse has a remedy. *See supra* ch. 8, *infra* ch. 12.

B. Income and Principal of Marital Property. Any net income of this trust from marital property during our joint lifetimes shall be distributed to or applied for the benefit of us or either of us at least quarterly as marital property. During our joint lifetimes, the trustee may distribute to or for the benefit of us or either of us such amounts of principal of the marital property as the trustee in its discretion shall consider advisable for expenses of maintenance, support, medical care, comfort, or other benefit.

C. Income and Principal of Nonmarital Property. Any net income this trust may have from nonmarital property shall be paid to or applied for the benefit of the settlor who contributed the property to the trust except that if the trustee considers it in that settlor's best interests, it may, in its discretion, apply that income for the benefit of the other settlor. The trustee may distribute to either settlor such amounts of principal of nonmarital property as the trustee in its discretion shall consider advisable for expenses of maintenance, support, medical care, comfort, or other benefit.

➢ ***Comment.*** Parts B and C above do not authorize distributions to children of the settlors. Since each spouse can withdraw marital property, the spouses themselves can discharge any legal obligations they owe for the support of children. If the trustee could distribute marital property to adult children, this might be contrary to the gift limitation of section 766.53, and it is arguable that the character of the marital property would not be preserved because the trustee could make gifts of marital property that a spouse might not make.

D. Revocability, Withdrawals, Additions. While both of us are alive, either of us may:

1. Withdraw all or part of the income from marital property assets or nonmarital property assets (if the income of such nonmarital assets is classified as marital property) and all or any part of the marital property in this trust upon giving reasonable notice in writing to the trustee and the other settlor. Any such withdrawals shall be delivered to the settlors as marital property.

2. Withdraw property derived from the nonmarital property that he or she may have contributed (including the income therefrom if such income is classified as individual property of such settlor) upon giving reasonable notice in writing to the trustee.

While both of us are alive, both of us, acting together, may amend or revoke this trust in whole or in part at any time and from time to time by a signed written instrument. A An amendment or revocation shall become effective when signed, but the trustee shall not be liable for any action taken under the terms of the trust as they existed before the trustee received the amendment or revocation. Following any complete revocation, the trustee shall distribute to us as marital property all marital property remaining in the trust and shall distribute all nonmarital property remaining in the trust to the settlor who contributed it. Marital property assets contributed by a settlor with sole management and control of such marital property assets shall be distributed to that settlor.

➢ ***Comment.*** The part above requires both spouses to join in an amendment of the trust. This power must be carefully considered. If one spouse becomes incompetent, that spouse cannot join in the amendment. However, it appears that the guardian of the spouse may join under section 54.20(2)(h) with court approval. The considerations concerning joinder for an amendment are similar to the considerations necessary in deciding whether to use a will substitute agreement.

Subparagraph D.2. requires that withdrawals of marital property be distributed to both spouses as marital property, except in the case of marital property assets contributed to the trust by a settlor who had sole management and control of a marital property asset; in that case, the asset would be distributed to the contributing settlor (but would retain its character as marital property).

II. Administration After Death of a Settlor

All property that is or becomes subject to the terms of this trust instrument at the time of or after the death of a settlor shall be paid or distributed as follows:

A. Payment of Claims, Expenses, and Taxes

1. If a settlor dies and a personal representative is appointed for the deceased settlor's estate, this trust shall be indebted to the personal representative for any amount the personal representative may demand in a writing stating that the demand is made for the purpose of paying claims, funeral expenses, expenses of administration, pecuniary legacies, family allowances by court order, or taxes of any kind. Upon receipt of such a demand this trust shall terminate in favor of the deceased settlor's estate as to an amount equal to the amount demanded and the trustee shall distribute such amount to the personal representative. In any event, the trustee may pay to the deceased settlor's estate such amounts as the trustee determines, in its absolute discretion, will benefit the beneficiaries of this trust.

2. If a settlor dies and a personal representative is not appointed for the deceased settlor's estate, the trustee shall pay all gifts and bequests of cash and specific property in the document or documents that are the deceased settlor's last will admitted to probate, the deceased settlor's funeral expenses, and those expenses of administration and death taxes (estate, inheritance and like taxes, including any interest and penalties but not including any generation-skipping transfer taxes) that are payable as a result of the deceased settlor's death. Notwithstanding the above, the trustee shall not pay, or if required to pay, shall seek reimbursement for, the amount of the increase in expenses of administration and death taxes resulting from the inclusion in the deceased settlor's estate for such tax purposes of an unexercised power of appointment, property in which the deceased settlor had a qualifying income interest for life under I.R.C. § 2056(b)(7) or § 2523(f), and transfers, whether during the settlor's life or as a result of the settlor's death, to or for anyone who is not a beneficiary of the deceased settlor's last will or any trust established by the deceased settlor.

3. All payments in 1. or 2. above, except interest, shall be charged against that portion of the principal of this trust includible in the deceased settlor's estate for federal estate tax purposes and any interest so paid shall be charged to the income thereof, except as follows:

a. Any such payment of taxes and last illness and funeral expenses arising on the death of the first settlor to die shall be charged against the principal of the family trust created by the death of that settlor and any interest shall be charged to the income of the family trust.

b. Any such payments for legally enforceable claims that represent obligations for which all former marital property is obligated shall be charged to the trust estate before the division specified in subparagraph II(B); except that nonmarital property or the proceeds thereof contributed by the surviving settlor shall not be subject to such obligations. Any such payments shall be charged to the decedent's interest in nonmarital property, the decedent's interest in marital property, and the surviving settlor's interest in marital property, in that order.

c. Any such payments for legally enforceable claims that represent obligations for which the deceased was obligated at death that were not incurred in the interest of the marriage or the family shall be charged to the deceased settlor's interest in the principal of the trust estate and not to the surviving settlor's interest before the division specified in subparagraph II(B).

4. In no event shall the trustee make any payment referred to in subparagraph II.A. from: (a) property added to this trust by anyone other than us or our estates; (b) property transferred to this trust by the exercise by either of us of any power of appointment other than a general power of appointment, or (c) any property, such as life insurance proceeds, that would otherwise be immune from the claims of creditors and if such payment would cause that property to be subject to the claims of creditors; provided, however, that such proceeds and other property may be used for the purchase of assets from a deceased settlor's estate at fair market value.

5. Notwithstanding any provision of this instrument, no portion of any payments made under subparagraph II.A. (or such payments made by an estate) shall be allocable or chargeable against any distribution from this trust with respect to which a federal estate tax marital deduction is claimed, unless and only to the extent that the other assets available for such payments are insufficient.

➢ ***Comment.*** Subparagraph II.A authorizes the trustee to pay claims, expenses, and taxes on the death of either settlor. Some commentators caution against including authority to remit assets for the payment of claims on the basis that this may unnecessarily expose to claims of estate creditors assets that otherwise may not be reachable. The tax payment clause is a sample only and should be modified to fit the particular clients' situation.

On the death of the first spouse to die, taxes and expenses are charged to the family trust, which always consists of the deceased spouse's one-half interest in marital property and the deceased spouse's nonmarital property, less any marital deduction amount.

On the death of the surviving spouse, taxes and expenses are charged to the survivor's trust because that is the principal includible in the "deceased settlor's" estate for tax purposes.

The payment of claims after one spouse dies can be an extraordinarily complicated matter. In the form, the family trust bears the burden of the claims because it receives the balance of the trust estate after the survivor's trust is funded. The survivor's trust receives the surviving spouse's interest in marital and nonmarital property. The form does not specify whether the family trust has a right of reimbursement from the survivor's trust.

B. Division Into Trusts. Upon the death of the first of us to die (*deceased spouse*), the trustee shall divide the assets remaining in or passing to this trust into two separate trusts, hereinafter called the survivor's trust and the family trust, as follows:

1. The survivor's trust shall consist of: (a) the interest of the settlor who survives the deceased spouse (*surviving spouse*) in marital property; (b) the surviving spouse's nonmarital property, if any; and (c) the smallest amount of the remaining property available for distribution under subparagraph II.B.1. necessary to eliminate (or, if that is not possible, to minimize) the net federal estate tax payable by the deceased spouse's estate or this trust. The term *net federal estate tax* means the estate tax imposed by I.R.C. § 2001 as a result of the first spouse's death reduced by (i) the then applicable credit amount and (ii) the then available credit for state death taxes paid to the extent that a state death tax computed on the basis of or with reference to that credit is not thereby caused or increased. In determining the amount distributable under subparagraph II.B.1.c., the trustee shall use the final federal estate tax values in the deceased spouse's estate and shall consider all factors that affect the computation of the distributable amount, such as property passing outside the terms of this subparagraph II.B.1. that does not qualify for the federal estate tax marital deduction, and charges to principal that are not deducted in computing the federal estate tax. Each asset distributed in satisfaction of the amount under subparagraph II.B.1.c. shall be valued at its value on the date it is distributed. We both recognize that the amount passing under subparagraph II.B.1.c. may be affected by the actions of the fiduciaries in exercising certain tax elections. We also recognize that it is possible, depending upon the size of the estate, the year of death, and other factors, that no amount will pass under subparagraph II.B.1.c.

2. The remaining property shall be distributed to the family trust.

➢ ***Comment.*** After claims, expenses, and taxes are paid, the trust document must identify the beneficiaries and must describe their beneficial interests. Of course there are many possibilities, depending on the spouses' wishes. If a certain spouse dies first, the spouses may want the entire trust to terminate and all assets to be distributed to the surviving spouse, or the trust to continue as one trust for the benefit of the surviving spouse, or the trust assets to be divided into two separate shares, each share consisting of each spouse's interest in marital property and nonmarital property.

If the trust estate will be divided, the spouses must consider how each share will be distributed. The decedent's share may be distributed outright to persons other than the surviving spouse, for example, children. The survivor's share may stay in trust for the survivor's lifetime, subject to a power to revoke, with dispositive provisions. The decedent's share may stay in an irrevocable trust for the benefit of the surviving spouse, with dispositive provisions at the survivor's death that minimize federal estate tax on the surviving spouse's death. These are just a few of the possibilities.

These considerations upon the death of the first spouse are not unique to estate planning in Wisconsin. For example, a typical estate plan in Wisconsin when the value of the spouses' combined assets exceeds the applicable exclusion amount calls for a division of assets while both spouses are alive so that each spouse owns assets. Each spouse may solely own assets or the spouses may own assets together as tenants in common. When each spouse owns assets in a common law property jurisdiction, the disposition of each spouse's property must be considered.

The form in this section is intended to be used when all the following factors are present:

1. The spouses own property having a combined value that exceeds the federal exemption equivalent (applicable exclusion amount) discussed in chapter 9, *supra*.
2. One spouse or both spouses own nonmarital property.
3. The spouses wish to avoid federal estate tax on the predeceasing spouse's death and minimize federal estate tax on the surviving spouse's death.

➢ ***Note.*** This form does not purport to address the differences between the federal estate tax system and the Wisconsin estate tax system. Hence, depending upon the size of the first deceased settlor's estate for estate tax purposes, there could be Wisconsin estate tax due but no federal estate tax due. After 2004 (at least until the sunset of the federal tax changes in made in 2001) there no longer will be an "applicable credit amount" for federal estate tax purposes.

➢ ***Note.*** The form assumes the existence of a federal estate tax system at the death of the first spouse. Hence, the so-called *repeal year* (2010) under the federal tax law changes made in 2001 has been disregarded.

The form calls for a division of the trust assets into two trusts upon the first death: a survivor's trust, and a family trust. The survivor's trust consists of the survivor's interest in marital property and nonmarital property. The family trust consists of the remaining trust assets (decedent's interest in marital property and nonmarital property less claims, taxes, and expenses), with one exception. The form contains a *formula pecuniary marital clause* directing the trustee to distribute from the predeceasing spouse's interest to the survivor's trust whatever is necessary to eliminate federal estate tax (*as noted above, this will not necessarily eliminate Wisconsin estate tax*).

In addition to the assets held by the trustee at the first death, assets such as probate assets poured over from the will, life insurance, and retirement benefits may be transferred to the trustee after death.

C. Savings Clause. It is intended to qualify the distribution under subparagraph II.B.1.c. for the federal estate tax marital deduction, and this instrument is to be construed accordingly. Notwithstanding any provision in this instrument to the contrary, the trustee shall have no discretion or power, the existence or exercise of which would disqualify such distribution for the marital deduction. Any power to invest in or retain unproductive property in the survivor's trust shall be subject to the power in the surviving spouse to require that any such property be converted into productive property within a reasonable time following such spouse's written request.

➢ ***Comment.*** Subparagraph C is a standard savings clause.

III. Survivor's Trust

All property that is part of this survivor's trust shall be held and administered as a separate trust as follows:

A. Income. The net income beginning as of the date of the deceased spouse's death shall be paid to or for the benefit of the surviving spouse, not less frequently than quarterly as long as he or she lives.

B. Invasion of Principal. It is our desire that, if the assets are sufficient, the surviving spouse be amply provided for so as to be able to maintain the approximate standard of living maintained during our lifetimes. Accordingly, the trustee is authorized in its discretion to distribute to the surviving spouse or apply for his or her benefit such amounts of principal as the trustee shall consider desirable for the surviving spouse's comfortable support, maintenance, general welfare, and any other worthwhile purpose, taking into account other resources known to the trustee to be available.

C. Right to Withdraw Principal. The trustee shall distribute to the surviving spouse during his or her lifetime such part or all of the principal of this trust as he or she from time to time requests in writing.

➢ ***Comment.*** Subparagraph III.C gives the surviving spouse the power to withdraw all the assets in the survivor's trust. This power may be necessary to obtain the full adjustment in basis for marital property held in the trust. Rev. Rul. 66-283, 1966-2 C.B. 297. The survivor's trust may also include property of the decedent due to the pecuniary formula clause. A power to withdraw is not necessary for this property. It can be distributed to a separate trust for the surviving spouse as long as it qualifies for the marital deduction.

D. Distribution on Surviving Spouse's Death. The surviving spouse shall have the power to appoint by will the principal and any income accrued and undistributed at the time of death to such person or persons and upon such terms and conditions, whether outright, in trust, or otherwise, as he or she may choose, by specific reference to this power of appointment in his or her will. This power shall be unrestricted and shall include the power to appoint to his or her estate. To the extent that he or she shall fail to effectively exercise this power, then the undistributed principal and accrued income shall be added to the family trust.

➢ ***Comment.*** Paragraph III is a "power of appointment" trust. Since a portion of the decedent's property may pass to the Survivor's Trust, the entire trust must qualify for the marital deduction. The general power of appointment complies with I.R.C. § 2056(b)(5).

IV. Family Trust

All property that is part of this family trust shall be held and administered as a separate trust as follows:

A. Income and Principal. The net income of this trust shall be distributed to or applied for the benefit of the surviving spouse, not less frequently than quarterly for his or her lifetime. In addition, the trustee may distribute to or apply for the benefit of the surviving spouse such amounts of the principal of this trust as the trustee in its absolute discretion, shall determine. Following the surviving spouse's death, the current and accumulated net income and the principal of this trust may be distributed to or applied for the benefit of any one or more of the group consisting of our children, and our children's issue, in such amounts and at such times as the trustee, in its absolute discretion, may determine. The terms *children* and *issue* mean children and issue of the predeceasing spouse who also are children and issue of the surviving spouse.

➢ ***Comment.*** It is intended that the term *our children* refers to the children common to both settlors. If the surviving spouse may remarry and have more children, and it is intended that they be included, the form must be modified.

B. Guides to Trustee

1. The trustee shall have no duty to preserve principal intact to the extent it shall consider its current use in the best interests of the current beneficiaries. Distributions may be made for a beneficiary's care, comfort, maintenance, education (including graduate or technical education), purchases of homes, purchases of businesses, or any other worthwhile purpose. The trustee shall have no liability to any beneficiary for any good-faith exercise of its powers to make or withhold distributions of principal. It is suggested that no principal be distributed to or for the surviving spouse until the survivor's trust assets have been exhausted, but this suggestion is not mandatory.

2. Whenever discretion is given to make distributions among a group of beneficiaries, the distributions shall be made on the basis of the purposes of this trust and the needs and circumstances of the beneficiaries. It is anticipated that the needs of beneficiaries may not be equal and that distributions to them may also be unequal. However, the trustee may charge all or any part of any distribution hereunder against the share of any beneficiary (or his or her successors in interest) if it shall consider this most equitable under the circumstances. The trustee may consider other resources known to it to be available to beneficiaries.

C. Division into Shares. At such time after the death of the survivor of us, when there is no living child of ours under the age of twenty-two (22) years, the then remaining net assets of this trust shall be divided into equal shares so that there is one share for each of our then living children and one share for each of our then deceased children who is survived by then living issue.

1. Each share for a then living child shall be distributed to that child.

2. Each share for a then deceased child who is survived by then living issue shall be paid to or held for the benefit of such one or more of the group consisting of my child's issue as my child may have appointed (whether outright, in trust or otherwise) by specific reference to this power in his or her will. Any portion of the then deceased child's share not so appointed shall be distributed to my child's then living issue by right of representation.

D. Distributions for Beneficiaries. Distributions of principal or income to or for the benefit of any person who is less than twenty-two (22) years of age or is, in the sole judgment of the trustee, incompetent to manage such property may be made in the trustee's sole discretion in any one or more of the following ways, and the trustee shall not be responsible for the application of such distributions:

1. Distribution to the person even if he or she has not reached the age of majority;

2. Distribution for expenses of support, health, education, comfort or welfare of the person;

3. Distribution to the legal guardian of the person or to a custodian for the person under any applicable Uniform Gifts to Minors Act; or

4. Retention in a separate trust for the person until, in the trustee's discretion, payment may be made by any of the methods set out above. The income and principal of the separate trust may be distributed to or for the benefit of the person at such times and in such amounts as the trustee, in its absolute discretion, may determine. The assets remaining in the separate trust at the time of the person's death shall be distributed to his or her estate.

E. Failure of Beneficiaries. If at any time after the survivor's death there shall be any assets of any trust established under this agreement not otherwise disposed of, those assets shall be divided into two equal shares to be distributed as follows: One such share shall be distributed to such then living persons and in the proportions that property of the first spouse would have been distributed if he or she had died unmarried and intestate immediately after this paragraph became operative, and the other share shall be distributed to such then living persons and in the proportions that the surviving spouse's property would have been distributed if the surviving spouse had died unmarried and intestate immediately after this paragraph became operative, provided, however, that the intestate succession laws of the state of Wisconsin in effect at the time of execution of this instrument shall determine the distributions under this paragraph.

V. Powers and Duties

(Insert desired powers)

➤ ***Comment.*** This form assumes that an independent, corporate fiduciary is the trustee. Special considerations must be taken into account if the surviving spouse or a trust beneficiary is the trustee.

VI. Trustee and Successor

(Insert name of trustee, provisions with respect to resignation and removal, and similar provisions)

VII. Accounts

(Insert provisions with respect to trustee's duty to account)

VIII. Miscellaneous Provisions

(Insert miscellaneous provisions such as definitions, change of situs, and rules for interpretation of the document)

Dated: ____________________

WITNESSES:

____________________________ ____________________________
(name of spouse)

____

____________________________ ____________________________
(name of spouse)

____

(Name of trustee) accepts the foregoing, consents to act as trustee under the terms of the foregoing trust instrument, and acknowledges receipt of the property referred to in paragraph I.

(Name of trustee)
By: ____________________________
Its: ____________________________
By: ____________________________
Its: ____________________________

C. Forced Election Clause for Will [§ 10.181]

It is my intention by this will to dispose of my individual property, my predetermination date property, whether or not it is deferred marital property, and all marital property that I own together with my spouse. I believe that my spouse will benefit by taking under the provisions of this will made for *(him) (her)* and I request that *(he) (she)* accept these provisions rather than claim the rights in such property passing under this will that *(he) (she)* has. If my spouse elects, however, to retain *(his) (her)* interest in marital property, to make the deferred marital property election in chapter 861 of the Wisconsin Statutes, I then direct that the bequest in *(his) (her)* favor of the residence, household goods and personal effects contained in Paragraph __ of this will shall be valid and operative and that all other bequests, devises, and provisions in this will in *(his) (her)* favor are void and have no effect; but the remaining provisions herein in favor of other persons shall nevertheless be valid and operative in the same manner as though my spouse predeceased me.

➢ ***Comment.*** This form can be used to put the surviving spouse to a forced election. This is not the same as the equitable election in section 853.15. The consequences of an equitable election are spelled out in section 853.15. The consequences of a forced election are spelled out in the instrument.

The forced election clause above contains a forfeiture provision if the surviving spouse elects to retain his or her interest in marital property or makes the deferred marital property election in chapter 861. The form is drafted so that doing either invokes the forfeiture. Of course, the form could be drafted in a number of other ways. For example, the form applies to both marital property and deferred marital property, but could be tailored to apply to one or the other.

➢ ***Caution.*** The tax consequences of a forced election are uncertain. Therefore, this form should be used with caution. *See supra* ch. 9.

D. Voluntary Election Clause for Will [§ 10.182]

It is my desire by this will to dispose of my individual property, my predetermination date property, and all marital property that I own together with my spouse. I believe that my spouse will benefit by taking under the provisions herein made for *(him) (her)*. I request that *(he) (she)* accept these provisions rather than claim any rights that *(he) (she)* has in property passing under this instrument. If my spouse elects to take the rights given *(him) (her)* by law, *(he) (she)* shall nevertheless be entitled to all benefits given *(him) (her)* by this will with respect to all property remaining subject to it. If my spouse elects to take the rights given *(him) (her)* under law, I confirm *(his) (her)* interest in all marital property and hereby state my intention that this will dispose only of my interest in property.

➢ ***Comment.*** This clause is used when the decedent suggests a disposition of the surviving spouse's interest in marital property. However, the suggestion does not put the spouse to an election.

The tax consequences of a voluntary election are far more certain than the tax consequences of a forced election. *See supra* ch. 9.

E. Intent with Respect to Equitable Election: No Election [§ 10.183]

I hereby declare that my spouse owns a one-half interest in marital property, if any, and that I intend that this will dispose only of my interest in such property. I do not intend to transfer my spouse's interest in our marital property.

➢ ***Comment.*** The 1985 Trailer Bill amended the equitable election statute, section 853.15, to enable the maker of a will to indicate in the will whether or not the maker intends to put the surviving spouse to an equitable election.

This form states that it is the maker's intent to not transfer the surviving spouse's interest in marital property. The next form states the maker's intention to put the spouse to an equitable election.

F. Intent To Put Surviving Spouse to Equitable Election [§ 10.184]

It is my intent by this will to dispose of my spouse's interest in marital property. It is my intent that my spouse elect, under section 853.15 of the Wisconsin Statutes, between accepting the benefits of this will and transferring *(his) (her)* marital property interest, if any, in accordance with this will; and retaining *(his) (her)* marital property interests interest, if any, and not taking under this will. If my spouse elects not to take under this will, the property given *(him) (her)* under this will shall be assigned to *(name of person to receive surviving spouse's property)*.

➢ ***Comment.*** This form is designed to put the surviving spouse to an equitable election under section 853.15. Section 853.15 permits the will to state whether there is an election and, if so, what the consequences of the election are.

Specifying the consequences will depend on the exact circumstances. The form in this section simply restates the consequences that are specified by section 853.15 if the will is silent on the matter.

G. Apportionment of Expenses of Administration [§ 10.185]

My personal representative may pay expenses of administration of my estate out of my interests in marital property, nonmarital property, or both, as my personal representative, in its sole discretion, may determine is in the best interests of my estate.

➢ ***Comment.*** Section 857.04(1) provides that the personal representative shall pay expenses of administration out of the decedent's interests in marital property and in property other than marital property on a prorated basis according to the value of those interests. Depending on the circumstances, such a proration may not be desirable. For example, if section 857.04(1) is applied literally, property may have to be sold to pay expenses of administration. In this form, the maker of the will gives the personal representative discretion to pay all expenses of administration from residue without charging the expenses to any particular assets. Presumably, the maker of a will can alter the effect of section 857.04(1), although it is not expressly permitted by the statute.

H. Declaration of Gift to Spouse Reclassifying Marital Property to Individual Property [§ 10.186]

DECLARATION OF GIFT

I, *(name of donor)* of the city of *(city)*, county of *(county)*, state of Wisconsin, own a marital property interest in the following shares of stock of *(name of company)*.

(describe certificates)

I desire to give the above described property to my spouse, *(name)*, as *(his) (her)* individual property.

To carry out my intention to make this gift, I do hereby give and deliver the above described property to *(name of spouse)* to be *(his) (hers)* absolutely.

It is my purpose and intention to vest all incidents of absolute ownership of the above described property in my spouse from this time forward, including all income attributable to such property after this gift.

Dated: ____________________.

____
Donor

ACCEPTANCE

I accept delivery of and dominion over the above gift.

Dated ____________________

____
Donee

➢ ***Comment.*** Section 766.31(10) permits spouses to reclassify property by gift. However, the Act does not define *gift*. The traditional common law definition of gift requires four elements: intent; dominion by the donor; delivery; and dominion by the donee. Under the former common law property system, as a practical matter, gifts between spouses were implemented by simply changing the title document, if there was one, or by delivery of possession if there was no title document. Whether the former methods used to implement gifts suffice under the Act is not certain. Under the Act, changing title may reflect a change of management rather than ownership.

The purpose of this form is to provide evidence that a gift has occurred. Of course, mere execution of the form is not enough. There must be a gift in fact between the spouses.

The above form expressly states that the income of the donated asset is the individual property of the donee spouse, which is consistent with section 766.31(10) as it relates to gifts between spouses.

I. Unilateral Statement Classifying Income Attributable to Nonmarital Property as Individual Property [§ 10.187]

UNILATERAL STATEMENT CLASSIFYING
INCOME ATTRIBUTABLE TO NONMARITAL
PROPERTY AS INDIVIDUAL PROPERTY

Pursuant to section 766.59 of the Wisconsin Statutes, the undersigned spouse classifies the income attributable *(to all of his or her property other than marital property, whether now or hereafter acquired) (to the following described property . . . and property acquired in exchange for or with the proceeds of that property)* as individual property. This statement is effective on the later of *(date)* the date this statement is executed, or the date of marriage.

Dated: ________________

____
Signature

STATE OF WISCONSIN
COUNTY OF __________

This instrument was acknowledged before me on *(date)* by *(name)*.

____
Notary Public, State of Wisconsin
My commission expires _______

ACKNOWLEDGMENT

I acknowledge receipt of a copy of the foregoing statement.

Dated: ________________

____
Signature

➢ ***Comment.*** This form is designed to accomplish a so-called *unilateral statement* under section 766.59. For a discussion of the statute, see sections 10.164–.167, *supra*. The receipt has been included to avoid the need for service by certified mail. The form may be used by an existing spouse or a prospective spouse.

J. Written Consent to Reclassify Life Insurance Policy as Individual Property of the Other Spouse [§ 10.188]

WRITTEN CONSENT TO LIFE INSURANCEBENEFICIARY DESIGNATION

I, *(name)*, do hereby consent to the designation by my spouse, *(name)* as the beneficiary of the proceeds of Policy #_____ which insures my spouse, *(name)*.

This written consent is effective to reclassify all of my interest, if any, in the ownership interest and proceeds of said life insurance policy as the individual property of my spouse.

In view of the fact that this written consent is effective to reclassify my interest in the ownership interest and proceeds of said life insurance policy as the individual property of my spouse, I understand that this written consent is effective to limit my rights in the policy.

This written consent is *(revocable) (irrevocable)*. This consent is effective only with respect to the beneficiary named in this instrument.

Dated: _______________.

______________________	______________________
Witness	Signature of Consenting Spouse

➢ ***Comment.*** The statutes provides for two types of written consents: a written consent by creditors under section 766.55(4) and a written consent concerning life insurance insuring a spouse under section 766.61(3)(e).

A spouse may consent to the designation of another person as the beneficiary of the proceeds or consent to the use of property to pay premiums on life insurance. Wis. Stat. § 766.61(3)(e). This form is only a consent to the designation of a beneficiary. The form in section 10.186, *infra*, is a consent to the use of property to pay premiums.

A written consent is effective only with respect to the beneficiary named in it unless the written consent provides otherwise. Wis. Stat. § 766.61(3)(e). This form pertains to a specific beneficiary.

The extent to which the written consent relinquishes or reclassifies the consenting spouse's marital property interest depends on the terms of the written consent. Wis. Stat. § 766.61(3)(e). In general, there are two choices. First, the consenting spouse can relinquish his or her marital property interest in the policy or the proceeds in favor of the beneficiary. Such a consent may be a gift to the beneficiary subject to gift tax. *See supra* ch. 9. Second, the consenting spouse can reclassify his or her marital property interest as the individual property of the other spouse. Such a reclassification may also be a gift. However, if it is, it should qualify for the federal gift tax marital deduction. *Id*. Since a gift to the spouse is likely to be tax free, the form in this section results in a gift to the other spouse, rather than to the beneficiary.

A written consent is revocable unless it expressly provides otherwise. Wis. Stat. § 766.61(3)(e). This form provides a choice. If the consent is irrevocable, the consenting spouse should be made aware of the property rights relinquished. See chapter 14, *infra*, for a discussion of joint representation.

Section 766.61(3)(e) provides that the revocation of a written consent is effective no earlier than the date on which it is signed by the revoking spouse; section 766.61(3)(e) does not operate to reclassify any property that was reclassified by the written consent or in which the revoking spouse relinquished an interest during the time the written consent was effective.

This form does not apply to property used to pay premiums. The form in section 10.188, *supra*, is used to reclassify assets used to pay premiums. The two forms can be combined into one form if desired. However, the consequences of such a combination should be carefully considered. Since this form applies only to the policy or the proceeds of the policy, and reclassifies the policy as the individual property of the other spouse, care must be taken with respect to the payment of premiums after execution of the written consent. If the written consent reclassifies a policy as the individual property of the other spouse, and marital property is subsequently used to pay a premium, it is arguable that the policy has become mixed property under section 766.61, with the result that it has a marital property component. To avoid the argument of mixing, nonmarital property should be used by the other spouse to pay premiums.

Section 766.61(3)(e) applies to "a policy." The statute does not expressly state whether it is limited to policies as they exist on the date the written consent is signed or whether the written consent may also apply to replacements of, additions to, or subdivisions of existing policies or new policies that may otherwise be acquired or issued in the future. This form applies to only a specific existing policy.

The differences between a revocable consent and irrevocable consent can be complex and thus should be considered. If the consent is revocable, it may be treated as an incomplete gift for tax purposes. If the consenting spouse can revoke at any time, he or she may have the ability to vest ownership of a portion of the life insurance policy in himself or herself.

> ➢ ***Example.*** On July 1, 1986, a husband signs a revocable written consent consenting to his wife's son by a prior marriage as beneficiary of a certain policy. The written consent reclassifies the policy to be the wife's individual property. The policy was issued after the determination date and the wife is the insured and the record owner.

Before the written consent was signed, the policy was marital property because the insured was the record owner and the policy was issued after the determination date. *See* Wis. Stat. § 766.61(3)(a). The effect of the written consent is to reclassify the policy as the wife's individual property because the written consent so states. Wis. Stat. § 766.61(3)(e).

Assume that the husband revokes the consent on January 1, 1987. If section 766.61(3)(a) is applied literally, the policy is marital property after the revocation because the insured is the record owner and the policy was issued after the determination date. However, section 766.61(3)(e) states that unless the written consent provides otherwise, revocation does not operate to reclassify any property that was reclassified from the date of the consent to the date of revocation. Presumably, despite section 766.61(3)(a), the policy is the individual property of the wife immediately after revocation of the consent. But what is the effect of the payment of future premiums? Future premiums may be paid from nonmarital property or marital property. Generally, the special time-apportionment rules of section 766.61 apply to policies insuring spouses. However, section 766.61 does not contain any time-apportionment rules for a policy issued after the determination date when the insured spouse is also the record owner. Thus, it is unclear whether the special time-apportionment rules of section 766.61 apply after revocation of a written consent.

If the special time-apportionment rules do not apply, the general property mixing rules contained in section 766.63(1) may apply. If some mixing rules apply, whether contained in section 766.61 or 766.63, the wife may be able to preserve the policy as her individual property by making sure that all premiums paid after revocation are paid with nonmarital property. Since the concept of section 766.61(3)(a) is that a life insurance policy issued after the determination date is marital property, a strong argument can be made that the policy in the example is individual property during the time the written consent is effective and is marital property after revocation, despite the classification of the property used to pay premiums after revocation.

If the consenting spouse can revoke the consent and thereby vest an ownership interest in the policy in himself or herself, a revocable consent may not be completely effective for tax purposes. The consent may have the effect of initially reclassifying the policy as the individual property of the wife, but the husband may be treated as a part owner of the policy for tax purposes during the period of the revocable consent to the extent he can vest an ownership interest in himself.

The above is just one example. The possible permutations and combinations that may arise under section 766.61 are numerous. One thing is certain: the preparation of a written consent form can be very complex.

K. Written Consent to Use of Property To Pay Life Insurance Premiums [§ 10.189]

WRITTEN CONSENT TO USE OF PROPERTY
TO PAY PREMIUMS

I, *(name)*, do hereby consent to the use of my interest in property to pay premiums on Policy #_____, which insures my spouse, *(name)*.

This written consent is effective to reclassify all my interest in property used to pay premiums on said policy as the individual property of my spouse.

In view of the fact that this written consent is effective to reclassify my interest in such property as the individual property of my spouse, I understand that this written consent limits my rights in the policy.

This written consent is *(revocable) (irrevocable)*.

Dated: _______________.

___________________________	____________________________
Witness	Consenting Spouse

➢ ***Comment.*** For a more complete discussion of written consent, see the comment to the form in section 10.188, *supra*.

Section 766.61(3)(e) provides for two types of written consents: a consent to the designation of another person as beneficiary; and a consent to the use of property to pay premiums. The former type of written consent is in section 10.188, *supra*. The form in this section is the latter type. The two types can be combined into one form if desired. The two types have been separated here to highlight their differences.

The consent form in this section may be revocable or irrevocable. If the form is revocable, adverse consequences may result if it is revoked. For example, assume that the written consent is being used to reclassify property as nonmarital property before premiums are paid on a life insurance policy owned by an irrevocable trust. If the consent is revoked, with the result that marital property is used to pay the premiums, both spouses may be considered to be grantors of the irrevocable trust for tax purposes.

If the written consent is revocable, it may be incomplete for tax purposes to the extent the consenting spouse can vest an ownership interest in himself or herself by revoking the consent. The tax consequences of using a written consent to reclassify property to pay premiums should be carefully considered.

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11

Family Law

I. Scope of Chapter [§ 11.1]

This chapter addresses the application of marital property rules or a comparison of those rules to the disposition of spouses' property when a marriage is dissolved. In addition, the marital property rules' effect on child support and maintenance is examined. The chapter also explains the effect and enforceability of marital property agreements as they relate to the dissolution of marriage. Finally, the chapter addresses nonmarital relationships and invalid marriages and their relationship to the marital property rules.[1]

II. Property Division at Dissolution [§ 11.2]

A. In General [§ 11.3]

1. Property Division Rules [§ 11.4]

The legal attributes of marriage have changed considerably from the view expressed by the Wisconsin Supreme Court in 1923 that "a marriage contract is a civil contract, but its essence is to define a status in society rather than to regulate control over property." *Roether v. Roether*, 180 Wis. 24, 27, 191 N.W. 576 (1923). In contrast, chapter 766 is titled "Property Rights of Married Persons; Marital Property." One of the purposes of the Wisconsin Family Code, chapters 765–768, is "to recognize the valuable contributions of both spouses during the marriage and at termination of the marriage by dissolution or death." Wis. Stat. § 765.001(2).

Dissolution is defined in the Wisconsin Marital Property Act, 1983 Wisconsin Act 186 (codified as amended at chapter 766 and scattered

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[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2007–08 Wisconsin Statutes, as affected by acts through 2009 Wisconsin Act 189; all references to the United States Code (U.S.C.) and the Internal Revenue Code (I.R.C.) are current through Public Law No. 111-156 (excluding Pub. L. Nos. 111-148 and 111-152) (Apr. 7, 2010); and all references to the Wisconsin Administrative Code are current through Wisconsin Administrative Register No. 652 (Apr. 14, 2010) (eff. Apr. 15, 2010). Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

sections of the Wisconsin Statutes) [hereinafter the Act or Wisconsin Marital Property Act], to mean the termination of the marriage by "decree of dissolution, divorce, annulment or declaration of invalidity or entry of a decree of legal separation or separate maintenance." Wis. Stat. § 766.01(7). Different grounds for dissolution apply to the different types of actions. *See* Wis. Stat. § 767.315. Once the marriage is dissolved, marital property principles of ownership no longer apply; however, marital property rules apply as long as the parties are married, and marital property ownership may have a practical effect on couples undergoing a dissolution action.

Before the effective date of Wisconsin's Marital Property Act, January 1, 1986, ownership of or title to property did not affect how a couple's property was divided at dissolution, except for property received by gift or inheritance. *See* Wis. Stat. § 767.61. The same is true after the effective date of the Act. Classification of property, whether as marital property or nonmarital property (i.e., individual property or predetermination date property—that is, property acquired while the parties are married but before their determination date), does not determine how assets will be divided between the spouses if the marriage is dissolved. *Id.*; *Kuhlman v. Kuhlman*, 146 Wis. 2d 588, 432 N.W.2d 295 (Ct. App. 1988); *see also* June M. Weisberger, *The Marital Property Act Does Not Change Wisconsin's Divorce Law*, Wis. B. Bull., May 1987, at 14. A spouse's rights in property during the marriage are governed by chapter 766; a spouse's rights in property at dissolution are governed by chapter 767.

Section 767.61 authorizes the court in a dissolution action to divide all property of the parties and to divest and transfer "title" accordingly. After the judgment of dissolution has been entered, the transfer of title by a property division transfers ownership to the recipient. Income and assets acquired after the divorce are the solely owned property of the owner and are not classified as marital property. *Luna v. Luna*, 183 Wis. 2d 20, 28–29, 515 N.W.2d 480 (Ct. App. 1994) (holding that circuit court erred in classifying husband's income earned after dissolution as marital property).

The court begins the process of property division with the presumption that the property of the parties is subject to division. Wis. Stat. § 767.61. As is true of classification of an asset, title to the asset at the time of dissolution is irrelevant, except when one party is attempting to prove that an asset acquired by gift from a third party other than the spouse or by inheritance, or assets traceable to such a gift or inheritance, is not subject to division, in which case title may become relevant. Assets so acquired are not divisible, unless the court finds that failure to divide the assets would create a hardship. Assets acquired by probate or nonprobate means on account of the death of another person, or assets traceable to assets so acquired, are likewise not divisible, absent hardship. *Id.*; *Asbeck v. Asbeck*, 116 Wis. 2d 289, 342 N.W.2d 750 (Ct. App. 1983); *see also infra* § 11.13. An exception to this general rule applies when the court finds that the character of the asset has changed, with the result that the asset is divisible. *See infra* §§ 11.13–.15. The party asserting that an asset was acquired by gift or inheritance or with funds traceable to a gift or inheritance has the burden of proving its source. *Preuss v. Preuss*, 195 Wis. 2d 95, 536 N.W.2d 101 (Ct. App. 1995); *Brandt v. Brandt*, 145 Wis. 2d 394, 408, 427 N.W.2d 126 (Ct. App. 1988); *see also Steinmann v. Steinmann*, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145 (discussing burden of proof for assets alleged not subject to division under marital property agreement); *Estate of Kobylski v. Hellstern (In re Estate of Kobylski)*, 178 Wis. 2d 158, 503 N.W.2d 369 (Ct. App. 1993) (discussing tracing principles and burden of proof in probate context); *Lloyd v. Lloyd (In re Estate of Lloyd)*, 170 Wis. 2d 240, 254, 487 N.W.2d 647 (Ct. App. 1992). It appears that a gift from the other party is divisible, whether the gift occurred before or after marriage. Interspousal gifts are divisible even though the transferred asset and the income from that asset may be classified as the individual property of the recipient under the Act's classification system. *See* Wis. Stat. § 766.31(10). The different treatment of property acquired by gift or inheritance makes it useful to refer to such property as *nondivisible* property, which it is under ordinary circumstances, and all other property as *divisible* property. Some cases refer to nondivisible property as "exempt."

Except for property acquired by gift or transfer at death, or purchased with funds so acquired, there is a presumption that all property is to be divided equally. Wis. Stat. § 767.61(3)(intro.). Under principles of equitable property division, a court may alter the presumptively equal division after consideration of the 13 factors set forth in section 767.61(3). The factors include the parties' age, health, skills, education, and length of time out of the job market; the value of the homemaker's contribution in caring for the home and children; and any other factor that in equity would entitle one spouse to more than one-half of the divisible property. *See* Wis. Stat. § 767.61(3)(a)–(m). Recognition of the various contributions of each spouse who has worked in or outside the home may be achieved by property division and by maintenance payments under section 767.56. Under Wisconsin's method of equitable division, the characterization of property as divisible does not necessarily mean that the property will be divided equally. By contrast, in some community property states, separate property is not divided and the division of community property and quasi-community property is strictly equal and without regard to equitable factors. *See infra* § 11.6.

In addition to awarding assets under section 767.61, the court may assign responsibility for payment of liabilities. Wis. Stat. § 766.55(2m); *see supra* ch. 6. A spouse may be assigned such responsibility even though he or she did not incur the debt. If an obligation is assigned to one spouse, the creditor has a direct cause of action against the spouse assigned the debt as well as against the spouse who incurred it. Wis. Stat. § 766.55(2m); *See infra* § 11.25. If the spouse who was not assigned responsibility pays the obligation, he or she may have a right of contribution against the spouse who was assigned responsibility for payment. *See infra* § 11.25.

After dissolution, with respect to a former marital property asset for which the decree makes no provision, each former spouse owns an undivided one-half interest in the asset as a tenant in common. Wis. Stat. § 766.75. However, it is highly unusual for a decree not to deal with an asset.

A legal separation is a dissolution of marriage, and a decree of legal separation has the legal attributes of a divorce in almost all respects. *See* Patricia K, Ballman, *Legal Separation: Is It a Termination of Marriage or a Suspension of Marriage?*, 25 Wis. J. Fam. L. 1 (2005).

2. Uniform Marital Property Act [§ 11.5]

The Prefatory Note to the Uniform Marital Property Act (UMPA), 9A U.L.A. 103 (1998 & Supp. 2003), *reprinted infra* app. A, the uniform act on which the Wisconsin Marital Property Act is based, describes UMPA as an extension of the movement in common law property states toward the concept of sharing property at the death of a spouse or at the dissolution of the marriage. The Prefatory Note states that embodied in this movement is the equal sharing during the marriage of the economic rewards that flow from the personal efforts of either or both spouses during marriage. The interest of each spouse in a marital property asset arises the instant the asset is acquired or created. It is not necessary for one spouse to wait for a gift from the other spouse, nor is it necessary to end the marriage to establish equal ownership. The heart of UMPA is economic equality throughout the marriage. *See* Prefatory Note to UMPA.

Wisconsin followed UMPA's principles in that no change in the law of divorce or other forms of dissolution was intended by the state's passage of the Marital Property Act. With the exception of one procedural amendment to chapter 767, *see* Wis. Stat. § 767.331, no statutory change in the law concerning dissolution resulted from the adoption of the Marital Property Act. The UMPA Prefatory Note explains the role of property law at the dissolution of a marriage:

> The Act takes the parties "to the door of the divorce court" only. It leaves to existing dissolution procedures in the several states the selection of the appropriate procedures for dividing property. On the other hand the Act has the function of confirming the *ownership* of property as the couple enters the process. Thus reallocation of property derived from the effort of both spouses during the marriage starts from a basis of equal undivided ownership that the spouses share in their marital property.

Wisconsin did not enact all UMPA sections that affect dissolution. For example, the state omitted UMPA section 13, concerning the valuation of deferred employment benefits, and UMPA section 17, concerning the treatment of certain property at dissolution.

When the Act first became effective, there was some confusion as to whether marital property classification rules would have an impact on dissolution actions. In *Kuhlman v. Kuhlman*, 146 Wis. 2d 588, 432 N.W.2d 295 (Ct. App. 1988), the circuit court determined that all property of the parties was classified as marital property. The circuit court divided the property equally, on the ground that chapter 766 superseded the equitable-division provisions of section 767.255 (now section 767.61). The court of appeals found that the Act does not determine property division and remanded the case for property division in accordance with the equitable-property division standards of section 767.255 (now section 767.61).

Thus, UMPA and the Wisconsin Marital Property Act are property statutes. Nevertheless, how an asset is owned or classified does not alter a divorce court's authority to disregard title or ownership in making a property division. *See* UMPA § 17 cmt.; Wis. Stat. Ann. § 766.75 Legis. Council Notes—1985 Wis. Act 37, §§ 141–143 (West 2009). Assets that are excluded from property division are excluded by authority of section 767.61, not because of their classification under chapter 766.

In *Gardner v. Gardner*, 190 Wis. 2d 216, 236–37, 527 N.W.2d 701, 708 (Ct. App. 1994), the court of appeals, citing *Kuhlman*, reiterated the principle that classification under the Marital Property Act has no relation to how assets are divided upon dissolution of the marriage.

3. Comparison of Wisconsin to Other Community Property States [§ 11.6]

The various community property states, as well as common law property states, apply several approaches to the division of property at dissolution. Since none of them is completely analogous to the approach in Wisconsin, extreme caution must be exercised in considering case law from other community property states.

In California, Louisiana, and New Mexico, the spouses' community property is divided equally, and in California, quasi-community property, which is property that would have been community property if it had been acquired in California, is also divided equally; in these states, each spouse receives his or her separate property. *See* Cal. Fam. Code Ann. §§ 2550–2660 (West, WESTLAW current with all 2009 Reg. Sess. laws; all 2009-2010 1st through 5th, 7th, and 8th Ex. Sess. laws; urgency legislation through Ch. 14 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot); La. Civ. Code Ann. Art. 2336 (West, WESTLAW current through 2009 regular session); N.M. Stat. Ann. § 40-4-3 (West, WESTLAW current through laws effective March 9, 2010 of the Second Session of the 49th Legislature (2010)); *Michelson v. Michelson*, 520 P.2d 263 (N.M. 1974). A contested property division in one of these states would focus on classification of assets, and in turn on tracing, since equitable factors are not relevant. A spouse may attempt to show that property is his or her separate property to be awarded all of it and may attempt to show that the other spouse's allegedly separate property is community property to receive one-half. California is unique in that it also has a detailed system for assigning responsibility for payment of debts incurred while the parties were married but residing separately.

By contrast, Arizona, Idaho, Nevada, Texas, and Washington do not divide community property assets equally but rather provide for an equitable division of community property assets at dissolution. Ariz. Rev. Stat. Ann. § 25-318 (West, WESTLAW current through legislation effective February 9, 2010 of the Sixth Special Session, and legislation effective April 5, 2010 of the Second Regular Session of the Forty-Ninth Legislature (2010)); Idaho Code § 32-712 (West, WESTLAW current through (2010) Chs. 1-161 and HJRs 4, 5, and 7 that are effective on or before March 29, 2010); Nev. Rev. Stat. § 125.150 (West, WESTLAW current through the 2007 74th Regular Session and the 25th Special Session (2008) of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau through the 25th Special Session (2008)); Tex. Fam. Code Ann. § 7.001 (West, WESTLAW current through end of 2009 Regular and First Called Session of the 81st Legislature); Wash. Rev. Code Ann. § 26.09.080 (West, WESTLAW current with 2010 legislation effective through March 16, 2010). In these states, separate property is awarded to the owner, except that in Washington separate property may also be equitably divided (although whether an asset is separate or community property is a factor in arriving at an equitable division). Wash. Rev. Code Ann. § 26.09.080 (West, WESTLAW current with 2010 legislation effective through March 16, 2010). In these states, courts may also divide certain types of assets equitably notwithstanding that an asset might not be community property; such non-community property could be homestead property, co-owned property, or property acquired while the parties resided in another state that would have been community property if acquired in the state in which the parties resided when the dissolution occurred. Wash. Rev. Code Ann. § 26.09.080 (West, WESTLAW current with 2010 legislation effective through March 16, 2010); *see also Washington Community Property Deskbook* § 5.40 (3d ed. 2003); W.S. McClanahan, *Community Property Law in the United States* 244–50 (1982 & Supp. 1992). There are also variations in the application of equitable factors.

In all community property states, each spouse has an undivided one-half interest in each community property asset, but each asset need not itself be divided upon dissolution. *See supra* § 2.22. A court in a state requiring equal division of community property may divide the aggregate of all community property so that each spouse receives an equal share of the total. If an equitable division is allowed, then different shares of the aggregate of the community property or of the community and separate property may be awarded to the parties.

Since Wisconsin's property-division system at dissolution includes equitable division of both marital property assets and nonmarital property assets, Washington appears to have the system closest to Wisconsin's. However, an important distinction is that Washington treats both inherited property and property brought to the marriage as separate property, but there is no distinction in the way assets of each type are treated at dissolution. Wash. Rev. Code Ann. § 26.09.080 (West, WESTLAW current with 2010 legislation effective through March 16, 2010). Wisconsin, on the other hand, treats these two types of individual property differently at dissolution. Property brought to the marriage is subject to division, but property acquired before or after marriage by gift or inheritance, or property acquired with funds received by gift or inheritance, is only divided if failure to do so would result in a hardship for the other spouse or the children. Wis. Stat. § 767.61; *See infra* §§ 11.10, .13.

Because of the wide variation in property-division rules in other community property states, and Wisconsin's well-established rule that classification under the Act is not a factor in determining property division, case law from other community property states concerning property division is of limited value.

4. Previous Representation by Counsel [§ 11.7]

An attorney who previously represented both spouses in various matters may be asked by one of the spouses to represent that spouse in a divorce action. This may be economical if the attorney is familiar with the client's business or other financial affairs. However, if significant matters involved in a prior dual representation are relevant to the divorce, written consent from the other spouse to the subsequent representation is necessary. *See infra* ch. 14.

In addition, the attorney must be alert to possible conflicts of interest that did not arise under the common law property system. For example, the attorney who represents a business corporation in which one spouse is employed, the stock of which is classified as the spouses' marital property, may be asked to represent only the employed spouse in a divorce. In representing the business, the attorney may have acquired confidential information, and agreeing to represent either spouse in a divorce may, depending on the particular circumstances, conflict with the attorney's prior representation. *See, e.g.*, *Mathias v. Mathias*, 188 Wis.

2d 280, 525 N.W.2d 81 (Ct. App. 1994) (holding that prior estate planning for husband was "substantially related" to divorce, and husband's attorneys were precluded from representing wife in dissolution). In such a case, unless both spouses consent, the attorney must decline to represent either spouse. *See Woods v. Superior Court*, 197 Cal. Rptr. 185 (Ct. App. 1983). *But see Friedman v. Friedman (In re Marriage of Friedman)*, 122 Cal. Rptr. 2d 412 (Ct. App. 2002) (holding that wife could not avoid prenuptial agreement even though same law firm represented both spouses in estate planning and represented only husband with respect to agreement, because wife was attorney and no duress or unfair advantage was found).

B. Application of Principles of Equitable Division to Various Types of Property [§ 11.8]

1. Marital Property [§ 11.9]

The only kind of property that is nondivisible at dissolution is property that is acquired by gift from a third party or by reason of the death of another or that is purchased with funds so acquired (although even this property is divisible if hardship would otherwise result). Wis. Stat. § 767.61(2). In general, such nondivisible property is classified as individual property. Wis. Stat. § 766.31(7)(a); *See infra* § 11.13.

It follows that marital property assets are divisible at dissolution of the marriage. The determination of what assets are to be divided is made as of the date of dissolution, unless "special circumstances" exist. *Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990); *see also Long v. Long*, 196 Wis. 2d 691, 539 N.W.2d 462 (Ct. App. 1995) (holding that income earned and spent during pendency of dissolution was marital property but could not be divided as an asset). Although there is a presumption that divisible property is to be divided equally, the court may depart from the equal division after considering the equitable factors of section 767.61(3)(a)–(m).

The burden of proving that property is nondivisible at dissolution is on the party attempting to exclude the property from division. *Steinmann*, 2008 WI 43, ¶ 26, 309 Wis. 2d 29; *Preuss*, 195 Wis. 2d at 101; *Brandt*, 145 Wis. 2d at 408–09; *Popp v. Popp*, 146 Wis. 2d 778, 786–87, 432 N.W.2d 600 (Ct. App. 1988). Although property received by gift or inheritance is entitled to a statutory presumption of nondivisibility, property classified as individual by a marital property agreement is not. *Steinmann*, 2008 WI 43, ¶ 38, 309 Wis. 2d 29. Once property has been determined to be part of the divisible estate, there need be no showing of hardship to divide it. *Brandt*, 145 Wis. 2d at 417.

One commentator has posited a theory that a marital property agreement classifying spouses' assets as marital property for all purposes except dissolution, thereby obtaining the tax benefits of community property ownership at death, will not subject otherwise nondivisible assets to division at dissolution. Carl J. Rasmussen, *Divorce Provisions in Opt-in Marital Property Agreements*, Wis. Law., Apr. 1994, at 15. The dissolution and tax ramifications of this theory are uncertain. *See supra* § 11.3.

2. Property Brought to Marriage Not Acquired by Gift from Third Party or by Reason of Another Person's Death [§ 11.10]

Property brought to the marriage, whether inherited or received by gift or acquired by other means, is classified as individual property or as predetermination date property if the marriage occurred before January 1, 1986, or while the parties resided in another state. Wis. Stat. § 766.31(6) (defining individual property). However, these two "types" of individual or predetermination date property—that is, property brought to the marriage that was inherited or received by gift and property brought to the marriage that was acquired by other means—are treated differently at dissolution. *See* Wis. Stat. § 767.61(2)(a).

At dissolution, property brought to the marriage that was not acquired as a gift from a third party or inherited, or was not purchased with funds so acquired or traceable to such funds, is subject to division under section 767.61, although the extent of such property is one factor that may be considered in awarding the spouse who owns such property a greater share of the estate. Wis. Stat. § 767.61(3)(b); *see Hokin v. Hokin*, 231 Wis. 2d 184, 194–95, 605 N.W.2d 219 (Ct. App. 1999) (holding that court was not required to divide deferred employment benefits using the "coverture" fraction found in section 766.62(2) but was not prohibited from doing so). On the other hand, the property one spouse acquires by gift or inheritance before or after the marriage is excluded from the property division, assuming it is traceable to identifiable assets at the time of the dissolution and has not been transmuted. *See infra* § 11.13. Such property is awarded to the owner spouse unless it would be a hardship to the other spouse or the children of the parties to do so. Wis. Stat. § 767.61(2)(b); *Doerr v. Doerr*, 189 Wis. 2d 112, 121–25, 525 N.W.2d 745 (Ct. App. 1994).

Persons who inherit or are given property while they are not married might not keep separate records for such property. If marriage is not contemplated, there is no reason for a person not to mix such property with property acquired by other means. When mixing has occurred before marriage, and a person wishes to retain the property in the event of divorce, it may be appropriate to use a marital property agreement before marriage to confirm the identity of the gift or inheritance portion of a person's assets. *See supra* § 7.32.

3. Property Acquired While Married and Before Determination Date Other Than by Gift from Third Party or by Reason of Another Person's Death [§ 11.11]

Assets that spouses acquire while they are married but before their determination date—that is, while the spouses resided in another common law state or while they resided in Wisconsin before January 1, 1986—are neither marital property nor individual property but rather a type of predetermination date property. The spouses' rights in such property were unchanged by the passage of chapter 766. Wis. Stat. § 766.31(8). Unless a spouse can prove that an asset that is predetermination date property was acquired by gift from a person other than the other spouse or was acquired by reason of the death of another person, or was purchased with property so acquired, the asset is divisible in a property division at dissolution of the marriage. Wis. Stat. § 767.61(2)(a).

The fact that spouses acquire an ownership interest during marriage in marital property assets acquired after the determination date but do not acquire a present interest in similar property acquired while the spouses are married but before the determination date does not affect the spouses' rights in assets divided at dissolution. Section 767.255(5e) of the original Marital Property Act treated assets that would have been marital property if acquired after the determination date in the same manner as marital property upon dissolution. The inclusion of this subsection might have been interpreted to mean that predetermination date property that would have been classified as marital property under the Act would have to be divided equally at dissolution. This subsection was deleted by 1985 Wisconsin Act 37 [hereinafter 1985 Trailer Bill], to avoid confusion concerning the Act's effect on property division at divorce, since a change in the court's power to equitably divide property was not intended. *See* 1985 Wis. Act 37, § 150. Links to acts amending the Wisconsin Marital Property Act are available in appendix B, *infra*.

➢ ***Note.*** Section 767.255 was repealed and recreated as section 767.61, effective January 1, 2007.

4. Property Acquired by Gift from Third Party or by Reason of Another Person's Death [§ 11.12]

a. In General [§ 11.13]

Section 767.61(2)(a)–(b) provides that assets received by inheritance or by gift to a spouse from a third party, before or after marriage, or assets traceable to such assets, are excluded from property division unless the court finds that failure to divide the asset will result in a hardship for the other spouse or the parties' children. Likewise, funds or other assets acquired on account of the death of another person, including life insurance proceeds, death benefits payable by a deferred-employment-benefit plan, individual retirement account (IRA) proceeds, property acquired by right of survivorship, trust distributions, bequests, inheritances, funds received by payable-on-death designation, or any other transfer under chapter 705 are nondivisible, unless the court finds that failure to divide the asset will result in a hardship for the other spouse or the parties' children. Wis. Stat. § 767.61(2)(b); *see also Doerr v. Doerr*, 189 Wis. 2d 112, 525 N.W.2d 745 (Ct. App. 1994). If awarding nondivisible assets to the owner would result in a hardship to the other spouse or the children, the court may award sufficient nondivisible property to the other spouse to avoid the hardship. Wis. Stat. § 767.61(2)(b); *see also Grumbeck v. Grumbeck*, 2006 WI App 215, 296 Wis. 2d 611, 723 N.W.2d 778 (holding that court may not make de facto division of gifted property by awarding a majority of divisible assets to nonowning spouse without showing of hardship); *Popp*, 146

Wis. 2d at 790–92; *Asbeck v. Asbeck*, 116 Wis. 2d 289, 295, 342 N.W.2d 750 (Ct. App. 1983). This rule is unchanged by the Act.

A spouse attempting to exclude from a property division assets acquired by gift or inheritance has the burden of proof that an asset is not subject to division. *Preuss*, 195 Wis. 2d at 101; *Brandt*, 145 Wis. 2d at 408. Once the party attempting to exclude the asset has made a prima facie showing that the asset is traceable to property acquired by gift or inheritance, the burden shifts to the other party to rebut the evidence by showing that the character of the asset has changed from nondivisible to divisible. *Brandt*, 145 Wis. 2d at 408–09; *Spindler v. Spindler*, 207 Wis. 2d 327, 558 N.W.2d 645 (Ct. App. 1996); *Trattles v. Trattles*, 126 Wis. 2d 219, 376 N.W.2d 379 (Ct. App. 1985); *see also* Neal Nettesheim, *Gifted and Inherited Property: To Divide or Not Divide?*, 10 Wis. J. Fam. L. 127 (1990).

Two key concepts have evolved in the analysis of whether a particular asset is subject to division: *character* and *identity*. The concept of character is loosely analogous to the classification and reclassification of property when a dissolution court determines whether an asset that was not subject to division when one spouse acquired it has changed so that it is subject to division. *See supra* ch. 3. However, the classification of property under marital property law is not synonymous with a determination of its character for purposes of property division at dissolution, and property is not classified in the dissolution proceeding. The rationale underlying the application of marital property law to the classification of assets is distinct from the principles applied in dividing assets at dissolution, and cases decided after the Marital Property Act became effective have made it clear that an asset's classification does not determine its division at dissolution.

If the court determines that a nondivisible asset has not changed its character, then the court must determine if it can be identified. The concept of identity is loosely analogous to tracing principles applicable to mixed property and whether an asset in existence at the time of divorce can be proved to have been acquired with funds traceable to an asset that was nondivisible when it was acquired. Otherwise nondivisible assets that have lost their character or have not retained their identity are subject to property division at dissolution. *Preuss*, 195 Wis. 2d at 103–04.

The Wisconsin Court of Appeals sought to clarify the line of cases dealing with character and identity in *Derr v. Derr*, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170. The court found those terms confusing and largely unhelpful when dealing with whether an asset is subject to division in the dissolution of a marriage. Instead, the court focused on tracing, as opposed to identity, which it described as "nothing more than the exercise of following an asset trail. If an asset, or component part of an asset, can be traced to a source, we then rely on *other* principles and rules to determine whether the traced asset is divisible or non-divisible." *Id.* ¶ 19. The party wishing to exclude an asset from division has the burden of tracing the existing asset to a nondivisible source. *Id.* ¶¶ 11, 17 (citing *Brandt v. Brandt*, 145 Wis. 2d 394, 427 N.W.2d 126 (Ct. App. 1988)); *see also Krejci v. Krejci*, 2003 WI App 160, 266 Wis. 2d 284, 667 N.W.2d 780.

The *Derr* court also rejected the term character in favor of *donative intent* when determining whether an asset has changed from a nondivisible asset to one that is subject to division. *Derr*, 2005 WI App 63, ¶ 24, 280 Wis. 2d 681. After surveying the many cases dealing with change of character or donative intent in making a gift of a nondivisible asset to the pot of marital assets subject to division, the court in this case held that the husband had not possessed the requisite donative intent. The husband's parents gave him a parcel of commercial real estate, which he kept in his sole name. Even though he had executed a mortgage on the building for a loan, the proceeds of which were used for the benefit of the family, and payments were made with marital funds, he did not intend to make a gift to the marriage. *Id.* ¶ 62. However, the debt was divisible. *Id.* ¶¶ 48–49; *see also* Marta T. Myers, *Gifted and Inherited Property after* Derr*: "Tracing" and "Donative Intent" Are In; "Character" and "Identity" Are Out*, 26 Wis. J. Fam. L. 37 (2006); Brett R. Turner, *Tracing, Transmutation and the Language of Law*, 17 Divorce Litig. 89 (2005).

b. Character [§ 11.14]

Cases dealing with character focus on how the asset is held or titled and whether it was treated as separate by the owner during the marriage. A change in the classification or character of the asset as a result of the owner's conduct is sometimes referred to as *transmutation*. It is relevant whether the asset, or assets traceable to the asset, originally acquired by gift or inheritance are still in the name of the spouse who originally acquired the asset. If the spouse who originally acquired the asset keeps it separate from the spouses' other assets and continually treats it as being solely owned, it retains its character. *See, e.g.*, *Popp*, 146 Wis. 2d at 788 (discussed *infra*); *Gardner v. Gardner*, No. 92-1258, 1993 WL 331496 (Wis. Ct. App. Sept. 2, 1993) (unpublished opinion not citable per section 809.23(3)); *see also Lloyd*, 170 Wis. 2d at 259 (discussing character in probate context). Courts in cases involving real estate in which title changed from the name of the spouse who acquired the nondivisible real estate, or the funds used to acquire it, to the names of both spouses have held that the real estate changed its character and became divisible; *see Steinmann*, 2008 WI 43, ¶ 58, 309 Wis. 2d 29 (holding that allegation of no donative intent in titling property jointly not proved); *Bonnell v. Bonnell*, 117 Wis. 2d 241, 344 N.W.2d 123 (1984) (holding that wife changed title to inherited cottages to a joint tenancy with her husband, thereby changing character and subjecting cottages to division); *Weiss v. Weiss*, 122 Wis. 2d 688, 691–94, 365 N.W.2d 608 (Ct. App. 1985) (holding that funds received by gift used for down payment on joint real estate were divisible). Whether types of assets other than real estate or titled assets have changed character depends on the nature of the asset and the conduct of the acquiring spouse. *See also Rumpff v. Rumpff*, 2004 WI App 197, 276 Wis. 2d 606, 688 N.W.2d 699 (holding that gifted property was no longer nondivisible individual property at time of divorce and upholding equal division; court did not address hardship).

Donative intent is necessary to change the character of an asset from nondivisible to divisible. *Steinmann*, 2008 WI 43, ¶ 34, 309 Wis. 2d 29; *Brandt*, 145 Wis. 2d at 410–11. For example, in *Popp v. Popp*, 146 Wis. 2d 778, 432 N.W.2d 600 (Ct. App. 1988), the husband had received a gift of stock in a family corporation during the marriage. He had used corporate funds to purchase artwork, some of which was used in the family home. He did not treat the artwork as his solely owned property, thus making it possible to infer donative intent. The court found that the artwork was contributed to family use and was divisible, while the stock received by gift was not.

Donative intent can usually be inferred from a party's actions. For example, the husband in *Finley v. Finley*, 2002 WI App 144, 256 Wis. 2d 508, 648 N.W.2d 536, placed inherited funds in a joint bank account, and a presumption arose that the character of the funds was changed from the husband's individual property to funds having a family or marital purpose, thus making the IRAs purchased with those funds divisible when the parties later divorced. The evidence showed that these funds were part of an overall plan of retirement planning for the spouses, and the presumption was not rebutted.

Another example of donative intent involved a change in the title of real estate to the names of both spouses. In *Steinmann*, the wife used her funds, classified as her individual property by a marital property agreement, to purchase real estate titled jointly. The court held the real estate divisible. *Steinmann*, 2008 WI 43, ¶ 2, 309 Wis. 2d 29. Similarly, in *Weiss*, 122 Wis. 2d at 692–94, the husband had used a $5,000 gift as a down payment on a home placed in joint tenancy with his wife. The court found this sufficient to establish donative intent, and it held that the entire value of the house was divisible. In *Trattles v. Trattles*, 126 Wis. 2d 219, 376 N.W.2d 379 (Ct. App. 1985), the wife had received gifts of cash that were used for ordinary living expenses, household items, and mortgage payments and improvements on jointly held real estate. The court stated that the mixing of nondivisible assets and other assets created a presumption of donative intent, which in that case was not rebutted. Mixing can cause the character of property to change even if the circuit court does not make a specific finding that the donor spouse had donative intent. *Id.* at 224. Once the court determines that the character of the property has changed from property not ordinarily subject to division to divisible property, then it is not necessary to determine its "identity" (by tracing the inherited portion). *Id.* at 227–28; *see also* Joan F. Kessler, et al., *The Law of Tracing Separate Property: Where Should Wisconsin Be Going?*, 21 Wis. J. Fam. L. 71 (2001); Joan F. Kessler, *Transmutation: Finding Extra Property to Divide in Divorce*, Wis. Law., Aug. 1990, at 13; Brett R. Turner, *Changing Horses in Midstream: The Doctrine of Transmutation*, 3 Equitable Distribution Alert 5 (May 1991); Brett R. Turner, *Transmutation by Commingling and the Process of Tracing*, 3 Equitable Distribution Alert 13 (June 1991).

The creation of joint ownership of a bank account in the names of both spouses is not necessarily conclusive as to a change of character. *See supra* § 3.14. For example, the wife in *Zirngibl v. Zirngibl*, 165 Wis. 2d 130, 477 N.W.2d 637 (Ct. App. 1991), placed funds acquired by gift before marriage in a joint bank account for the purchase of a home to be held in joint tenancy. However, the husband titled the house in his sole name. The court found that the wife's deposit to the joint bank account was a conditional gift, and since the condition (i.e., the purchase of a home held in joint tenancy) was not met, she was entitled to recover the funds intended for the purchase of joint real estate when the parties' assets were divided at dissolution. *Id.* at 135–37. In *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990), the husband had placed otherwise nondivisible funds in a joint account. These funds were not, however, commingled with other funds, and the court found that the funds were only in a joint account to protect the wife if the husband died and that there was no present donative intent. Therefore, no change in character was found. *Id.* at 550–51. Similarly, the wife in *Brandt v. Brandt*, 145 Wis. 2d 394, 427 N.W.2d 126 (Ct. App. 1988), had inadvertently placed inherited funds in a joint brokerage account, but she placed them in her own name as soon as the mistake was discovered. No change of character occurred with respect to that account or to the same funds later transferred to an account held by a bank. The brokerage account appeared to have been treated like a bank account for tracing purposes. Unlike in *Weberg*, however, in *Brandt*, other divisible funds were placed into the account into which nondivisible funds had been deposited. Through "countless transactions," these nondivisible funds could not be traced and lost their identity, even though they had not lost their character. *Brandt*, 145 Wis. 2d at 413; *see also supra* §§ 2.293, 3.14. *Brandt* and *Weberg* illustrate the interaction between the application of character and identity concepts and how such application affects the divisibility of an asset. *See also* Neal Nettesheim, *Gifted and Inherited Property Character and Identity*, 8 Wis. Law. Marital Prop. F. 11 (1991).

In *Spindler v. Spindler*, 207 Wis. 2d 327, 558 N.W.2d 645 (Ct. App. 1996), the wife attempted to prove that her labor and the expenditure of marital property funds to maintain the husband's inherited cottage had changed its character, entitling her to a portion of its increase in value during marriage. The property had been in the husband's name since he acquired it, so its identity did not change. *Id.* at 339. The court of appeals overruled the circuit court's finding that the property had lost its separate character, given the testimony of the appraiser that the increase in value of the property overall resulted solely from an increase in the value of the land and that the improvements' value had not grown. The court held that any increase in value as a result of the nonowning spouse's efforts must be substantial to change the asset's character. *Id.* at 339–40. However, the marital property funds expended for upkeep, which the court stated could be readily ascertained, were subject to division, and the court assigned the balance of the cottage's value to the husband. *Id.* at 340. The court of appeals remanded the case to the circuit court to determine whether there would be a hardship to the wife if the value were not divided. *Id.* at 341.

The *Spindler* case was distinguished by the court in *In re Czerneski*, 330 B.R. 240 (Bankr. E.D. Wis. 2005), in which the debtor husband was attempting to claim a portion of the value of an individual property asset owned by the debtor wife. The court rejected the husband's position, observing that payment of property taxes did not entitle the husband to a property interest, citing *Krueger v. Rodenberg*, 190 Wis. 2d 367, 527 N.W.2d 381 (Ct. App. 1994), and that any rights to the property under divorce law, such as awarding otherwise nondivisible property to the nonowning spouse on account of hardship, did not apply in the bankruptcy context, which looks solely to property law. *See supra* ch. 4; *see also* David R. Knauss, Comment, *What Part of Yours is Mine?: The Creation of a Marital Property Ownership Interest by Improving Nonmarital Property Under Wisconsin's Marital Property Law*, 2005 Wis. L. Rev. 855.

- ***Comment.*** Had mixing occurred in *Czerneski* as a result of the use of marital property funds to pay real estate taxes on the wife's real estate, the husband could have claimed his interest exempt. The couple could then have excluded a greater value from their combined bankruptcy estates, which would have preserved the value for the debtors rather than their creditors.

In *Fowler v. Fowler*, 158 Wis. 2d 508, 463 N.W.2d 370 (Ct. App. 1990), inherited stock that was exchanged for other stock did not change character, but cash gifts deposited in a joint account did. The wife had inherited AT&T stock. When AT&T was required to divest itself of assets, the stock was exchanged for shares of various other companies. The court found that the exchange did not result in a change in the stock's character. *Id.* at 516. However, gifts of cash that were deposited in the parties' joint bank account along with other divisible funds had been so commingled as to lose their character, making them fully divisible. *Id.* at 517–18. The court found the joint account was divisible in character, whereas the courts in *Brandt* and *Weberg* held that the joint accounts in those cases retained their nondivisible character.

A single asset can have a character that has both a divisible component and a nondivisible component. In *Torgerson v. Torgerson*, 128 Wis. 2d 465, 383 N.W.2d 506 (Ct. App. 1986), only the down payment on rental real estate consisted of the wife's inheritance;

mortgage payments and maintenance expenses had been paid from the rent and from the spouses' earnings from employment. Title remained in the wife's name. The husband made no claim to the down payment, and that amount was returned to the wife. The parties did not ask the court to determine whether the down payment had lost its character. The court divided the value of the asset in excess of the down payment.

Schwegler v. Schwegler, 142 Wis. 2d 362, 364–66, 417 N.W.2d 420 (Ct. App. 1987), also involved an asset with possible divisible and nondivisible components. The husband had received real estate by gift before the marriage and had built a house on it using other funds, also before the marriage. The circuit court had awarded the wife one-half of the appreciation in the house that had occurred during the marriage. The husband argued that he should receive the entire value of the house and land. The court of appeals remanded the case to the circuit court to determine whether the house was an asset with separate character that would be divisible even though the land was not.

Wierman v. Wierman, 130 Wis. 2d 425, 387 N.W.2d 744 (1986), demonstrates the well-settled rule that marital property classification rules do not govern property division. The wife had received a gift of an interest in a real estate partnership. The partnership was managed by the wife's father. Except for amounts needed to pay income taxes, the profits from real estate sales were retained in the partnership and reinvested. Neither spouse's labor contributed to the increase in the partnership's value. *See infra* § 11.16. The court found that no mixing of nondivisible and other assets had occurred, so the character of the partnership interest was not changed. However, the court did not address the wife's share of accumulated partnership income, which would have been added to the wife's partnership account each year. Under classification principles, the wife's share of accumulated partnership income would be marital property and subject to division. *See supra* § 2.51, *infra* § 11.17. It appears that even though the wife's share of the income from the partnership would have been marital property, the court treated it as nondivisible because it remained in the partnership, thereby preserving its character and identity for divorce purposes. Also, the fact that neither spouse's efforts contributed to the acquisition of funds retained in the partnership may have been a consideration in the award of the entire value of the partnership interest to the wife, even though those funds would have been marital property. *Wierman*, 130 Wis. 2d at 441.

Lendman v. Lendman, 157 Wis. 2d 606, 460 N.W.2d 781 (Ct. App. 1990), also concerned income retained by a business entity that originally would have been characterized as nondivisible. The husband had formed a corporation, contributed $8,500 of inherited funds as the initial capital, and loaned the corporation approximately $25,000 of inherited funds. The corporation incurred debt to acquire the business and reduced the debt from corporate income as it was earned. The parties stipulated that the value of the stock in the corporation increased during the marriage by the amount of the debt reduction. The court found that the initial capital maintained its nondivisible character, but the increase in value of the corporation attributable to the debt reduction was divisible. *Id.* at 610–12. See section 11.16, *infra*, for further discussion of *Lendman* and the effect of labor on the value of an entity. If the parties had not agreed on the value of the corporation and the component part of the value that represented inherited funds, it is not clear how the court could have determined what part of the asset's value had retained its inherited character.

In *Arneson v. Arneson*, 120 Wis. 2d 236, 355 N.W.2d 16 (Ct. App. 1984), the husband worked in his family-owned business. He received some of his stock in the business by gift and purchased some of the stock using dividends generated by the stock and distributed to him. The court distinguished between the asset, which was acquired by gift and retained its character, and the income the asset produced, which was earned and not acquired by gift. It did not divide the stock acquired by gift but did divide the stock purchased with dividends. *Id.* at 245–46; *See infra* § 11.17. These earnings were at all times divisible in character. The appreciation in the stock's value, resulting from the husband's efforts or otherwise, was not addressed.

Similarly, the court in *Preuss*, 195 Wis. 2d at 102–03, held that the offspring of cattle acquired by gift were not themselves a gift excludable from division. The original cattle, which the wife had received by gift from her father, no longer existed. Therefore, all existing cattle had been acquired other than by gift and were subject to division.

The character of distributions from a trust established by a third party was addressed in *Friebel v. Friebel*, 181 Wis. 2d 285, 510 N.W.2d 767 (Ct. App. 1993). The court distinguished distributions of trust income from the dividend income received by the shareholder spouse in *Arneson*. Unlike the income at issue in *Arneson*, the income from assets in the trust in *Friebel* was not income from an asset owned by a spouse;

the trust had legal ownership of the assets, and the beneficiary had no right to demand possession or to dispose of the assets. Thus, when the trust funds were distributed, they were a gift at that time from the settlor. *Id.* at 294–95. It was immaterial whether the distributions were from the trust's principal or from the trust's income. Because the wife had kept these distributions in a separate account and there was no evidence of donative intent to change ownership, the distributions retained their character. *Id.* at 298. However, income earned on the distributions in the separate account were subject to division. *Id.* at 297. It was not clear from the record how much of the wife's account was derived from gains on sales of appreciated investments, and the court of appeals remanded for that determination. The court stated that gains resulting from appreciation are usually not divisible, citing *Wierman*, but that income that is separate from a gift is divisible. *Id.*; *see also Grohmann v. Grohmann*, 189 Wis. 2d 532, 525 N.W.2d 261 (1995) (holding that undistributed income from grantor trust established by parent with assets received by gift could be used to establish amount of child support, even though trustee had discretion to distribute income); Patricia K. McDowell, *Trust Issues in Divorce*, 14 Wis. J. Fam. L. 55 (1994).

c. Identity [§ 11.15]

If the court determines that the character of an asset has not changed, it must determine whether the nondivisible asset can be identified. The concept of identity refers to whether the asset acquired by gift or inheritance can be traced to a particular asset in existence at the time of dissolution. *Brandt*, 145 Wis. 2d at 411–13. The asset sought to be excluded must be in existence at the time of dissolution, or there must be an asset in existence that is traceable to the gift. *Preuss*, 195 Wis. 2d at 103–04 (holding that inherited funds had been expended and could not be excluded by the wife); *see also Lloyd*, 170 Wis. 2d at 268 (applying character and identity principles in probate context and holding that transfer of predetermination date funds into joint bank account held by both spouses changed character of funds to marital property); *Estate of Kobylski*, 178 Wis. 2d 158. The nondivisible character must first be determined to have been retained before identity becomes an issue. *Steinmann*, 2008 WI 43, ¶¶ 34–35, 309 Wis. 2d 29 (no tracing necessary when donative intent was found). For a discussion of tracing principles, see chapter 3, *supra*.

In *Bonnell v. Bonnell*, 117 Wis. 2d 241, 344 N.W.2d 123 (1984), and *Weiss v. Weiss*, 122 Wis. 2d 688, 365 N.W.2d 608 (Ct. App. 1985), both of which involved real estate held by the spouses in joint tenancy, the inherited property or the funds received by gift could easily be traced. However, the transmutation or change in character of the original asset made tracing immaterial. Once an asset is determined to be divisible, its source becomes irrelevant.

In *Friebel*, discussed in section 11.14, *supra*, the court concluded that the character of assets in the wife's investment account had been retained, but that the interest income on the account was subject to division. The circuit court had held that the assets were commingled by the retention of interest income in the account, but the court of appeals disagreed. The court estimated that no more than five percent of the account could have been income. Since the wife agreed that any withdrawals could be considered to be from the funds she had received by gift, the income could be readily ascertained from the account records. On remand the court was directed to subtract the full value of divisible property (i.e. the income on the account) and award the balance to the wife. *Friebel*, 181 Wis. 2d at 299.

If the wife in *Friebel* had executed a unilateral statement under section 766.59, the income in her investment account would have been classified as her individual property rather than as marital property. However, notwithstanding such classification, the income was not received by gift and would have been divisible. It therefore appears that a unilateral statement has no effect on the division of assets at dissolution.

The interrelationship between character and identity was demonstrated in *Brandt* and *Weberg*, discussed in section 11.14, *supra*. In both cases, the court determined that the nondivisible funds deposited by one spouse in a joint account held by both spouses had not changed character. In each case, no gift was intended by the deposit in a joint account; hence, there was no change in character. However, in *Brandt*, the nondivisible funds had been commingled with divisible funds. While commingling does not necessarily make tracing impossible, in this case deposits and withdrawals were so numerous that it was impossible to tell which funds were divisible and which were nondivisible, resulting in the entire account being divisible. *Brandt*, 145 Wis. 2d at 412–13. In *Weberg*, however, only withdrawals were made, and no divisible funds were deposited. Therefore, the remaining funds retained their identity. *Weberg*, 158 Wis. 2d at 550.

Fowler, discussed in section 11.14, *supra*, also demonstrated the interrelationship between character and identity. In *Fowler*, the court found that no change in character resulted from an exchange of inherited AT&T stock for shares of various other companies established when AT&T was required to divest itself of assets. The court also found that the shares' identity was preserved because they were traceable to the original nondivisible stock. *Fowler*, 158 Wis. 2d at 516. However, cash gifts that were deposited in the parties' joint bank account along with divisible funds had been so commingled as to lose their character. Unlike in *Brandt* and *Weberg*, the spouse receiving the cash gifts had not intended that they be kept separate, thus making establishment of identity unnecessary. *Id.* at 517–18.

The court's criteria in the divorce context for dividing the increase in value of a nondivisible asset caused by the labor of the nonowning spouse can be contrasted with the property law approach used by a probate court following the death of one of the spouses in *Estate of Kobylski*, 178 Wis. 2d 158. During the marriage, the spouses used marital property funds to improve and maintain a house owned by the wife (the decedent spouse) as her nonmarital property. The surviving spouse sought reimbursement of these funds from the estate since he would benefit from the estate's reimbursement of marital property. *Id.* at 166. In addition, he had made a deferred marital property election and augmented deferred marital property election under sections 861.02 and 861.03. The circuit court had found that the house was reclassified as marital property because mixing occurred by the expenditure of marital property funds and labor and because tracing was impossible. *See id.* at 167. The court of appeals reversed, noting that the surviving spouse kept meticulous records of expenditures made on the house, thus satisfying his burden of proving that the house had become mixed property as a result of these expenditures. *Id.* at 175. The estate had the burden of tracing the nonmarital component, and this burden was satisfied by reference to the surviving husband's records. *Id.* at 176. The court of appeals remanded the case to the circuit court to determine the house's enhanced value, if any, attributable to these expenditures. The court of appeals also held that the measure of reimbursement was a portion of the increased value, not the cost of improvements. *Id.* at 180.

The surviving spouse had also argued that his labor created a marital property interest in the house. To satisfy his burden of proof on the creation of marital property by labor, the surviving spouse must show substantial labor, no reasonable compensation, and substantial appreciation. *Id.* at 182–84. This is a higher level of contribution than the nonowning spouse needed to prove in *Haldemann* to be entitled to an interest in the asset by property division. The court of appeals also directed the circuit court to determine on remand whether the surviving spouse's labor created marital property. *Id.* at 187.

5. Increase in Value of Nondivisible Property [§ 11.16]

Under ordinary circumstances, a spouse's property is not subject to division if it was acquired by inheritance or gift or was purchased with funds so acquired. Wis. Stat. § 767.61(2)(a). Also, the owner spouse must be able to show that the asset has retained its nondivisible character and its identity. An increase in an asset's value that is not income from the asset and that is attributable to economic conditions unrelated to the efforts of a spouse is likewise nondivisible in character. *Spindler*, 207 Wis. 2d at 339–40; *Schwegler*, 142 Wis. 2d 362. For a discussion of divisibility of income from a nondivisible asset, see section 11.17, *infra*.

An increase in the value of nondivisible property attributable to the efforts of either spouse is divisible at dissolution. If the nondivisible component has retained its character and identity, these efforts result in a divisible component in the asset's value at the time of dissolution. Situations in which the nonowning spouse's efforts caused an increase in the value of the other spouse's nondivisible asset were addressed in *Haldemann v. Haldemann*, 145 Wis. 2d 296, 426 N.W.2d 107 (Ct. App. 1988), and *Plachta v. Plachta*, 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984). In *Plachta*, the wife had received a house as a gift. During the marriage, the house's value increased from $6,000 to $27,500. The court did not award any of the value of the house to the husband because he failed to prove that any of the increase in value resulted from his efforts. However, the court explained that failure to divide property when the nonowning spouse's efforts contributed to that increase would cause hardship. *Plachta*, 118 Wis. 2d at 334. Thus, the appreciation in an asset not otherwise subject to division would have been divisible if the nonowning spouse's efforts had contributed to the appreciation. De minimis efforts will not cause the asset to become divisible. *See Spindler*, 207 Wis. 2d 327.

The issue of the effect of a nonowning spouse's efforts in improving the other spouse's nondivisible property was further developed in *Haldemann*. The wife had inherited a farm from her first husband. During the wife's second marriage, her husband worked on the farm raising hogs and made improvements on the property. The parties kept a joint bank account in which income from the hog operation was deposited and from which general farm expenses were paid. Both worked in and benefited from the hog operation. The farm's value increased during the marriage, even though farm prices in the area had generally decreased during the same period. When the divorce occurred, the wife argued that she should receive the entire farm, and the circuit court agreed. The court of appeals remanded the case to the circuit court to determine what portion of the increased value of the farm was caused by the husband's efforts. *Haldemann*, 145 Wis. 2d 307. Whereas the *Plachta* court had stated that failing to divide the increase in the value of one spouse's nondivisible asset would be a hardship to the other spouse whose efforts caused the increase in value, the court in *Haldemann* ruled that an increase that results from a spouse's efforts is part of the divisible estate and should be divided without any showing of hardship. *Id.* at 301. Citing *Torgerson v. Torgerson*, 128 Wis. 2d 465, 469–70 n.3, 383 N.W.2d 506 (Ct. App. 1986), the court observed that an asset may have divisible and nondivisible components. *See also Richmond v. Richmond*, 2002 WI App 25, 250 Wis. 2d 647, 640 N.W.2d 220 (remanding case for circuit court to determine whether spouse's efforts were "catalyst" for rapid appreciation in value of farm or whether market factors were cause).

If a court finds that an asset has appreciated because of the nonowning spouse's efforts to the extent that a portion of the value should be divided, it appears that the court will divide only the appreciation, not the entire asset. The *Haldemann* court stated that appreciation caused by the nonowning spouse's "unusual and uncompensated" efforts, that is, efforts beyond the usual and normal marital responsibilities, is divisible property. *Haldemann*, 145 Wis. 2d at 301–02. The court found this consistent with, but not necessarily the same as, the requirement that the appreciation be "substantial," that the labor be "substantial," or that reasonable compensation not be received, the section 766.63(2) elements for creation of a marital property component in the value of a nonmarital asset. *Id.* at 301; *see also Krejci* *v. Krejci*, 2003 WI App 780, 266 Wis. 2d 284, 667 N.W.2d 780 (holding that appreciation of husband's inherited asset caused by efforts of both spouses was divisible and premarital agreement making such appreciation nondivisible was unenforceable).

Similarly, in *Spindler*, 207 Wis. 2d at 339–40, the court held that the wife's efforts in maintaining the husband's inherited cottage were a de minimis factor in its increase in value. She was, however, entitled to division of the marital property funds used to maintain the property.

Schwegler v. Schwegler, 142 Wis. 2d 362, demonstrates how an increase in value of nondivisible property resulting from the owning spouse's efforts might affect property division. The husband had received land by gift before marriage. He then built a house on this land, also before marriage. The circuit court divided the appreciation on the house that occurred after the date of the marriage. The court of appeals remanded the case for the circuit court to determine the gift component of the improved real estate—that is, how much of the value of the property was attributable to the land and how much to the house—and to then determine the source of any appreciation. Appreciation as a result of general economic factors remains nondivisible along with the gift, and appreciation as a result of efforts of the nonowning spouse becomes divisible. *Id.* at 366. The opinion does not say what should happen to appreciation caused by the owning spouse's efforts. However, because the court of appeals directed the circuit court to determine the source of any appreciation, it appears that appreciation of a nondivisible asset as a result of efforts or other contributions of either the owning or nonowning spouse may be considered in determining how the divisible component of an asset is divided. *See also* Martin Gales, *Expenditure of Community Labor and Assets on Separate Property in Washington*, 12 Community Prop. J. 269 (1985); Peggy L. Podell, *Enhanced Value of a Closely Held Corporation at the Time of Divorce: What Role Will Wisconsin's Marital Property Act Play?*, 69 Marq. L. Rev. 82 (1985); Brett R. Turner, *Distinguishing Between Active and Passive Appreciation in Separate Property: A Suggested Approach*, 13 Divorce Litig. 73 (2001).

An increase in the value of a nondivisible asset as a result of the efforts of the owning spouse occurred in *Lendman v. Lendman*, 157 Wis. 2d 606, 460 N.W.2d 781 (Ct. App. 1990). The husband set up a corporation with $8,500 in inherited funds and loaned the corporation approximately $25,000, also from inherited funds. The corporation used this money to purchase a business and incurred additional debt for the same purpose. The corporation paid down the debt with corporate income as it was earned. At the time of the divorce, the parties stipulated and the court found that the value of the corporation had increased because of the reduction of debt. The original nondivisible character of the stock was unchanged, but because the source of the funds used to pay the note was the husband's efforts, the court found that this portion of the value was divisible. *Id.* at 610–12.

The contrast between marital property law and the law governing property division at dissolution as they concern the increase in an asset's value as a result of the spouses' labor is illustrated by *Schorer v. Schorer*, 177 Wis. 2d 387, 501 N.W.2d 916 (Ct. App. 1993). The contested asset in this case was stock in a family business that the husband had inherited from his father. Both spouses worked in the business, but apparently most of the success of the business was attributable to the husband's time and managerial skills. The parties were married in 1971, and the company was in bankruptcy in the early 1980s, so the court found that the entire value of the multimillion-dollar company at the time of divorce resulted from the spouses' efforts. Citing *Schwegler*, *Haldemann*, *Lendman*, *Wierman*, and *Plachta*, the court acknowledged that "active appreciation" as a result of spouses' efforts is subject to division and "passive appreciation" as a result of general economic conditions is not. *Id.* at 407. The husband argued that the appreciation in the business's value should be treated as passive appreciation because the marital partnership had been adequately compensated during the marriage, presumably by his salary. *Id.* at 406. If the business were being classified under chapter 766, the separate components of value would be determined in the manner that the husband argued; that is, the appreciation of the stock classified as individual property would likewise be classified as individual property unless substantial appreciation resulted from a spouse's efforts and reasonable compensation was not received. Wis. Stat. § 766.63(2). Because reasonable compensation was received, the increase in value resulting from the spouses' efforts would be classified as the husband's individual property. However, the court found that the fact that reasonable compensation was received was irrelevant to the determination of whether the business was divisible. *Schorer*, 177 Wis. 2d at 406. Without referring to chapter 766, the court stated that "[w]hatever the effect of such a proposition elsewhere, it has not been given legal status in Wisconsin." *Id.* Consequently, the court of appeals held that the business was entirely divisible, notwithstanding that it would be classified as the husband's individual property.

In *Ayres v. Ayres*, 230 Wis. 2d 431, 602 N.W.2d 132 (Ct. App. 1999), family members gave the husband shares of a closely held corporation, which he sold shortly before the divorce. The court held that part of the value the husband received consisted of retained earnings and an increase in value attributable to general economic conditions. The court assigned this amount to the husband. The proceeds were attributable in part to undistributed dividends, which the court deemed separate from the nondivisible asset and subject to division.

The distinction between a finding that a portion of the value of a nondivisible asset is divisible and a finding that hardship exists is important. If a portion of the asset (e.g., the amount of an increase in the asset's value) is found to be divisible, the presumption of equal division of divisible assets may result in an equal division of the entire increase in value. However, if a portion of the increase in value of the nondivisible asset is divided because of hardship, the court should divide only the amount necessary to avoid the hardship. The latter amount may be less than would be received by the nonowning spouse if the court divided the entire increase in value. *See also Wright v. Wright*, 2008 WI App 21, 307 Wis. 2d 156, 747 N.W.2d 690 (holding that insurance proceeds paid to and retained by nondivisible corporation to replace destroyed assets remained nondivisible).

Since the general rule is that all property of the spouses is divisible, the burden of proving that an asset is nondivisible is on the spouse attempting to exclude it from division. *Steinmann*, 2008 WI 43, ¶ 26, 309 Wis. 2d 29; *Brandt*, 145 Wis. 2d at 408. That spouse must show that the character of the property has not changed, so that it continues to be nondivisible, and that the property can be identified and traced. *Preuss v. Preuss*, 195 Wis. 2d 95, 536 N.W.2d 101 (Ct. App. 1995); *Brandt*, 145 Wis. 2d at 408. If the owning spouse meets that burden, the nonowning spouse attempting to include all or a portion of the increase in value as a divisible asset then has the burden of proof as to how the increase became divisible and how the divisible component should be valued. *Spindler*, 207 Wis. 2d at 338–39; *Brandt*, 145 Wis. 2d at 409; *see also* William A. Reppy, *Calculating the Spousal Interests in "Mixed" Property Cases Under Wisconsin's Marital Property Act*, 7 Wis. Law. Marital Prop. F. 17 (1990). The concepts of character and identity are discussed at sections 11.14–.15, *supra*.

6. Income Generated by Nondivisible Property [§ 11.17]

Income from a marital property asset is classified as marital property. Wis. Stat. § 766.31(4). Income from a nonmarital property asset (i.e., individual property and predetermination date property) is also classified as marital property unless a unilateral statement relating to the income is executed under section 766.59. *Id.*; *see also* Wis. Stat. § 766.31(7p). Income from any asset can also be reclassified by gift or by marital property agreement. *See supra* § 2.5 (regarding how property can be reclassified).

In a case decided before the marital property laws became effective, the Wisconsin Court of Appeals found that the income generated by an asset that was nondivisible at divorce was nonetheless distinct from the asset itself and was subject to division. *Arneson v. Arneson*, 120 Wis. 2d 236, 355 N.W.2d 16 (Ct. App. 1984). The husband had received as a gift 100 shares of stock in a family-owned corporation. He purchased an additional 150 shares of stock in the family corporation and other unrelated securities with the dividends generated by the stock he had received as a gift. In dividing the purchased stock and other securities, the court distinguished assets purchased with income generated by a nondivisible asset from the underlying asset itself. The court characterized this income as "earned," rather than acquired by a spouse through gift or inheritance, which removed the income from the category of assets not subject to property division. *Id.* at 244–45. Therefore, the stock and other securities purchased with dividends generated by the husband's nondivisible stock were subject to division.

Similarly, in a case decided after the marital property laws became effective, the court in *Friebel v. Friebel*, 181 Wis. 2d 285, 510 N.W.2d 767 (Ct. App. 1993), held that income generated by the wife's nondivisible assets was divisible. This income did not include income earned before distribution by assets held in a trust established by the wife's father; the divisible income was that earned on an investment account in which the wife had deposited her trust distributions. Discretionary distributions of income or principal of a trust were gifts by the settlor when distributed and were nondivisible. *See supra* § 11.14.

The court of appeals made a similar finding with respect to retained income in *Lendman v. Lendman*, 157 Wis. 2d 606, 460 N.W.2d 781 (Ct.

App. 1990). The husband used inherited funds to set up a corporation and purchase a business. The corporation took out a loan for a portion of the purchase price and paid back the loan out of its earnings. The corporation's earnings were attributable to the husband's labor, but instead of being distributed as salary, they were retained in the corporation and used to pay back the loan. The court determined that the increase in the corporation's value, stipulated by the parties to be the amount attributable to loan payments, was divisible. *Id.* at 612. This case actually involved appreciation of an asset rather than income derived from the asset because no dividend distribution was made, but the court went beyond the form of the entity and divided the value created by a spouse's efforts. *See supra* §§ 2.51, 3.42. The court did not entirely disregard the entity, however; when the court addressed maintenance, it upheld the circuit court's finding that some of the retained income might be considered in arriving at an income figure on which to base the amount of maintenance. *Lendman*, 157 Wis. 2d at 616; *see also Anderson v. Roach*, No. 2007AP1667, 2008 WL 763140 (Wis. Ct. App. Mar. 25, 2008) (unpublished opinion not citable per section 809.23(3)) (holding that income generated and retained by nondivisible partnership was divisible).

Since the decision in *Arneson*, courts have continued to make the distinction between an increase in the value of nondivisible closely held corporate stock attributable to general market conditions and an increase attributable to income earned and retained by the corporation. In *Metz v. Keener*, 215 Wis. 2d 626, 573 N.W.2d 865 (Ct. App. 1997), the court held that the retained earnings in the wife's inherited subchapter S corporation were subject to property division. The court treated these earnings as separate from the value of the corporation itself, notwithstanding that they had not been distributed by the corporation. Likewise, the court in *Ayres v. Ayres*, 230 Wis. 2d 431, 602 N.W.2d 132 (Ct. App. 1999), treated part of a corporation's retained earnings that the husband had received by gift and sold during the marriage as undistributed dividends. These were subject to division. The court found that the balance of the shares' value was attributable to general economic conditions, and it assigned this portion of the value to the husband.

Similarly, the court in *Steinmann v. Steinmann*, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145, found that the fact that property can be traced to income generated by nondivisible property does not make it nondivisible.

Id. ¶ 43 (citing *Derr v. Derr*, 2005 WI App 63, ¶ 16, 280 Wis. 2d 681, 696 N.W.2d 170).

The wife in *Fowler v. Fowler*, 158 Wis. 2d 508, 463 N.W.2d 370 (Ct. App. 1990), had inherited stock in AT&T that the corporation exchanged for stock in different corporations established when AT&T was required to divest itself of certain assets. The court found that this transformation did not change the character of the originally inherited stock. The court held, however, that the reinvested dividends of the same stock, even stock dividends, were distinguishable from the original shares as income, and purchased stock that was traceable to those dividends was divisible.

A different result occurred in *Wierman v. Wierman*, 130 Wis. 2d 425, 387 N.W.2d 744 (1986). The wife received an interest in a real estate partnership managed by her father. Except for amounts necessary to pay income taxes, income and capital gains were retained in the partnership and reinvested. The court found the entire interest not subject to property division. The court did not address the fact that the wife's partnership account consisted in part of income from a nondivisible asset, which income would be classified as marital property. Wis. Stat. § 766.31(4). The determinative factor appears to be that the wife never received the income, and neither spouse's efforts contributed to generating the income.

Under section 766.59, a spouse may execute a unilateral statement that classifies the income from his or her nonmarital property as individual property. Wis. Stat. § 766.31(7p). Nonmarital property assets to which the statement applies may be either divisible or nondivisible at dissolution. A nonmarital property asset may be subject to division because it was acquired otherwise than by gift from a third person, before marriage, or by reason of the death of another while the spouses were married and before their determination date. Conversely, a nonmarital property asset may be nondivisible if acquired by gift from a third person, before marriage, or by reason of the death of another or with funds so acquired, provided the asset's character and identity are maintained. *See supra* §§ 11.14–.15. However, *Arneson* and *Fowler* held that income attributable to nondivisible property is distinct from the asset itself and is divisible. Therefore, it appears that income from any type of nonmarital property asset is subject to division, notwithstanding that the income may be classified as individual property by a unilateral statement. *See* Timothy A. Bascom, *Irreconcilable Differences: Income* *from Separate Property Under Divorce Law and Under Wisconsin's Marital Property Act*, 70 Marq. L. Rev. 41 (1986).

7. Deferred Employment Benefits [§ 11.18]

Absent a marital property agreement to the contrary, deferred employment benefits earned by a spouse before or after marriage or before or after the spouses' determination date are divisible in a dissolution action. Wis. Stat. § 767.61(3) (intro.), (j). By its nature, a deferred employment benefit is not acquired by gift or inheritance. Classification as marital property or nonmarital property is immaterial. The fact that part or all of the benefits are earned before marriage is a factor that may affect how the benefits are divided because benefits attributable to premarriage employment are in the nature of property brought to the marriage. *See* Wis. Stat. § 767.61(3)(b); *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997); *Rodak v. Rodak*, 150 Wis. 2d 624, 630, 442 N.W.2d 489 (Ct. App. 1989); *see also Mausing v. Mausing*, 146 Wis. 2d 92, 429 N.W.2d 768 (1988); *Olson v. Olson*, 148 Wis. 2d 219, 435 N.W.2d 266 (Ct. App. 1988); *Loveland v. Loveland*, 147 Wis. 2d 605, 433 N.W.2d 625 (Ct. App. 1988).

A spouse working for the same employer before and after the marriage may accumulate deferred employment benefits attributable to periods before and after the marriage, resulting in the mixing of marital property and nonmarital property. Classification of such benefits would follow the formula prescribed by section 766.62. A spouse attempting to invoke section 767.61(3)(b) to achieve an unequal distribution of such an asset should attempt to show how much of the value of the deferred employment benefit is attributable to employment before the marriage and how much is attributable to employment after the marriage.

Section 766.62(2m) provides that deferred employment benefits that are mixed property are to be valued as of the date of marital dissolution or the date of the employee spouse's death, presumably in accordance with the rules of section 766.62(2), unless an agreement or court decree provides otherwise. However, section 766.62 has no effect on property division at dissolution, since section 767.61 does not require that property division correlate with classification. Even if the court wants to value such benefits and determine how much of the value is attributable to labor expended before marriage and how much is attributable to labor expended after marriage, it appears that the rules of section 766.62 need not be followed. *See Hokin v. Hokin*, 231 Wis. 2d 184, 605 N.W.2d 219 (Ct. App. 1999) (holding that court was not required to use "coverture fraction" found in section 766.62(2) but was not prohibited from doing so). The court can use any valuation method calculated to achieve justice. *Mausing*, 146 Wis. 2d at 97–98; *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d 235 (1978) (discussing methods of valuing deferred-employment-benefit plan for purposes of property division in divorce); *Ably v. Ably*, 155 Wis. 2d 286, 290, 455 N.W.2d 632 (Ct. App. 1990).

In severing the economic incidents of a marriage, a court in a dissolution action has the discretion to treat a deferred-employment-benefit plan as an income stream rather than an asset to be divided. In *Dutchin v. Dutchin*, 2004 WI App 94, 273 Wis. 2d 495, 681 N.W.2d 295, the husband's pension was a major asset of a long marriage and was in payment status at the time of the divorce. The court refused to divide the pension but instead considered it as income for the purpose of awarding the wife maintenance. The court also refused to treat the wife's survivorship interest in the husband's plan as property because it was derived from the pension, which was not treated as property, and to do so would have resulted in a complicated exchange of funds. Thus, the court's ability to arrive at an equitable economic result does not depend on the property's classification. *But see Kelly v. Kelly*, No. 2009AP852, 2010 WL 814030 (Wis. Ct. App. Mar. 11, 2010) (publication recommended) (holding that *Steinke v. Steinke*, 126 Wis. 2d 372, 376 N.W.2d 839 (1985), required court to include monthly pension payments in property division, subject to statutory presumption of equal division).

In *Waln v. Waln*, 2005 WI App 54, 280 Wis. 2d 253, 694 N.W.2d 452, the court reiterated the principle that a pension can be considered in crafting a property division, even though the spendthrift clause in the pension plan and statute prohibited the court from dividing the husband's Milwaukee police pension itself. Also, the court has the authority to order a party to elect payment and beneficiary options, and this power does not violate the spendthrift clause.

Finally, in *Winkler v. Winkler*, 2005 WI App 100, 282 Wis. 2d 746, 699 N.W.2d 652, the court refused to reopen a divorce judgment to award an employee's former spouse an additional portion of the employee's Milwaukee County pension. The increase in the pension's value occurred as a result of a statutory change made after the divorce.

8. Claim for Personal Injury [§ 11.19]

Under section 766.31(7)(f), a postdetermination-date personal injury recovery by a spouse from a third party is the individual property of the injured spouse, except to the extent the recovery represents reimbursement for expenses paid with marital property funds and for income loss during the marriage. Compensation for expenses paid with marital property funds and for the loss of income that would have been marital property is marital property. *Id.* In the context of a dissolution, however, the court is not bound by marital property classification rules in dividing the award.

Richardson v. Richardson, 139 Wis. 2d 778, 407 N.W.2d 231 (1987), set forth the supreme court's guidelines for dividing a potential personal injury award for damages caused by a third person to a spouse. In Richardson, the wife had a pending personal injury claim that had not been settled or tried at the time of the divorce. The court found that the entire claim was subject to division under section 767.255 (now section 767.61). However, the court established guidelines for determining the division of personal injury claims at divorce. The circuit court should presume that the injured party is entitled to the recovery for loss of future earnings, pain and suffering, and loss of bodily function. Recovery for medical expenses and compensation for earnings lost during the marriage should be divided equally. *Richardson*, 139 Wis. 2d at 780. Although the court couched these guidelines in terms of presumptions rather than as a mandatory distribution scheme for personal injury awards, it appears that these presumptions will in most instances parallel the classification rules of section 766.31(7)(f). The noninjured spouse is entitled to any recovery for loss of consortium, since loss of consortium is a type of personal injury to the noninjured spouse. *Richardson*, 139 Wis. 2d at 780; *see also Mack v. Mack*, 108 Wis. 2d 604, 323 N.W.2d 153 (Ct. App. 1982) (holding, in case decided before Richardson guidelines were established, that personal injury award was divisible).

The court applied these presumptions to determine the division of a structured personal injury settlement in *Krebs v. Krebs*, 148 Wis. 2d 51, 435 N.W.2d 240 (1989). While a divorce court may still divide a personal injury award equitably if circumstances warrant, the supreme court concluded that the *Richardson* presumption supersedes the section 767.255(3) (now section 767.61(3)) presumption of equal division with respect to an injured spouse's entitlement to future payments under a personal injury award. *See also Schwegler*, 142 Wis. 2d at 369 (court remanded case for circuit court to divide wife's personal injury award according to presumptions established by *Richardson*).

The *Richardson* rule applies to personal injury awards and similar compensation that have already been received as well as those that are pending or not yet determined. The court of appeals in *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990), held that a worker's compensation settlement received several years before the divorce should be divided pursuant to the *Richardson* criteria. The funds were subjected to a character-and-identity analysis to determine whether they continued to be nondivisible after receipt. They had been kept in a joint account, but the circuit court found that this was done only to protect the wife if the husband died and that there was no present donative intent. There were occasional withdrawals to pay debts, but the funds were not commingled with other funds. The court found that the funds' character was not changed, and that because the settlement was the sole source of the funds in the account, identity was established. As in *Popp v. Popp*, 146 Wis. 2d 778, 432 N.W.2d 600 (Ct. App. 1988), the court emphasized that there had been only withdrawals and that therefore the identity of the remaining funds was preserved. *See also* Donald A. Levy, *Marital Property Division of Personal Injury Proceeds*, 11 Wis. J. Fam. L. 85 (1991).

9. Income Tax Considerations in Property Division [§ 11.20]

Transfers between spouses and transfers incident to dissolution are not subject to tax. I.R.C. § 1041. The basis of an asset that is transferred from one spouse to the other does not change. I.R.C. §§ 1041(b), 1015(e). However, if it is necessary to sell an asset to effectuate a property division, taxable gain may still be a consideration in the equitable determination of the division. Wis. Stat. § 767.61(3)(k).

10. Property Not Dealt with by Decree of Dissolution [§ 11.21]

Upon the dissolution of a marriage, "the court shall divide the property of the parties and divest and transfer the title of any such property accordingly." Wis. Stat. § 767.61(1). Property received by each spouse is therefore titled in the recipient's name and solely owned by that person, and the other spouse is divested of his or her interest. If a marital property asset is omitted from the decree for any reason, the spouses continue to own the property after the dissolution, but as a tenancy in common, not as marital property. Wis. Stat. § 766.75.

The purpose of retaining co-ownership of marital property assets not divided by the decree is to protect both spouses' interests until disposition of the property. For example, after the death of the former spouse having control of the omitted property, the other spouse might come forward to assert an ownership interest in the previously undiscovered property.

Nevada law, like Wisconsin law, provides that former spouses hold undivided assets as tenants in common. In *Williams v. Waldman*, 836 P.2d 614, 619 (Nev. 1992), the husband had acted as attorney for both parties but the settlement agreement did not include his law practice. Much later, the wife learned that the law practice was community property and was subject to division at divorce under Nevada law. The court held that because the husband had acted as attorney for the wife, he had breached his fiduciary duty of fair disclosure of financial information concerning the practice. Therefore, the asset was deemed undivided, and the wife had a right to an independent action to divide this remaining asset. *See also* Cal. Fam. Code Ann. § 2556 (West, WESTLAW current with all 2009 Reg. Sess. laws; all 2009-2010 1st through 5th, 7th, and 8th Ex. Sess. laws; urgency legislation through Ch. 14 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot) (similar rule).

If undivided assets were deliberately concealed, the former spouse who did not conceal the assets may have an independent action to recover a share of those assets and may have a right to punitive damages if egregious circumstances exist. *See* Brett R. Turner, *Common-Law Fraud as a Remedy for Asset-Related Misconduct*, 7 Divorce Litig. 205 (1995).

Washington also has a rule similar to section 766.75. *See* Harry Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. L. Rev. 13 (1986). However, there are situations described in Washington case law in which equitable considerations have been applied to prevent a former spouse from enforcing an ownership interest in former community property omitted from a judgment of dissolution. In *Witzel v. Tena*, 295 P.2d 1115 (Wash. 1956), the wife had claimed in the divorce in 1939 that the parties had no community property, and she made no claim to any such property. In 1953, she asserted a claim to one-half of certain substantially appreciated real estate owned by the husband that had been omitted from the divorce decree. The court found the necessary elements of equitable estoppel to bar the claim. The court held that the former wife's actions at the time of the divorce were inconsistent with the later claim, and that the former husband had relied on her earlier assertion that she made no community property claim to his property when he entered an appearance and consented to the decree. Finally, the court said that it would have been unjust to allow the former wife to benefit by the former husband's efforts in the years after the divorce.

A similar situation occurred in *Dean v. National Bank of Washington*, 360 P.2d 150 (Wash. 1961). In that case, the former husband had owned several paint stores to which the former wife asserted a claim after the former husband died. The stores' existence was not concealed at the time of the divorce, and although no value was assigned to them, sufficient information was available to allow the former wife to discover any value. For 27 years, the former wife had not challenged the former husband's ownership, and he invested considerable assets in the stores, to the point that they constituted a substantial portion of his estate. The court found all the elements of equitable estoppel and denied the wife's recovery of an ownership interest in the stores.

C. Relation to Interspousal Remedies [§ 11.22]

The only significant change in chapter 767 made by the Act is found in section 767.331, titled "Actions for Certain Interspousal Remedies," which provides:

> If a spouse has begun an action against the other spouse under s. 766.70 and either or both spouses subsequently bring an action under this chapter for divorce, annulment or legal separation, the actions may be consolidated by the court exercising jurisdiction under this chapter. If the actions are consolidated, to the extent the procedural and substantive requirements of this chapter conflict with the requirements under s. 766.70, this chapter controls. No action under s. 766.70 may be brought by a spouse against the other spouse while an action for divorce, annulment or legal separation is pending under this chapter.

See supra ch. 8. The court of appeals held constitutional section 767.331 (then numbered as section 767.05(7)) in *Haack v. Haack*, 149 Wis. 2d 243, 440 N.W.2d 794 (Ct. App. 1989). Since an action based on an interspousal remedy may not be commenced against a spouse once a divorce is pending, an interspousal action against the other spouse must be brought before filing a divorce. *Gardner v. Gardner*, 175 Wis. 2d 420, 499 N.W.2d 266 (Ct. App. 1993) (holding that matters involving spouses' property are dealt with in divorce action, and separate action for damage to marital property is barred after divorce action is commenced). *But see Knafelc v. Dain Bosworth, Inc.*, 224 Wis. 2d 346, 591 N.W.2d 611 (Ct. App. 1999) (holding that action against spouse for securities violations could be maintained after dissolution action filed). An action under section 766.70 may be brought against a third party after commencement of a dissolution action between the spouses.

If a spouse has a cause of action against the other spouse under section 766.70, and a dissolution action is dismissed or terminated, the action under section 766.70 may be commenced. In *Socha v. Socha*, 204 Wis. 2d 474, 555 N.W.2d 152 (Ct. App. 1996), the husband changed the beneficiary designation on a marital property life insurance policy to the parties' son. The change violated temporary orders entered in the dissolution action requiring that the wife remain the beneficiary. The dissolution action terminated before judgment because the husband died. The circuit court imposed a constructive trust on the proceeds of the policy, but the court of appeals remanded for a determination of the wife's and son's rights under section 766.70(6). Because the legislature had passed comprehensive statutes dealing with this situation, the court held that section 766.70(6) was the wife's sole remedy.

The remedies available under section 766.70 and chapter 767 are different and do not conflict. An action based on an interspousal remedy applies only until the marriage is dissolved, and the divorce decree applies after the dissolution. Therefore, commencing an interspousal action before commencing a dissolution action may be appropriate to provide relief for a spouse until the dissolution is final.

Certain interspousal actions would probably not be necessary to protect an aggrieved spouse's rights in marital property assets if a divorce is imminent. These include: actions alleging breach of the good-faith duty, Wis. Stat. § 766.70(1); actions for an accounting for marital property, Wis. Stat. § 766.70(2); actions for reimbursement for other than family-purpose debts paid with marital property funds, Wis.

Stat. § 766.70(5); and actions for recovery of gifts in excess of limits, Wis. Stat. § 766.70(6)(a). In cases in which one of these remedies would be appropriate against the other spouse, marital property funds typically have been disposed of by the defendant spouse, but recovery from that spouse (as opposed to a third-party transferee) is feasible as part of the property division when there are sufficient assets to compensate the aggrieved spouse. An accounting for marital property funds managed by the other spouse may also be effected as part of the dissolution proceeding. If full relief is available under divorce law and there are sufficient assets to compensate the aggrieved spouse, a separate interspousal proceeding is unnecessary. Brett R. Turner, *Here Today, Gone Tomorrow: Identification and Division of Dissipated Marital Assets*, 3 Equitable Distribution Alert 7 (Oct. 1991).

Section 767.117(1)(b) prohibits either spouse from "encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both of the parties" during the pendency of a dissolution proceeding without the consent of the other spouse or by order of the court or circuit court commissioner, except in the ordinary course of business, for necessities of life, or to pay reasonable costs and expenses of the action, including attorney fees. This appears to be a codification of customary existing pretrial practice. Presumably, a violation of this statute could be taken into consideration when dividing the parties' property. *See Anstutz v. Anstutz*, 112 Wis. 2d 10, 12–13, 331 N.W.2d 844 (Ct. App. 1983) (holding that party's squandering of assets may affect property division, causing party responsible for dissipating assets to receive lesser share). *But see Hauge v. Hauge*, 145 Wis. 2d 600, 603–05, 427 N.W.2d 154 (Ct. App. 1988) (holding that party who makes improvident but good-faith investment decisions will not necessarily receive smaller share of divisible property, even though party's poor judgment has resulted in loss of assets); *Ward v. Ward*, No. 94-1712, 1995 WL 521867 (Wis. Ct. App. Sept. 6, 1995) (unpublished opinion not citable per section 809.23(3)) (holding that both parties were responsible for loss in asset's value). In that event, rules for an equitable division of the spouses' property would be applied to compensate the aggrieved spouse, but a demonstrable right to recover under one of the interspousal remedies may be persuasive to the court in determining property division.

Section 767.63 includes in the divisible estate property valued at more than $500 that would have been part of the divisible estate but that within one year before the commencement of the dissolution action was transferred for inadequate consideration, wasted, given away or was otherwise unaccounted for. This provision is in addition to but does not conflict with remedies available under section 766.70(6)(a). *See also* Lee R. Russ, Annotation, *Spouse's Dissipation of Marital Assets Prior to Divorce as Factor in Divorce Court's Determination of Property Division*, 41 A.L.R.4th 416 (1985).

Remedies that would determine classification or that would reclassify property are of limited use because of the divorce court's ability under section 767.61 to award property regardless of classification. *See* Wis. Stat. § 766.70(2), (4). However, a judicial finding that a particular asset is inherited individual property should result in issue preclusion in a later dissolution proceeding involving the same asset.

The usefulness of assigning existing liabilities under section 766.70(4)(a)3. is limited, particularly since the court as part of the dissolution decree can assign liability. Wis. Stat. § 766.55(2m).

In contrast, a separate interspousal action may be essential to protect a party's interest in marital property assets that are under the other spouse's control during the pendency of the action. For example, if a nontitled spouse is concerned that bank or brokerage accounts, the funds in which are classified as marital property, may be dissipated, adding the nontitled spouse's name to the account could mean that both signatures would be required for withdrawals. Wis. Stat. §§ 766.70(2), .51(2). The order should clearly state that both signatures are necessary; this avoids confusion with joint accounts requiring only one signature. This remedy provides more protection than would a restraining order under section 767.225(1)(h), since the previously nontitled spouse has veto power over withdrawals. It is also more flexible than freezing an account by order of the court or circuit court commissioner because the parties may agree to the use of the account. It appears, however, that direct access to the other spouse's wages cannot be achieved under section 766.70. *See supra* § 8.40.

In certain unusual circumstances, limitation of management and control over a marital property asset may be necessary to protect the spouse who does not have management and control. Wis. Stat. § 766.70(4)(a)1. Also, if one of the parties has spendthrift tendencies or is otherwise likely to incur burdensome obligations, the other party may wish to obtain an order as soon as possible to assign future obligations and to classify property acquired in the future. If there is a finding of gross mismanagement, waste, or absence, the court may order that future obligations are the responsibility of the incurring spouse and that property thereafter acquired is the individual property of the acquiring spouse. Wis. Stat. § 766.70(4)(a)4., 5. These remedies may be especially necessary if it is anticipated that the divorce will be protracted, a marital property asset such as real estate or a business will have to be sold before judgment, and the holding spouse will not or cannot manage the transaction. Limitation of management and control for business interests is available for only a sole proprietorship; it does not apply to interests in partnerships, closely held corporations, joint ventures, or professional corporations or other interests in which a third party's rights may be adversely affected. Wis. Stat. § 766.70(4)(c).

➢ ***Comment.*** Although section 766.70(4)(c) was not amended after the creation of chapter 183 ("Limited Liability Companies") to exclude limited liability companies from those to which this remedy does not apply, this is probably a drafting error, and such entities would also be excluded. *See* Wis. Stat. § 766.70(3)(aL).

The entry of an order under section 766.70 would not prevent the court from dividing an asset using the principles of section 767.61 at the conclusion of the dissolution action. Even if the interspousal action establishes that an asset is classified as individual property because it was inherited, the dissolution court might nonetheless find that failure to divide the asset would result in a hardship to the other spouse and proceed to divide the asset.

In general, creditors whose rights arose before an order is entered under section 766.70 or who had no knowledge of the order will not be adversely affected by any provisions in the order that would otherwise limit recovery on the obligation. Wis. Stat. § 766.55(4m). However, an order entered under section 766.70(4) transferring management and control of an asset to the untitled spouse will protect the property acquired by the nonobligated spouse (usually his or her wages) from recovery by a creditor for family-purpose obligations incurred by the other spouse while the action is pending, as long as the creditor has received a copy or has actual knowledge of the order before the obligation is incurred. *See supra* § 6.36; *see also* Wis. Stat. § 766.55(4m). The order should require each spouse to disclose the order to future creditors so that the marital property income and assets acquired by the nonincurring spouse will be protected from recovery by family-purpose creditors of the incurring spouse. *See* Wis. Stat.

§§ 766.55(4m), .56(2)(c). A spouse's failure to disclose the order could subject that spouse to a finding of contempt or could affect the eventual property division.

In *Covelli v. Covelli*, 2006 WI App 121, 293 Wis. 2d 707, 718 N.W.2d 260, the court held that the husband committed marital waste, justifying an award of the majority of the marital assets to the wife, by failing to pay a corporation's sales tax under the following circumstances: only the husband was active in the corporation and he alone decided how to spend its available funds, the corporation was being audited for sales taxes, the wife was unaware of tax problems, and the husband continued to supply funds for a lavish lifestyle.

In *Noble v. Noble*, 2005 WI App 227, 287 Wis. 2d 699, 706 N.W.2d 166, the wife asked the court of appeals to increase the amount of property deemed subject to division in the dissolution action and to increase the wife's share of available assets based on these added assets. The husband and his brother were members of a farming partnership. The partnership owned no real estate; the land was rented by the partnership and owned by the brothers and their wives. The disputed three parcels were owned by the husband's brother and his wife, but the husband had declined to acquire an interest when they were purchased. The partnership financed the purchase, and the value of this receivable was included in the property division, but the husband took no interest. All parties admitted the real estate was acquired in this manner to prevent the wife from acquiring an interest in case of divorce.

The court held that the marital estate was not diminished or wasted by the husband's failure to obtain an interest in the real estate. The court distinguished waste, which assumes that assets are no longer in the estate, from the failure to take advantage of an opportunity to increase the marital estate. "In short, the law does not require a party to a prospective divorce to take advantage of an opportunity to acquire property that would increase the value of the marital estate, and the use of partnership funds to finance the purchase of the properties did not improperly dissipate the value of the marital estate." *Id.* ¶ 2; *see also supra* § 8.12; Matthew J. Price, *Case Spotlight: Noble v. Noble*, 26 Wis. J. Fam. L. 24 (2006).

D. Rights of Creditors at Dissolution [§ 11.23]

1. In General [§ 11.24]

One of the major objectives of the Marital Property Act was to increase nonwage-earning spouses' access to credit. *See supra* § 5.42. The Act accomplished this by expanding management and control rights in credit transactions, Wis. Stat. § 766.51(1m), and by requiring that creditors consider the property available to satisfy obligations when determining a spouse's creditworthiness. *See* Wis. Stat. §§ 766.55, .56(1). A person's marital status is an essential element in determining creditworthiness, since obligations incurred in the interest of the marriage or the family may be satisfied from all marital property assets as well as from the nonmarital property assets of the incurring spouse. Wis. Stat. § 766.55(2)(b). A potential creditor must consider most marital property assets acquired by, as well as obligations incurred by, either or both spouses. It therefore follows that creditors who rely on and extend credit based on the existence of the marriage should be protected, although they may not be if the marriage is dissolved and the property previously classified as marital property is thereafter solely owned. *See supra* ch. 5, ch. 6.

The right of creditors to recover marital property assets is unchanged by the separation of spouses or the commencement of an action for dissolution. However, after the dissolution, any income earned by the nonincurring spouse is not available to the creditor unless the decree so provides, even though the creditor may have relied on that income in granting the credit. Wis. Stat. § 766.55(2m). This result is consistent with the treatment of creditors after the incurring spouse dies, unless the obligation resulted from an extension of credit (which applies to most obligations) or is a tax obligation to the state. Wis. Stat. § 859.18(3). If the incurring spouse dies owing an obligation to a creditor who regularly extends credit or to the state of Wisconsin for a tax obligation, the surviving spouse's income is available for recovery. *Id.* For example, if one spouse incurs department-store charge-card obligations and the spouses are later divorced, unless the decree provides for payment by the nonincurring spouse, the store cannot recover from the income of the nonincurring spouse, even though the store might have considered the income of the nonincurring spouse in deciding whether to issue the charge card to the incurring spouse. *See infra* § 11.25, *supra* § 5.37. If the incurring spouse had died and the spouses were not divorced, the store could recover from the income of the nonincurring surviving spouse. The 1985 Trailer Bill Original Nontax Note to section 766.55(2m) acknowledges the limitation on creditors' rights upon dissolution of the marriage and how these rights differ from the provisions for creditors' rights at the death of the incurring spouse. *See* Wis. Stat. Ann. § 766.55 Legis. Council Notes—1985 Act 37, §§ 90–98 (West 2009). The 1985 Trailer Bill Original Nontax Note to section 859.18 points out that these two forms of terminating a marriage are distinguishable but does not state why the treatment of creditors is different in those two circumstances. *See* Wis. Stat. Ann. § 859.18 Legis. Council Notes—1985 Act 37, § 169 (West 2002). One reason for the difference may be that only in a dissolution action can the court assign responsibility for payment of an obligation to a nonobligated or nonincurring spouse and thus protect the rights of creditors and parties on a case-by-case basis. *See* Wis. Stat. § 766.55(2m).

2. Assignment of Obligations by Decree of Dissolution [§ 11.25]

The court may assign the responsibility for payment of specific debts to either the incurring or the nonincurring spouse as part of the decree, but as a nonparty to the dissolution action, a creditor is not bound to look only to the spouse to whom the debt is assigned if the other spouse is otherwise liable. Wis. Stat. § 766.55(2m). The provision in the decree making the nonincurring spouse responsible for the obligation allows the creditor to recover from either spouse as if both spouses incurred the obligation. *Id.*; *see also* Wis. Stat. § 803.045; *supra* § 6.53 (procedure to recover payment of obligations from spouses).

If an obligation incurred by one spouse in a pending divorce is substantial, a creditor may consider attempting to intervene in the dissolution action, or at least informing the spouses of the creditor's interest in the outcome, to persuade the court or the parties to assign the debt to the spouse who will be better able to pay. *See* Wis. Stat. § 803.09; *Sokaogon Gaming Enter. Corp. v. Curda-Derickson (In re Marriage of Curda-Derickson v. Derickson)*, 2003 WI App 167, 266 Wis. 2d 453, 668 N.W.2d 736 (holding that husband's restitution debt was not incurred in the interest of marriage or family; creditor had intervened in dissolution action). If the incurring spouse is the one less able to pay, it will be in that spouse's interest to ask the court to assign responsibility for obligations to the spouse better able to pay. However, neither section 767.61 nor chapter 766 requires that the court consider the income or property relied on by a creditor when the obligation was incurred in determining the spouse to whom an obligation is assigned. *See supra* ch. 6; *see also* Catherine J. Furay, *Credit Aspects of Marital Property and Divorce*, 11 Wis. J. Fam. L. 103 (1991).

It should be noted that under section 766.55(2m), the earned or unearned income of the nonincurring spouse is unavailable to satisfy a family-purpose debt after entry of the decree unless the decree assigns responsibility to the nonincurring spouse. It appears that a creditor could recover income from the nonincurring spouse after the judgment is rendered orally in court but before it is reduced to written judgment and entered by the clerk of court. *See* Wis. Stat. § 806.06(1).

Former marital property assets received by either spouse in a decree of dissolution are available to satisfy a family-purpose obligation to the extent of the asset's value at the date of the decree. Wis. Stat. § 766.55(2m). After the judgment, any appreciation in value of an asset assigned to the nonincurring spouse would not be available.

> ➢ ***Comment.*** If the value of an asset declines, then the creditor would probably be limited to its value on the date of recovery because the nonincurring spouse need not make up for the decline with other property that would not otherwise be available to the creditor.

Categories of obligations other than those incurred in the interest of the marriage or the family under section 766.55(2)(b) are not mentioned in section 766.55(2m). It therefore appears that creditors holding these other obligations cannot reach former marital property assets received in the dissolution action by the spouse who is not also personally liable for the obligation, for example, under the doctrine of necessaries. *See St. Mary's Hosp. Med. Ctr. v. Brody*, 186 Wis. 2d 100, 519 N.W.2d 706 (Ct. App. 1994) (holding that under doctrine of necessaries, nonincurring spouse was obligated spouse for medical debt, which was support debt under section 766.55(2)(a), and creditor was not limited to recovery under section 766.55(2m)). Premarriage, pre-January 1, 1986, tort, and other non-family-purpose creditors of the obligated spouse cannot reach any former marital property assets in the hands of the nonobligated spouse, unless the nonobligated spouse is made responsible for the obligation in the judgment of dissolution. *Sokaogon Gaming Enter. Corp.*, 2003 WI App 167, 266 Wis. 2d 453 (holding that former wife not obligated for former husband's embezzlement-restitution debt, classified as a tort debt under section 766.55(2)(cm)). This appears to be true even if the assets received by the nonobligated or nonincurring spouse under the dissolution decree were former marital property assets generated by the obligated spouse. Such former marital property assets would have been available for recovery by the obligated spouse's premarriage or pre-Act creditors if the marriage had not been dissolved. *See* Wis. Stat. § 766.55(2)(c). However, section 766.55(2m) provides only for recovery of family-purpose obligations, and once the dissolution occurs, the assets awarded to the nonincurring spouse are no longer marital property available for recovery under section 766.55(2).

While the spouses are married, a creditor may recover any marital property assets held by either spouse to satisfy a family-purpose obligation. Wis. Stat. § 766.55(2)(b). It may be argued that in some instances, after the marriage is dissolved, equity requires that the creditor attempt collection from the spouse responsible for the obligation under the decree before proceeding against former marital property assets in the hands of the spouse who is not assigned responsibility. However, the statute does not so provide. Section 766.55(2m) allows the creditor to proceed "as if both spouses had incurred the obligation." *See also supra* §§ 6.51–.58 (procedure to recover payment of obligations from spouses). The existence of a provision assigning responsibility for payment of an obligation to one spouse might give the other spouse from whom collection is sought a right of contribution against the spouse obligated by the decree and the right to cross-claim against the responsible spouse in legal proceedings to collect the obligation.

3. Bankruptcy [§ 11.26]

a. Before Judgment of Dissolution [§ 11.27]

If one or both of the parties contemplate filing for bankruptcy relief during the pendency of the dissolution or shortly thereafter, the effect of the bankruptcy law, title 11 of the United States Code, must be considered. *See generally supra* ch. 6. If filing by one spouse occurs before the judgment of dissolution is granted, 11 U.S.C. § 541(a)(2) states that all property of the debtor and all marital property assets (referred to as "community property" in the Bankruptcy Code), with limited exceptions, are included in the bankruptcy estate. This brings all property of the bankruptcy estate under the bankruptcy court's jurisdiction and under the management and control of the bankruptcy trustee or debtor-in-possession. *See, e.g.*, *Teel v. Teel (In re Teel)*, 34 B.R. 762 (B.A.P. 9th Cir. 1983) (holding that state court had jurisdiction over parties' status but bankruptcy court had exclusive jurisdiction over parties' community property); *Kapila v. Morgan (In re Morgan)*, 286 B.R. 678 (Bankr. E.D. Wis. 2002); *Swink v. Sunwest Bank (In re Fingado)*, 113 B.R. 37 (Bankr. D. N.M. 1990), *aff'd*, 995 F.2d 175 (10th Cir. 1993); *see also Murray v. Murray (In re Murray)*, 31 B.R. 499 (Bankr. E.D. Pa. 1983); *In re Abrams/Maldanado*, 12 B.R. 300 (Bankr. D.P.R. 1981) (bankruptcy court declined to take jurisdiction to grant divorce even though it had jurisdiction over parties' property); *supra* § 3.43 (creditor's right to recover from marital property component of mixed property asset). If both spouses file, their community property is effectively in both estates. *Ageton v. Cervenka (In re Ageton)*, 14 B.R. 833 (B.A.P. 9th Cir. 1981).

Assets that are owned by the spouses as marital property must be distinguished from assets that are owned by an entity that is owned by the spouses as marital property. *See supra* § 2.51. For example, if the spouses own partnership interests that are marital property, the assets owned by the partnership are not marital property. *U.S. West Fin. Servs., Inc. v. Berlin (In re Berlin)*, 151 B.R. 719, 723 (Bankr. W.D. Pa. 1993); *In re Lundell Farms*, 86 Bankr. 582, 590 (Bankr. W.D. Wis. 1988). If the partnership becomes a bankruptcy debtor, only partnership assets are affected; the spouses' other property is not.

Certain property is exempt and may be withdrawn from the bankruptcy estate. 11 U.S.C. § 522(b). Also, property that is of negligible value or burdensome to the bankruptcy estate may be abandoned by the trustee. 11 U.S.C. § 554. Once an asset is removed from the bankruptcy estate, it is no longer administered as part of the bankruptcy process and can be dealt with by the state court in a dissolution action.

An important consideration for a spouse with creditor problems is that the bankruptcy court can liquidate the parties' community property for the benefit of creditors, whereas the state court in a property division can only assign debts and liabilities to the parties. *See* Mary Jo Heston, *Bankruptcy and Dissolution: Prevention, Action, and Reaction*, Community Prop. J., Jan. 1987, at 10. Liquidation and distribution through the bankruptcy court might be to the advantage of a spouse who does not anticipate having sufficient income or assets after the dissolution to pay joint obligations and who believes the other spouse will not pay the debts that are assigned to him or her.

Even though the bankruptcy court has exclusive jurisdiction over the spouses' marital property assets and the filing spouse's nonmarital property assets, the court may abstain or may keep jurisdiction over only as much property as is necessary to pay creditors if one party so requests. 28 U.S.C. § 1334(c)(2); 11 U.S.C. § 305; *see also* Alan N. Resnick & Henry J. Sommer, 5 *Collier on Bankruptcy* ¶ 541.13 (16th ed. 2009). The bankruptcy court will probably abstain to allow the state court to determine the spouses' rights in property, but actual distribution is under the bankruptcy court's jurisdiction. *See In re Palmer*, 78 B.R. 402 (Bankr. E.D.N.Y. 1987).

The filing of a bankruptcy petition results in an automatic stay of almost all proceedings against the debtor. 11 U.S.C. § 362(a). A party may request that the bankruptcy court lift the automatic stay to allow the state court to adjudicate the rights of the parties to property in the dissolution proceeding, even though the bankruptcy court will determine distribution. *Palmer*, 78 B.R. at 406; *see Kapila v. Morgan (In re Morgan)*, 286 B.R. 678 (Bankr. E.D. Wis. 2002) (holding void award of marital property homestead to wife by divorce court because property had previously passed to husband's bankruptcy estate). If the divorce court awards estate property to the nondebtor spouse, the nondebtor then has a claim in the debtor spouse's bankruptcy estate.

A debtor's spouse who co-owns an asset with the debtor's bankruptcy trustee may have the right to prevent sale of the entire asset. *See* 11 U.S.C. § 363(h). The debtor's spouse also has the right to purchase the estate's interest in co-owned property and in assets that were owned by the spouses as marital property. 11 U.S.C. § 363(i); *see infra* § 11.28.

b. After Judgment of Dissolution [§ 11.28]

If the dissolution was completed and judgment was entered before a bankruptcy petition was filed and the debtor spouse has a continuing obligation to the nondebtor spouse, the nondebtor spouse may have a claim as a creditor in the debtor spouse's bankruptcy estate. In general, a claim arising in a decree of dissolution is not subject to discharge. 11 U.S.C. § 523(a)(5), (15). A property division may be subject to discharge under a Chapter 13 plan. 11 U.S.C. § 1328(a).

The bankruptcy trustee can sell an asset that the debtor spouse co-owns with another person, such as a spouse or former spouse who is a joint tenant or a tenant in common of a former marital property asset, only if partition is impracticable, if the sale of the bankruptcy estate's interest will realize significantly less than if the asset is sold as a whole, if the benefit to the estate outweighs the detriment to the co-owner, and if the asset is not used in the production of energy. 11 U.S.C. § 363(h). The debtor's spouse, who previously had a community property interest in an asset, can also purchase the asset from the bankruptcy estate, but considerations relating to the hardship of sale are not available. 11 U.S.C. § 363(i). The co-owner has a right of first refusal to purchase the property at the price that would be paid by a third party. *Id.* After the sale, the co-owner's interest in the proceeds, less pro rata costs of sale, are distributed to the co-owner. 11 U.S.C. § 363 (j).

If an asset was transferred to the debtor spouse by a decree of dissolution and the nonfiling spouse has retained a lien to secure payment of an eventual property division, there is no statutory right to purchase the property, but a properly perfected and unavoidable lien would still entitle the lienholder to payment from the proceeds. Unless the spouse who was awarded the asset by the dissolution decree owned the asset as nonmarital property during the marriage, this lien is not avoidable under 11 U.S.C. § 522(f)(1) as a judicial lien that impairs the debtor's homestead exemption. *Farrey v. Sanderfoot*, 500 U.S. 291 (1991); *see also* Henry J. Sommer & Margaret Dee McGarity, *Collier Family Law and the Bankruptcy Code* § 7.04 (1995).

On April 20, 2005, President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23. Most provisions became effective for cases filed on or after October 17, 2005, but some changes, such as certain homestead-exemption provisions, were effective upon enactment. The details of this substantial and comprehensive revision of bankruptcy law are beyond the scope of this text. *See supra* ch. 6.

E. Treatment of Property and Obligations After Legal Separation [§ 11.29]

Section 767.61 requires a property division in every judgment of divorce, annulment, or legal separation. Legal separations are included in all references to dissolution in the Act by virtue of the definition of dissolution, Wis. Stat. § 766.01(7), notwithstanding that the different types of marital dissolution have different grounds for relief.

Section 766.75(4), which was part of the Marital Property Act before the 1985 Trailer Bill and which allowed the court to determine the treatment of marital property assets owned by the parties after a decree of legal separation, was repealed by the 1985 Trailer Bill. This repeal is consistent with section 767.61, which requires property division at dissolution. Further, the definition of *during marriage* in section 766.01(8) refers to a period in which both spouses are domiciled in Wisconsin that begins at the determination date and ends at the death of a spouse or a decree of dissolution. *See also* Wis. Stat. § 766.01(5) (*determination date* defined). The provision that income acquired during marriage is marital property unless otherwise provided, Wis. Stat. § 766.31(4), also supports the conclusion that former spouses do not own or generate marital property assets after a legal separation. *But see* Marjorie H. Schuett, *Are There Spousal Rights Under the Probate Code After a Legal Separation?* 16 Wis. J. Fam. L. 53 (1996).

III. Support [§ 11.30]

A. Equal Responsibility for Support [§ 11.31]

Each spouse has an equal obligation to support the other, and each parent has an equal obligation to support minor children as provided in chapter 48 (the Children's Code) and chapter 938 (the Juvenile Justice Code) and according to the standards set by chapter 49 (relating to public assistance). Wis. Stat. § 49.90(1m). Each parent also has an obligation to support a child of a dependent person. Wis. Stat. § 49.90(1)(a)2., (1m).

There may be criminal sanctions for unjustified failure to support a dependent child, a grandchild, a spouse, or a former spouse. Wis. Stat. § 948.22(2); *see, e.g.*, *State v. Monarch*, 230 Wis. 2d 542, 602 N.W.2d 179 (Ct. App. 1999); *State v. Lenz*, 230 Wis. 2d 529, 602 N.W.2d 173 (Ct. App. 1999). There are also sanctions under federal law if a child-support payor living in a different state from his or her children fails to make required payments. 18 U.S.C. § 228; *United States v. Black*, 125 F.3d 454 (7th Cir. 1997).

The intent of the legislature in regard to support obligations is stated in section 765.001(2):

> Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.

The measure of support for which a spouse is responsible is determined under section 767.501, which authorizes an independent action for support. The considerations in section 767.511, relating to child support, and in section 767.56, relating to maintenance, are used to determine the support obligation at dissolution. *See* Wis. Stat. § 767.501(2)(b). Obligations arising under the duty of support may be satisfied from all marital property assets and all other property of the obligated spouse. Wis. Stat. § 766.55(2)(a).

In addition to the direct obligation to the spouse to whom the duty of support is owed, a spouse required to furnish support is directly liable to a creditor furnishing necessary goods and services to the other spouse. This is known as the *necessaries* doctrine. *See St. Mary's Hosp. Med. Ctr. v. Brody*, 186 Wis. 2d 100, 519 N.W.2d 706 (Ct. App. 1994) (holding that obligation under doctrine of necessaries is included in category of support debt under section 766.55(2)(a)). The application of this doctrine may be different from the obligation for support, since the amount due for support is determined according to factors under section 767.56. For a detailed description of the support obligation and the necessaries doctrine, see sections 5.106,–.110, 6.4–.6, and 8.17, *supra*.

The federal criminal statute creating sanctions for failure to support children in a different state, 18 U.S.C. § 228, has been held partially unconstitutional by *United States v. Pillor*, 387 F. Supp. 2d 1053 (N.D. Cal. 2005), and *United States v. Morrow*, 368 F. Supp. 2d 863 (C.D. Ill. 2005). Both courts held that the mandatory presumption of willful refusal to pay support violated the defendant's due-process rights in that it impermissibly relieved the government of its burden of persuasion with respect to an element of the offense. The courts upheld the statute in all other respects.

B. Property Available for Recovery of Support Obligations [§ 11.32]

An obligation to support dependents that first arises before marriage is considered a premarriage obligation, notwithstanding that periodic payments are subject to modification and continue to be due and payable after marriage. *See* Wis. Stat. § 766.55(2)(c)1.; *see also St. Mary's Hosp. Med. Ctr. v. Brody*, 186 Wis. 2d 100, 519 N.W.2d 706 (Ct. App. 1994) (regarding recovery of support obligations arising under necessaries doctrine).

The property available to meet an obligation to support a former spouse or minor children is any property that would have been available but for the subsequent marriage. Wis. Stat. § 766.55(2)(c)1. This includes all the obligated spouse's nonmarital property assets and that part of the marital property assets that would have been the property of the obligated spouse if he or she had not remarried or had not married for the first time, if the obligation involves minor children born before any marriage. *Id.* All marital property assets generated by the obligated spouse are available notwithstanding the current spouse's ownership interest in the assets. The purpose behind this provision is to prevent the obligated spouse's subsequent marriage from diminishing or increasing the assets available to a minor child or former spouse for support. Consistent with this purpose, marital property assets that would have been the solely owned property of the subsequent spouse but for the marriage are not available, even though the obligated spouse has a one-half interest in the assets. Wis. Stat. § 766.55(2)(c)1. For example, the nonobligated spouse's wages cannot be garnished to meet the obligated spouse's support obligation, even though the obligated spouse has a one-half interest in such wages. If the wages of both the obligated spouse and the nonobligated spouse are commingled in a joint bank account or other marital property asset, it is not clear how the payee's right to recover is affected. *See supra* § 6.24. The resolution of this issue may depend on who has the burden of proof for tracing the assets. *See supra* ch. 3..

It is important to note that title is not a factor in determining which assets are available to meet support obligations. Therefore, if a spouse is obligated to support a former spouse or children born before the current marriage, and the obligated spouse who has married or remarried uses his or her wages to purchase a car titled in the name of a new spouse, then (unless the car was a gift that is not avoidable as a fraudulent conveyance and intended to be the individual property of the new spouse) the car could be recovered to satisfy the support obligations. Wis. Stat. § 766.31(10). Under the rule of section 766.55(2)(c)1., absent a gift, the car is classified as marital property, notwithstanding title, and it would have been the property of the obligated spouse but for the marriage. Therefore, it can be recovered for support of the former spouse or minor children.

Frequently, marital property funds are used for the support of a previous spouse or for minor children not of the current marriage. These obligations are treated as premarital obligations under section 766.55(2)(c)1. The nonobligated spouse may have a right to recover from the obligated spouse marital property funds equal in value to the amounts so used. Wis. Stat. § 766.70(5). The recovery would be the individual property of the nonobligated spouse. Wis. Stat. § 766.70(5). This right of reimbursement is affected by the rights of any third parties and by equitable considerations. Wis. Stat. § 766.70(5). It may be appropriate to reserve this remedy for cases in which the obligated spouse has acted in bad faith, for example, by using marital property funds to make payments despite having substantial nonmarital property funds available.

C. Maintenance [§ 11.33]

The obligation to support a spouse often extends beyond the dissolution of the marriage in the form of maintenance. Wis. Stat. § 767.56. Although the remarriage of the payee terminates the obligation on application of the payor, Wis. Stat. § 767.59(3), the remarriage of the payor does not. As to the subsequent marriage of the payor, the maintenance obligation to the payor's former spouse is a premarriage obligation that is collectible pursuant to section 766.55(2)(c)1.

The Wisconsin Supreme Court addressed the effect of marital property law on the income earned on assets owned by a maintenance payor's subsequent spouse in *Poindexter v. Poindexter*, 142 Wis. 2d 517, 419 N.W.2d 223 (1988). The maintenance awarded to the payor's previous spouse was based on a percentage of the payor's income. Divorced in 1980, the payor remarried in 1981, before the passage of the Marital Property Act. In 1985, the circuit court found that changes in the payor's circumstances warranted modification of the maintenance amount. Some of the changes, however, resulted from the payor's transfer of certain assets, including income-producing real estate, to his second wife, also before the effective date of the Marital Property Act. Although the circuit court had concluded that the income from the transferred properties should be entirely included in the maintenance calculation, the court of appeals held that only one-half the income should be included.

The supreme court affirmed the circuit court's use of a percentage-of-income standard to set the amount of maintenance for the first wife. *Id.* at 529–37. The court discussed the classification of income from assets transferred to the second spouse and concluded that the income should be excluded from the maintenance calculation, on the ground that the parcels of real estate were the second wife's predetermination date property and should have been treated as if they were her individual property assets. *See id.* at 541; *see also* Wis. Stat. § 766.31(9). Section 766.31(4) classifies income from such assets as marital property. However, a predetermination date obligation, as the husband's maintenance obligation was determined to be, may be satisfied only from the payor's nonmarital property assets and from marital property assets that would have been available for the payor's obligations but for the Act. Wis. Stat. § 766.55(2)(c)2. These assets, and the income from them, would have belonged solely to the second wife but for the Act. The supreme court remanded the case for the circuit court to consider the maintenance amount, since it may have been based on the circuit court's erroneous assumption that the rental income could be reached to enforce collection. *Poindexter*, 142 Wis. 2d at 543–44. The court also stated that section 766.55(2)(c)1. (premarriage obligations) did not apply in this case because the prior marriage and divorce occurred before the Marital Property Act was enacted, thereby making this a pre-Act rather than a premarriage obligation. *Id.* at 542.

The court did not discuss the effect of section 766.31(10), relating to interspousal gifts and the income from such gifts, although it is arguable that the section does not apply to interspousal predetermination date gifts. *See supra* § 2.94. If the interspousal-gift rule of section 766.31(10) had applied, the income from the transferred assets would not have been classified as marital property, and the result would have been the same, albeit based on a different reason.

In *Guzikowski v. Kuehl*, 153 Wis. 2d 227, 451 N.W.2d 145 (Ct. App. 1989), the court of appeals awarded the former wife attorney fees, a form of maintenance, on her cross-appeal that resulted in an increase in child support payable to her by her former husband. The fees were incurred after the former wife had remarried. Even though the wife owned one-half of her new husband's income, the court determined that it did not have to ignore the fact that the new husband, and not the wife, was the source of that income. The court concluded that it could disregard the new husband's income in awarding the attorney fees to the wife if considering the new husband's income would only burden his efforts with the cost of an unrelated party's legal proceedings—namely, the dispute between the former spouses.

D. Setting Amount of Child Support Obligations Arising Before Current Marriage [§ 11.34]

In setting child support to be paid to the parent having custody or primary placement by either the noncustodial parent or the parent having joint custody but not having physical placement of a minor child, the court is required to set the amount as a percentage of the payor parent's gross income from all sources (after deducting business expenses but before deducting taxes and Social Security contributions, *see* Wis. Admin. Code § DCF 150.02(13)), plus imputed income in some circumstances, unless it would be unfair to the child or any of the parties to do so. Wis. Stat. § 767.511(1j), (1m). The rules governing the percentage-of-income standard for child support are contained in Wisconsin Administrative Code chapter DCF 150 (formerly chapter DWD 40). Child support may be set as a dollar amount or as a percentage of income. Wis. Stat. § 767.511(1)(a). If there is a finding that the application of the percentage standard would be unfair to the child or any of the parties, the court can consider a number of equitable factors under section 767.511(1m) and make appropriate findings. Wis. Stat. § 767.511(1n).

Except for some paternity-support determinations, the amount of a child-support obligation will usually be decided in the first instance at the time of the parents' divorce, that is, before the payor parent remarries. All these rules are silent on the calculation of child support according to the percentage standards when the obligated parent marries or remarries and the income used in the original calculation of support is now the marital property of the payor and a new spouse.

An obligation arising before marriage, such as an obligation to support a child not of the current marriage, may be satisfied only from the parent's nonmarital property assets and from marital property assets that would have been the property of the obligated parent but for the obligated parent's subsequent marriage. Wis. Stat. § 766.55(2)(c)1. This is the same income that would have been available to meet the support obligation if the parent had not married.

The question of the extent to which the child support payor's subsequent spouse's income is to be considered, if at all, arises when a motion is made for modification or revision of the judgment under section 767.59. Section 767.59(1c)(a)2. states that the court may "[m]ake any judgment or order on any matter that the court might have made in the original action." The statute further states, "a revision under this section of a judgment or order with respect to an amount of child or family support may be made only upon a finding of a substantial change in circumstances." Subsections (1f)(b) and (c) of section 767.59 describe events that constitute a rebuttable presumption of a substantial change of circumstances and events that may constitute such a change, respectively. The named events do not include the payor's remarriage, which might entail consideration of the payor's marital property interest in income earned by the new spouse or the new spouse's interest in marital property income earned by the payor. In the appropriate case, however, the court may consider "[a]ny other factor that the court determines is relevant." Wis. Stat. § 767.59(1f)(c)4. Section 767.59(2) provides that the percentage standards, *see* Wis. Admin. Code § DCF 150.03(1), must be applied to a modification of child support unless, on the request of a party and after consideration of the factors listed in section 767.511(1m) (relating to the totality of the child's circumstances), the court finds by the greater weight of the credible evidence that the use of the percentage standards is unfair to the child or to any of the parties. *See Burger v. Burger*, 144 Wis. 2d 514, 424 N.W.2d 691 (1988).

The effect of the payor's interest in a new spouse's income after remarriage was addressed by the Wisconsin Supreme Court in *Abitz v. Abitz*, 155 Wis. 2d 161, 455 N.W.2d 609 (1990). The circuit court had held that the amount of support to be paid by the noncustodial mother was to be calculated by adding her income and that of her current husband, dividing by two, and applying the percentage standard to the resulting amount. The support thus determined equaled 57% of the mother's gross income. The order further stated, however, that the child support was to be paid only from the mother's nonmarital property and from her marital property that would have been her property but for the marriage. Her current husband's income would not be available to satisfy her obligation. The court of appeals had held that the current husband's income could not be used either to set the amount of support or as a source of collection, and that the totality of the circumstances should be considered, except for the current husband's marital property income. The supreme court affirmed the court of appeals' decision and remanded the case for determination of child support. However, the supreme court found that the court of appeals had erred in eliminating the earnings of the payor wife's current husband when considering the parties' total economic circumstances. The court held that if the standards are used, the percentages must be applied to the "gross income" of the obligated spouse "as if he or she were still single." *Abitz*, 155 Wis. 2d at 181–82; *see also Krieman v. Goldberg*, 214 Wis. 2d 163, 171, 571 N.W.2d 425 (Ct. App. 1997); *Miller v. Miller*, 171 Wis. 2d 131, 491 N.W.2d 104 (Ct. App. 1992).

Abitz was decided before subsections (2) and (2m) were added to section 767.32 (now section 767.59) by 1991 Wisconsin Act 39. Now, when modifying child support, the court must use the percentage standard unless, on the request of a party, "after considering the factors listed in s. 767.511(1m) [relating to the totality of the child's circumstances], the court finds, by the greater weight of the credible evidence, that the use of the percentage standard is unfair to the child or to any of the parties." Wis. Stat. § 767.59(2)(b). Had this statutory requirement been in effect at the time *Abitz* was decided, the court would first have had to consider each parent's earning capacity and total economic circumstances to find that the percentage standard was unfair to the children or the parties. Wis. Stat. § 767.59(1), (2)(a), (2)(b). Only then could it have set support based on the parties' total economic circumstances. *See* Wis. Stat. § 767.59(2)(b).

Abitz also was decided before the child-support percentage-of-income standard provisions in the Wisconsin Administrative Code (now at chapter DCF 150) were revised. Section DCF 150.02(13) now defines *gross income* quite broadly but does not clearly include a new spouse's income. *Krieman*, 214 Wis. 2d 163, was decided after these revisions, but it followed *Abitz* without discussing the definition of gross income in the administrative code.

The income of an obligated parent's new spouse can be one of the considerations in setting child support, despite the fact that the obligation was a pre-Act debt. In *J.G.W. v. Outagamie County Department Of Social Services (In the Interest of A.L.W.)*, 153 Wis. 2d 412, 451 N.W.2d 416 (1990), also decided before the creation of subsections 767.32(2) and (2m) (now subsections 767.59(2)(a) and (b)) and cited in *Abitz*, before the effective date of the Act the child had received medical assistance benefits, for which the father was obligated. Wis. Stat. §§ 766.55(2)(c)2., 46.03(18), .10(3). The court held that the fact that a nonobligated spouse's income is considered in setting the amount does not impose liability on the nonobligated spouse, nor is the nonobligated spouse's income available to the creditor for satisfaction of the debt. *A.L.W.*, 153 Wis. 2d at 426.

The court in *Brad Michael L. v. Lee D. (In re Paternity of Brad Michael L.)*, 210 Wis. 2d 437, 564 N.W.2d 354 (Ct. App. 1997), addressed the issue of how the income of a married child-support payor's spouse affected the child-support obligation in a paternity action. The circuit court had added together the gross income of the obligated father and his wife, divided the result by two, and applied the percentage standard to this amount. The court of appeals held this to be error. The court stated that under *Abitz*, only the father's income, determined as if he were single, should be used to set support. In this respect, the court deviated from the definition of *gross income* in Wisconsin Administrative Code section HSS 80.02(13)(a) (now DCF 150.02(13)), that is, gross income for federal income-tax purposes. However, the father's wife's income could be considered in the payor's total economic circumstances under section 767.59(2)(b), and her income could be used to determine whether the payor was able to *satisfy* the obligation. *Id.* at 457.

In *Steven J.S. v. Steven M.S. (In re Paternity of Steven J.S.)*, 183 Wis. 2d 347, 515 N.W.2d 719 (Ct. App. 1994), the court of appeals reversed the circuit court on the ground that the circuit court improperly added the income of the payor's spouse, who worked in the payor's business, in determining the payor's gross income for the purpose of calculating child support. Furthermore, the payor's spouse was not considered a *dependent household member* as that term was used in Wisconsin Administrative Code section HSS 80.02(10) (1995) (now section DCF 150.02(9)) for the purpose of imputing her income to him. The court of appeals did not rely on or mention marital property law in any determination affecting child support. However, the court observed that the spouse's income might be imputed to the payor if payments to the spouse were being used to divert the payor's income to reduce the amount of the payor's child support, citing *Evjen v. Evjen*, 171 Wis. 2d 677, 492 N.W.2d 361 (Ct. App. 1992). *Steven J.S.*, 183 Wis. 2d at 353; *see also Daniel R.C. v. Waukesha County (In the Interest of Kevin C.)*, 181 Wis. 2d 146, 510 N.W.2d 746 (Ct. App. 1993) (holding that spouses were manipulating assets to avoid responsibility for residential treatment for husband's child and allowing consideration of nonliable wife's income in imputing income to liable husband, notwithstanding marital property agreement classifying each spouse's assets as individual property of that spouse); *Evjen*, 171 Wis. 2d 677 (holding that court could consider payor's diversion of income to his current wife through his corporation in setting support); *Weston v. Holt*, 157 Wis. 2d 595, 603–05, 460 N.W.2d 776 (Ct. App. 1990) (holding that change in child support requires consideration of total economic circumstances); *Long v. Wasielewski*, 147 Wis. 2d 57, 432 N.W.2d 615 (Ct. App. 1988); *Hime v. Muir*, 128 Wis. 2d 293, 381 N.W.2d 607 (Ct. App. 1985). (*Hime* was decided before the Wisconsin Administrative Code Provisions dealing with child support were revised to provide for serial families.)

The court of appeals held in 1993 that a payor under an effective child-support order who later has other children was not a *serial family payer* within the meaning of Wisconsin Administrative Code section HSS 80.02, unless the child-support obligation to the subsequently born children arises pursuant to a court order. *Brown v. Brown*, 177 Wis. 2d 512, 522, 503 N.W.2d 280 (Ct. App. 1993). This interpretation is now codified in the replacement to section HSS 80.02, section DCF 150.02(25) of the Wisconsin Administrative Code, which now uses the term *serial-family parent*. *See also* Connie M. Chesnik, *New Child Support Guidelines Effective in 2004*, 24 Wis. J. Fam. L. 7 (2004).

The Wisconsin Supreme Court, in *Burger v. Burger*, 144 Wis. 2d 514, 424 N.W.2d 691 (1988), considered how a custodial parent's marital property interest in her new spouse's income affected the level of child support she was to receive. After the mother remarried and voluntarily quit working, she asked the court to increase child support, based on the children's father's increased income, her own lack of income, and the children's increased needs. The father asked that the mother's marital property interest in her husband's earnings be considered as her income. The family court commissioner found that there had been a substantial change in circumstances and set a new support order based solely on a percentage of the noncustodial father's income in accordance with the percentage standards under section 767.25(1j) (now section 767.511(1j)). The circuit court affirmed this amount.

Upon certification for direct appeal, the supreme court affirmed the child support amount. The court found that it was not an abuse of discretion to find that the increase in the ages of the children constituted a substantial change of circumstances as required by section 767.32 (now section 767.59) to warrant an increase in support. *Id.* at 524. It approved the use by the family court commissioner of the percentage standards in reaching the amount of the modified support order, although section 767.32(2) (now section 767.59(2)) was not in effect and use of the percentage standard was not required. *Id.* at 519 n.1. According to the supreme court, once the family court commissioner had determined that a substantial change had occurred and that the percentage standard was appropriate to determine the modified amount of support, the amount of the custodial mother's income from any source, including her interest in her new husband's income, was irrelevant. *Id.* at 525. The court did not need to address whether a payor's or payee's marital property interest in the earnings of his or her new spouse is a factor in determining the obligation to pay or the entitlement to receive support.

Although the court stated that *Poindexter v. Poindexter*, 142 Wis. 2d 517, 419 N.W.2d 223 (1988), had answered the question of attribution of a new spouse's income, *Poindexter* did not deal with the issue before the court in *Burger*. The mother's income in *Burger* was not a consideration in setting the modified support order under the percentage standards, and she was the only party who had remarried. *Poindexter* would not have provided guidance for the situation in *Burger* if the commissioner had elected not to apply the percentage standards but to consider the resources of the custodial parent, because *Poindexter* does not indicate whether the earnings of a parent's new spouse would enter into the equation and, if so, how. *See supra* § 11.33.

A marital property agreement cannot adversely affect the right of a child to support. Wis. Stat. § 766.58(2). The spouses in *Ondrasek v. Tenneson*, 158 Wis. 2d 690, 462 N.W.2d 915 (Ct. App. 1990), had entered into an agreement incident to their divorce that prohibited the wife from requesting child support as long as she was receiving periodic payments. The court found that an agreement that purported to prevent the court from taking the children's needs into consideration was against public policy. Conversely, an agreement that prohibited a court from taking the payor's reduced income into consideration in setting support was also against public policy. *Krieman*, 214 Wis. 2d at 176–78; *see also Motte v. Motte*, 2007 WI App 111, 300 Wis. 2d 621, 731 N.W.2d 294 (holding that stipulation to make future payments nonmodifiable if child's residence changed was against public policy but stipulation to forgive arrearage was not); *Wood v. Propeck*, 2007 WI App 24, 299 Wis. 2d 470, 728 N.W.2d 757 (holding that stipulation to modify child support only in event of "catastrophic circumstances" was against public policy).

A marital property agreement entered into by a noncustodial parent obligated to pay support and his or her nonobligated spouse, or a unilateral statement executed by the parent's spouse, may not adversely affect a child's right to support. Wis. Stat. §§ 766.58(2), .59(5). The nonobligated spouse's income might still be a consideration in determining the amount of the parent's obligation of support, even if the parties to the agreement opt out of the application of marital property rules. Nevertheless, the nonobligated spouse's income would only be used in setting the level of support; it would not be recoverable to pay such support. Wis. Stat. § 766.55(2)(c)1.

A child-support order arising during the marriage, for a child born during the marriage who is the child of one but not both spouses, may also be based on considerations of the parent's income and the parent's spouse's income. Because this obligation arose during the marriage, but is not likely to be considered in the interest of the marriage or the family, the obligation may be satisfied from the obligated spouse's nonmarital property and that spouse's interest in marital property, in that order. Wis. Stat. § 766.55(2)(d). Thus, the payee can collect from the wages of both the parent and the spouse who is not the parent of the child but only to the extent of the obligated parent's one-half interest.

An award of child-support payments may include a requirement that the payor maintain life insurance on his or her life with the minor children as irrevocable beneficiaries as long as one of them is entitled to support. If the insured names another beneficiary and then dies, the beneficiary holds the proceeds in constructive trust for the rightful recipients. *Richards v. Richards*, 58 Wis. 2d 290, 206 N.W.2d 134 (1973). In *Duhame v. Duhame*, 154 Wis. 2d 258, 453 N.W.2d 149 (Ct. App. 1989), the surviving spouse was named as the beneficiary of an insurance policy with respect to which the deceased husband had been required to name as beneficiaries his children from a prior marriage. The court found that the spouse was the constructive trustee of the proceeds for the children and rejected her argument that the Marital Property Act superseded the law of constructive trusts. *Id.* at 268–69. *See also Pluemer v. Pluemer*, 2009 WI App 170, 322 Wis. 2d 138, 776 N.W.2d 261 (remanding to circuit court to determine if surviving spouse was bona fide purchaser of insurance proceeds; court distinguished *Richards* and *Duhame*). Section 766.95 states that unless they are displaced by chapter 766, the principles of law and equity supplement the chapter's provisions. The law of constructive trusts still applies, even in instances when chapter 766 does also.

E. Income Tax Considerations [§ 11.35]

Marital property classification (community property ownership under the Internal Revenue Code) has an effect on the reporting and collection of tax on income received during the marriage. Under marital property classification rules, each spouse owns a one-half interest in income classified as marital property. Wis. Stat. § 766.31(3), (4). As a result, a spouse filing a separate federal or state income tax return, or a single person who was married for part of the year, must report and is taxed on one-half the spouses' entire marital property income. *See supra* § 9.6. Likewise, each spouse may claim one-half the deductions and amounts withheld relating to the production of marital property income. *Id.*

For Wisconsin income tax purposes, section 71.64(1)(c) provides that withholding from marital property income is to be allocated in the same manner that the income itself is or would be allocated. Marital property agreements may affect tax reporting and should be considered in the spouses' tax planning during the pendency of a dissolution action. *See supra* § 9.52.

A potential problem arises when a divorce is pending and the earnings or other marital property income generated by one spouse, plus temporary maintenance ordered by the court under section 767.225(1)(d) to be paid to that spouse, are less than one-half the spouses' entire marital property income that the spouse will need to report if the spouses file separate returns. This and other tax consequences can be considered by the court in awarding property division or maintenance. Wis. Stat. §§ 767.61(3)(k), .56(7).

Unless they have entered into an agreement reclassifying income as individual property before the beginning of the tax year, spouses must each report one-half their marital property income earned during the portion of the year before the judgment of dissolution is granted. Income earned after the judgment is granted is solely owned by the party who earned it and is entirely reportable by that spouse. The spouses may want to treat their marital property income as if it were solely owned by the party receiving the income as of the beginning of the year of the divorce, because they will file as single taxpayers for that year. However, a marital property agreement is ineffective for tax purposes to retroactively reclassify income, although such an agreement is effective prospectively. *See supra* §§ 7.14, 9.52.

If the effect of a temporary maintenance order is to equalize total marital property income between the parties or if the temporary order or the final judgment provides that the spouse receiving more than one-half of the spouses' marital property income will pay any increased taxes of the spouse receiving less than half, then any inequity resulting from state or federal reporting rules should be resolved. *But see supra* § 8.40 (discussion of the lack of authority of the circuit court commissioner to divide property). *See generally supra* §§ 6.14–.17 (tax liability and classifications of property from which taxes can be collected).

Finally, section 767.61(3)(k) allows the court to consider the tax consequences of the property division in dividing property. The court should likewise be able to consider tax consequences of the separation. *See also supra* §§ 6.14–.17 (concerning the collection of taxes from the income of spouses).

IV. Marital Property Agreements [§ 11.36]

A. Standards for Enforceability Generally [§ 11.37]

Agreements between spouses made before or during a marriage that provide for property division and spousal support in the event of the dissolution of the marriage were given statutory recognition in 1977 Wisconsin Law ch. 105, the Divorce Reform Act, which became effective on February 1, 1978. Previously, agreements limiting a spouse's liability in the event of divorce had been found to be against public policy. *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500 (1950).

Marital property agreements as defined in sections 766.58 and 766.585 are enforceable generally unless the spouse against whom enforcement is sought proves any of the following: (1) the agreement was unconscionable when made; (2) the spouse did not execute it voluntarily; or (3) the spouse did not receive fair and reasonable disclosure under the circumstances and did not have notice of the other spouse's property and financial obligations. Wis. Stat. § 766.58(6); *see, e.g.*, *Gardner v. Gardner*, 190 Wis. 2d 216, 232–33, 527 N.W.2d 701 (Ct. App. 1994) (holding that disclosure of stock's book value without appraisal was adequate since wife was advised of meaning of value and advised not to sign the agreement). A distinction must be made between agreements entered into in settlement of a pending divorce and agreements entered into in contemplation of an ongoing marriage. An agreement entered into when an action for dissolution is not pending is presumed enforceable under section 767.61(3)(L). An agreement entered into in settlement of the pending dissolution, however, is subject to court approval. Wis. Stat. § 767.34; *Van Boxtel v. Van Boxtel*, 2001 WI 40, 242 Wis. 2d 474, 625 N.W.2d 284. In *Evenson v. Evenson*, 228 Wis. 2d 676, 598 N.W.2d 232 (Ct. App. 1999), after the divorce petition was filed, the parties entered into a "Limited Marital Property Agreement" that dealt, among other things, with the disposition of the wife's stock. The husband sought to repudiate the agreement, but the circuit court enforced it. The court of appeals remanded the matter, holding that the agreement was a divorce settlement agreement subject to court approval under section 767.10(1) (now section 767.34), not a written agreement enforceable under section 767.255(3)(L) (now section 767.61(3)(L)). Similarly, the court in *Ayres v. Ayres*, 230 Wis. 2d 431, 602 N.W.2d 132 (Ct. App. 1999), allowed repudiation of an agreement entered into in connection with a pending divorce. *But see Hottenroth v. Hetsko*, 2006 WI App 249, 298 Wis. 2d 200, 727 N.W.2d 38 (not allowing repudiation of stipulation); *see also Wilke v. Wilke*, 212 Wis. 2d 271, 569 N.W.2d 296 (Ct. App. 1997) (holding that release in settlement agreement, of each party's interest in assets awarded to the other party, acted as release of husband's right to redeem wife's stock in closely held family corporation).

Specific standards apply at dissolution to the enforceability of provisions relating to property division, spousal support, and child support. These specific standards differ from the general standards and are discussed *infra* in the relevant sections.

B. Property Division [§ 11.38]

If there is a marital property agreement with property-division provisions, section 767.61(3)(L) states that at dissolution such an agreement will be enforced unless "the terms of the agreement are inequitable as to either party." There is a presumption that the terms are equitable, and the spouse seeking to have it set aside must prove that the agreement is inequitable. Wis. Stat. § 767.61(3)(L). This provision applies to agreements executed before and after the spouses' determination date. To be enforceable in a dissolution and considered equitable under section 767.61(3)(L), an agreement with property-division provisions must meet the tests of voluntariness and disclosure and must be fair when made, and, if circumstances have substantially changed since the time of execution, at the time of dissolution. *Button v. Button*, 131 Wis. 2d 84, 89, 388 N.W.2d 546 (1986); *see also supra* § 7.140 (discussion of *Button* and tension between tests for enforceability under sections 766.58(6) and 767.255(3)(L) (now section 767.61(3)(L))).

The court of appeals applied the *Button* test in *Warren v. Warren*, 147 Wis. 2d 704, 433 N.W.2d 295 (Ct. App. 1988). The wife's deferred employment benefits were significantly reduced because of her early retirement. When the parties were divorced, the wife argued that this reduced income was a change in circumstances and that she should not be bound by the parties' premarital agreement. The court found that her early retirement could have been reasonably contemplated and had in fact been contemplated when the agreement was made. Consequently, the court held that the agreement was equitable at divorce and enforced the agreement. *See supra* § 7.141. The court also stated that once an agreement is found to be equitable, it controls the outcome of the property division under section 767.255(11) (now section 767.61(3)(L)); in other words, the agreement is not merely one of the 13 factors altering the presumptively equal division. *Warren*, 147 Wis. 2d at 711–12. The court withdrew contrary dicta in *Torgerson v. Torgerson*, 128 Wis. 2d 465, 469 n.2, 383 N.W.2d 506 (Ct. App. 1986). *But see Krejci v. Krejci*, 2003 WI App 160, 266 Wis. 2d 284, 667 N.W.2d 780 (holding inequitable enforcement of prenuptial agreement at divorce when wife's efforts had contributed to appreciation of husband's inherited property); *Gardner v. Gardner*, 175 Wis. 2d 420, 432, 499 N.W.2d 266 (Ct. App. 1993) (holding that validity of parties' marital property agreement would not prevent court from providing relief to one spouse under section 767.255(11) (now section 767.61(3)(L)), if it would be equitable to deviate from agreement's terms); *Pearce v. Pearce*, 824 S.W.2d 195

(Tex. App. 1991) (holding that although wife was precluded by marital agreement from acquiring interest in community property, she was not precluded from claiming reimbursement for husband's use of "community efforts" to improve his separate property); *see also Steinmann v. Steinmann*, 2008 WI 43, ¶ 43, 309 Wis. 2d 29, 749 N.W.2d 145 (holding that income from excluded asset was divisible); *Antuk v. Antuk*, 130 Wis. 2d 340, 387 N.W.2d 80 (Ct. App. 1986) (holding that prenuptial agreement provision covering property "acquired by either prospective spouse before or after marriage" included appreciation of excluded asset, some of which resulted from nonowning spouse's efforts, and excluding such appreciation from marital estate).

Similarly, in *Greenwald v. Greenwald*, 154 Wis. 2d 767, 454 N.W.2d 34 (Ct. App. 1990), the court found that the disclosure requirement was met by one party's actual knowledge of the other party's financial condition and held that the agreement was fair even though its effect was one-sided. The parties were married late in life, and the husband repeatedly insisted that he would marry only on the condition that his assets be preserved for his children from a former marriage. The wife was his former housekeeper, and the court found that she voluntarily accepted the husband's terms. Since the parties' circumstances at the time of the divorce were reasonably anticipated at the time the agreement was executed, the agreement was enforceable under section 767.255(11) (now section 767.61(3)(L)). *See also Gardner v. Gardner*, 190 Wis. 2d 217, 527 N.W.2d 70 (Ct. App. 1994).

For a marital property agreement to be enforceable in a dissolution proceeding, it must contain provisions relating specifically to the dissolution of the marriage. An agreement relating only to disposition at death will not control property division at dissolution. *Levy v. Levy*, 130 Wis. 2d 523, 388 N.W.2d 170 (1986); *see also Webb v. Webb*, 148 Wis. 2d 455, 461–62, 434 N.W.2d 856 (Ct. App. 1988) (holding that although agreement had no specific provision relating to divorce, agreement nevertheless controlled property division, in part because attorney who drafted agreement testified that general waiver of rights was intended to apply to divorce).

Unless a judgment of dissolution provides otherwise, any provisions of a marital property agreement that would pass property at the death of a spouse, a so-called Washington will, are revoked at the time of judgment. Wis. Stat. § 767.375(1); *see* Barbara S. Hughes, *New Probate Code Affects Estate Planning at Divorce*, Wis. Law., Mar. 1999, at 14.

C. Right of Spouse to Support During Marriage and After Dissolution [§ 11.39]

The modification or elimination of support of a spouse during a marriage is a permissible subject for a marital property agreement. Wis. Stat. § 766.58(3)(d). The agreement may not, however, result in a spouse having less than adequate support during the marriage, taking into consideration all sources available for support. Wis. Stat. § 766.58(9)(a). This is consistent with section 948.22, which makes it a punishable offense for a person to intentionally fail to provide adequate support for a spouse or other dependents without just cause. *See supra* § 11.31.

More specifically, section 766.58(9)(b) sets an objective standard for determining whether provisions of marital property agreements relating to spousal support after dissolution are enforceable:

> If a marital property agreement modifies or eliminates spousal support so as to make one spouse eligible for public assistance at the time of dissolution of the marriage or termination of the marriage by death, the court may require the other spouse or the other spouse's estate to provide support necessary to avoid that eligibility, notwithstanding the marital property agreement.

Even if a marital property agreement limiting or eliminating support at the time of dissolution does not leave a spouse with less than adequate support or eligible for public assistance, the court is not bound by such a provision. Section 767.56(8) requires that a court only "consider" an agreement in setting maintenance. This section was unchanged by the Act. In a dissolution action the court could use its discretion to refuse to follow a provision reducing or eliminating support.

A court need not enforce an agreement limiting maintenance at the time of dissolution, but an agreement for nonmodifiable maintenance after dissolution is not against public policy. *Nichols v. Nichols*, 162 Wis. 2d 96, 100, 469 N.W.2d 619 (1991) (citing *Rintelman v. Rintelman*, 118 Wis. 2d 587, 348 N.W.2d 498 (1984)). The party seeking a modification of maintenance can be estopped by the agreement from receiving a modification. *Id.* Four conditions must be met for estoppel to apply: (1) the agreement must be incorporated into the judgment of dissolution; (2) the agreement must be part of a comprehensive property settlement approved by the court; (3) the agreement must be fair, equitable, not illegal, and not against public policy; and (4) the party seeking to be released from the agreement must be doing so on the ground that the court did not have the power to enter the order without the party's agreement. *Id. But see Patrickus v. Patrickus*, 2000 WI App 255, 239 Wis. 2d 340, 620 N.W.2d 205 (refusing to apply equitable estoppel to marital settlement agreement that was unfair because it allowed wife to seek increase in maintenance but did not allow husband to seek decrease as a result of decreased income). Although the agreements enforced in *Nichols* and *Rintelman* were entered into at the time of the dissolution, the same reasoning might apply to a marital property agreement enforced at the time of dissolution. *See also* Patricia K. Ballman, *Drafting Divorce Provisions in Marital Agreements*, 8 Wis. Law. Marital Prop. F. 1 (1991).

The question of enforceability arises if support is provided under a marital property agreement for a period of time after the decree and is then eliminated, thus causing the payee to become eligible for public assistance. A similar result might occur if a spouse receives a series of payments as a property division, with no maintenance, and he or she becomes eligible for public assistance after the payments cease. Such eligibility would occur after, not at the time of, the dissolution. The issue is whether including a provision for a short period of maintenance will avoid the application of section 766.58(9)(b). A spouse requesting an extension of maintenance before it is eliminated may be granted such an extension. *See Dixon v. Dixon*, 107 Wis. 2d 492, 508, 319 N.W.2d 846 (1982). Absent such a timely request by the payee spouse, however, it appears that the payor spouse could not be compelled to provide further support.

A marriage agreement entered into before the Act that eliminated spousal support after dissolution would not be limited by section 766.58(9)(a) or (b). However, section 767.56(8) requires that a court only "consider" a marriage agreement as it relates to spousal support. *See supra* § 7.140. If a spouse becomes eligible for public support at the time of divorce, it is highly unlikely that a court would follow the agreement. *See supra* § 4.92 (regarding spouse's eligibility for medical assistance (Medicaid)).

D. Child Support [§ 11.40]

A marital property agreement may not adversely affect the right of a child to support. Wis. Stat. § 766.58(2). Therefore, provisions limiting or eliminating a spouse's obligation to support a child or limiting the authority of a court to modify support upon a change of circumstances will not be enforced. *Motte v. Motte*, 2007 WI App 111, 300 Wis. 2d 621, 731 N.W.2d 294; *Wood v. Propeck*, 2007 WI App 24, 299 Wis. 2d 470, 728 N.W.2d 757; *Ondrasek v. Tenneson*, 158 Wis. 2d 690, 462 N.W.2d 915 (Ct. App. 1990). On the other hand, the court may enforce provisions enhancing a child's support, such as provisions to fund a college education or to support adult children or children not born to or adopted by the payor, whom the spouse would not otherwise be obligated to support. *See Bliwas v. Bliwas*, 47 Wis. 2d 635, 178 N.W.2d 35 (1970); *Honore v. Honore*, 149 Wis. 2d 512, 439 N.W.2d 827 (Ct. App. 1989). A provision that places a limit on child support notwithstanding the payor's income is against public policy. *Ondrasek*, 158 Wis. 2d 690; *see also supra* § 11.34. An agreement that prohibits consideration of a change in circumstances, even if it decreases child support, is likewise unenforceable. *Krieman v. Goldberg*, 214 Wis. 2d 163, 571 N.W.2d 425 (Ct. App. 1997). Nevertheless, if the child's needs are being met, a child support agreement may be enforced even if it differs from the percentage standards. *Zutz v. Zutz*, 208 Wis. 2d 338, 559 N.W.2d 919 (Ct. App. 1997) (refusing to modify prior agreement because child's needs were being met, notwithstanding change in both parties' circumstances).

E. Statutory Agreements [§ 11.41]

Chapter 766 includes two statutory marital property agreements. Wis. Stat. §§ 766.588, .589. These agreements are discussed in sections 7.73–.92, *supra*, and are reproduced in sections 7.173–.177, *supra*. By specific statutory provision, neither of these agreements may apply to or affect property division or support obligations at the dissolution of a marriage. Wis. Stat. §§ 766.588(6), .589(6).

V. Nonmarital Relationships and Invalid Marriages [§ 11.42]

A. Nonmarital Relationships [§ 11.43]

Chapter 766 does not apply when there is no determination date. *See* Wis. Stat. § 766.03(1). If both parties to a relationship know they are not married, the policies of the Act do not become applicable, because the Act applies only to spouses. *See* Wis. Stat. § 765.001(2). It does not apply to so-called common law marriages, which are not recognized in Wisconsin, although a common law marriage that is valid in another state in which the spouses resided when the common law marriage became effective would be given legal effect in Wisconsin. Wis. Stat. §§ 765.16, .21.

A long-standing relationship may, nevertheless, have many of the characteristics of a marriage without the ceremony, and the law has moved toward recognizing obligations that may result. The Wisconsin Supreme Court has held that even though section 767.255 (now section 767.61) does not apply, in the proper circumstances unmarried cohabitants may raise claims against each other, at the termination of their relationship, based on express or implied contract, quasi-contract, partnership, constructive trust, or resulting trust. A cohabiting nonmarital partner attempting to recover from the other partner must show a shared enterprise and proof that contributions by the plaintiff resulted in an increase in assets. *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987), *later proceeding*, 152 Wis. 2d 370, 448 N.W.2d 292 (Ct. App. 1989); *Lawlis v. Thompson*, 137 Wis. 2d 490, 405 N.W.2d 317 (1987); *Ulrich v. Zemke*, 2002 WI App 246, 258 Wis. 2d 180, 654 N.W.2d 458 (holding that court must look at entire shared enterprise and should not analyze claim asset by asset); *Meyer v. Meyer*, 2000 WI App 12, 232 Wis. 2d 191, 606 N.W.2d 184 (holding that it was unfair to use fixed salary to value medical degree and that degree is not an asset for unjust-enrichment determination); *Ward v. Jahnke*, 220 Wis. 2d 539, 583 N.W.2d 656 (Ct. App. 1998) (remanding for determination of damages because increase in assets after purchase of house not proved); *Waage v. Borer*, 188 Wis. 2d 324, 525 N.W.2d 96 (Ct. App. 1994) (holding that increase in assets was not proved). Fraud or estoppel may also support recovery by one party in a nonmarital relationship. *See also Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (under Washington law, court divided property that would have been community property if parties were married); *Chesterfield v. Nash*, 978 P.2d 551 (Wash. Ct. App. 1999) (under Washington law, holding that there is rebuttable presumption that property acquired by both parties during relationship is owned by both parties); *Foster v. Thilges*, 812 P.2d 523 (Wash. Ct. App. 1991) (under Washington law, holding that property of parties cohabiting in long-term "pseudomarital relationship" may be equitably divided); *Has the Door Been Opened for the Recognition of Palimony in Wisconsin?*, 22 Wis. J. Fam. L. 8 (2002); Marianne M. Jennings & Bruce K. Childers, *Property Rights of Unmarried Couples: Who Gets What When the Cohabitation Collapses?*, 6 Community Prop. J. 258 (1979);

Linda J. Ravdin, *The Next Wave of Domestic Partner Litigation: Why Domestic Partners Need Partnership Agreements*, 14 Divorce Litig. 137 (Aug. 2002); N. Roddy, *Rights and Remedies of Cohabiting Couples upon Termination of the Relationship*, 4 Divorce Litig. 209 (1992); Alvin R. Wohl & Helene A. Winnick, *Palimony—A Trial Run*, 9 Community Prop. J. 15 (1982). However, such remedies must be found outside the Act. Chapter 766, titled "Property Rights of Married Persons; Marital Property," applies only to spouses.

B. Invalid Marriages; Putative Spouses [§ 11.44]

Under some circumstances, through mistake or deceit, one or both parties to a relationship may believe there is a valid marriage when in fact there is not. This is most likely to occur when one spouse fails to obtain a valid divorce and participates in a subsequent marriage ceremony with another person. The law should treat the innocent party or parties equitably with respect to property interests that arise during the putative marriage. Section 766.73, titled "Invalid Marriages," provides:

> If a marriage is invalidated by a decree, a court may apply so much of this chapter to the property of the parties to the invalid marriage as is necessary to avoid an inequitable result. This section does not apply if s. 767.61 applies to the action to invalidate the marriage.

It is important to note that a decree declaring the marriage invalid is necessary for this section to apply. A marriage is presumed valid until a court declares it otherwise. Section 767.61(1) requires that a property division be made in every "judgment of annulment, divorce or legal separation." *See also* Wis. Stat. § 767.313 (circumstances under which court may annul marriage). Therefore, it is not clear when, if ever, section 766.73 would be applied. If the marriage is found to be invalid without a decree, such as for the purpose of determining inheritance tax, this section authorizing equitable allocation will not apply, and title will determine ownership. *See Estate of Steffke v. Wisconsin Dep't of Revenue (In re Estate of Steffke)*, 65 Wis. 2d 199, 222 N.W.2d 628 (1974).

Under historical community property principles, a putative marriage is one in which at least one spouse was unaware of any impediment to the marriage and believed the marriage to be valid. According to William Q. de Funiak & Michael J. Vaughn, *Principles of Community*

Property §§ 56, 222 (2d ed. 1971), the rules of community property apply to such a marriage; however, if there is a legal spouse, perhaps because of an invalid divorce, and if other equitable doctrines such as estoppel do not apply, then the legal spouse does not lose his or her interest in community property assets acquired by the spouse who has entered into another relationship. *Id.* The legal spouse owns one-half of the community property, the putative spouse owns the other half, and the spouse who wrongfully entered into the putative marriage receives nothing. The innocent party in a putative marriage may claim a community interest, while the spouse who did not act in good faith can make no claim to the property. *Id.* If bad faith exists with both parties, there is no community. *Id.* Conceivably, there could be three innocent parties, in which case a court's general equity powers would probably come into play. *See also supra* § 6.46 (rights of creditors after marriage is annulled).

California law provides that a good-faith party in a putative marriage is to receive as much of the marital estate as he or she would have received under community property concepts. Cal. Fam. Code Ann. § 2251 (West, WESTLAW current with all 2009 Reg. Sess. laws; all 2009-2010 1st through 5th, 7th, and 8th Ex. Sess. laws; urgency legislation through Ch. 14 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot). The court may also take into consideration the actions of the good- and bad-faith parties, however, and review the contributions to the estate. *Redmond v. Redmond*, 10 Fam. L. Rep. (BNA) 1559 (Cal. Ct. App. 1984) (unpublished opinion). Since an equitable division is provided for in Wisconsin when a marriage is found to be invalid, cases arising under the California statute may be helpful in determining property division under sections 766.73 and 767.61. *See also Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App. 1999) (putative marriage terminated when wife learned of husband's prior undissolved marriage).

Section 767.61(1) indicates that the court is to use the same equitable considerations in dividing property in an annulment as are used for a divorce or legal separation. *See Siskoy v. Siskoy*, 250 Wis. 435, 27 N.W.2d 488 (1947). Since both sections 766.73 and 767.61 provide for equitable division of property in an annulment, the result should be the same if section 766.61 is applied instead of section 766.73.

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Estate Administration and Nonprobate Transfers

I. Introduction: UMPA Is a Property Law [§ 12.1]

The Uniform Marital Property Act (UMPA, reprinted *infra* app. A) is a property statute that determines ownership of property. It does not contain provisions governing the distribution of property after the termination of the marriage by dissolution or death. The prefatory note to UMPA states in part as follows:

> FOURTH: On dissolution the structure of the Act as a *property statute* comes into full play. The Act takes the parties "to the door of the divorce court" only. It leaves to existing dissolution procedures in the several states the selection of the appropriate procedures for dividing property. On the other hand, the Act has the function of confirming the *ownership* of property as the couple enters the process. Thus reallocation of property derived from the effort of both spouses during the marriage starts from a basis of the equal undivided ownership that the spouses share in their marital property. A given state's equitable distribution or other property division procedures could mean that the ownership will end that way, or that it could be substantially altered, but that will depend on other applicable state law and judicial determinations. *An analogous situation obtains at death, with the Act operating primarily as a property statute rather than a probate statute.*

(Emphasis added to final sentence.) As the prefatory note indicates, states that adopt UMPA must fit the uniform act into their existing dissolution and probate law procedures. The Wisconsin Marital Property Act, 1983 Wisconsin Act 186 (codified as amended at chapter 766 and scattered sections of the Wisconsin Statutes) [hereinafter the Act or the

Wisconsin Marital Property Act], therefore includes provisions not found in UMPA concerning estate administration and nonprobate transfers.[1]

II. Estate Administration of Marital Property Assets: Administering Decedent's Interest vs. Both Spouses' Interests [§ 12.2]

The comment to UMPA section 18 states in part as follows:

> *The Administration Issue:* Historically the entire community was administered when a spouse died. *See* William Q. de Funiak and Michael J. Vaughn, *Principles of Community Property*, §§ 205–07 (1971). This pattern has been eroding. At this time [1983], California and Nevada require administration only of the decedent's interest in the community. Arizona, Idaho, New Mexico and Washington follow the traditional pattern, though all four have simplified administration procedures under their versions of the *Uniform Probate Code* or Washington's non-intervention provision. Texas and Louisiana have simplified procedures when there is a surviving spouse but no issue, in Texas, or when succession without administration occurs, in Louisiana. In addition, Texas has independent administration as a possibility. An adopting state will necessarily face the administration issue and will be forced to consider whether the California and Nevada solution represents the appropriate trend.

(Citation omitted.)

Wisconsin adopted the California and Nevada solution. Section 861.01(2) provides that when a spouse dies, the surviving spouse retains his or her undivided one-half interest in each marital property asset. The surviving spouse's interest is a tenancy in common, and the decedent's successor (for example, the personal representative) is a tenant in common with the surviving spouse. Wis. Stat. § 861.01(1). The

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2007–08 Wisconsin Statutes, as affected by acts through 2009 Wisconsin Act 189; all references to the Internal Revenue Code (I.R.C.) are current through Public Law No. 111-156 (excluding Pub. L. Nos. 111-148 and 111-152) (Apr. 7, 2010); and all references to the Code of Federal Regulations are current through 75 Fed. Reg. 18,375 (Apr. 9, 2010). Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

surviving spouse's marital property interest is not subject to administration. *Id.*

For some probate procedures (as distinguished from substantive law), the system under the Wisconsin Marital Property Act does not differ significantly from the former common law system. When one spouse dies, marital property assets subject to administration become tenancy-in-common property. Wis. Stat. § 861.01(2). The probate forms and procedures that existed before passage of the Act were adequate for the administration of tenancy-in-common property. However, the two systems differ significantly with respect to other probate procedures and practice:

1. The decedent's interest in former marital property assets must be determined. All the classification and mixing rules described in chapters 2 and 3, *supra*, must be applied. Fractional ownership interests in assets occur much more frequently under the Act than under the former common-law property system. The decedent may have a marital property interest in assets previously thought to be the surviving spouse's. Assertion of this interest by the decedent's personal representative is a procedure that was new with the Act.

2. The management and control rules of chapter 766 apply during probate. Wis. Stat. §§ 861.01(1), 857.01, .015.

3. The Act's rules regarding satisfaction of obligations considerably affect the procedure for claims.

4. The deferred marital property election under the Act replaced the surviving spouse's one-third elective share under the former common-law property system. *See* Wis. Stat. § 861.02.

III. Nonprobate Transfers [§ 12.3]

A. Distinction Between Probate and Nonprobate Transfers [§ 12.4]

1. In General [§ 12.5]

In Wisconsin, a decedent's interest in property is transferable at death either by intestate or testamentary (*probate*) means or by nontestamentary (*nonprobate*) means. Usually, when a spouse dies, both means are used to transfer property interests. The Wisconsin Marital Property Act did not change this historical scheme for transferring property at death. Therefore, when a spouse dies, his or her property may be transferred to designated beneficiaries by nonprobate means or may be subject to probate administration, by the personal representative, with or without the supervision of the probate court.

Nonprobate means of transfer are also referred to as *will substitutes*. The many types of will substitutes permit a decedent to own or enjoy property during his or her lifetime and to transfer it other than by will at death. The following are some of the more common will substitutes:

1. Joint tenancies with right of survivorship;

2. Joint accounts held at financial institutions, stock brokers, and mutual-fund companies;

3. Survivorship marital property;

4. Marital property agreements containing dispositive provisions;

5. Revocable living trusts containing dispositive provisions;

6. Life insurance, annuities, and other products issued by life insurance companies payable to someone other than the decedent's estate or having transfer of ownership provision at death;

   ➢ ***Note.*** In *Jung v. Jung*, 2000 WI App 151, 237 Wis. 2d 853, 616 N.W.2d 118, the decedent spouse owned an annuity as individual property. The annuity contract had a provision providing for a transfer of ownership at his death to his spouse.

The court of appeals held that the transfer of ownership provision in the annuity contract governed the disposition of the decedent's ownership interest at death.

7. Deferred employment benefits payable to someone other than the decedent's estate;

8. Payable on death (P.O.D.) accounts and P.O.D. bonds payable to someone other than the decedent's estate; and

9. Transfer on death (T.O.D.) provisions pursuant to sections 705.10 and 705.15.

2. Gifts of Marital Property Assets During Lifetime Contrasted with Gifts of Interest in Marital Property Assets at Death [§ 12.6]

a. In General [§ 12.7]

The Act contains provisions dealing with (1) one spouse's gifts of marital property assets during that spouse's lifetime, and (2) one spouse's gifts of an interest in marital property at that spouse's death. These provisions are discussed in sections 12.8–.10, *infra*.

b. Gifts of Marital Property Assets During Lifetime [§ 12.8]

Under the Act, one spouse who has the right, acting alone, to manage and control marital property assets may make gifts of marital property assets to third persons. Wis. Stat. § 766.51(4); Wis. Stat. Ann. § 766.51(4) Legis. Council Comm. Supplemental Notes Relating to 1985 Act 37 (West 2009). 1985 Wisconsin Act 37 is referred to as the 1985 Trailer Bill. Section 766.53 provides that a spouse acting alone may give marital property to a third person *only* if the aggregate value of the marital property assets when given to the third person does not exceed $1,000 in a calendar year or a larger amount, if reasonable. The 1985 Trailer Bill amended section 766.51(4) to clarify that the power of management and control applies to gifts that exceed the safe-harbor amounts in section 766.53. Section 766.53 should be amended to conform to section 766.51(4). However, if gifts by one spouse to a third person of marital property assets during the marriage exceed the safe-harbor limits in section 766.53, the other spouse (or that spouse's estate) has a remedy against the donating spouse (or the donating spouse's estate), the donee, or both. Wis. Stat. § 766.70(6)(a); *see supra* §§ 4.37, 8.45; *see also infra* § 12.12. Under section 766.70(6)(a), the nondonating spouse may bring an action to recover the property or a compensatory judgment.

> ➢ ***Note.*** The remedies provided by the Wisconsin Marital Property Act, in particular those provided by section 766.70, are the exclusive remedies for a spouse who disputes a transfer of marital property. *Jackson v. Employe Trust Funds Bd.*, 230 Wis. 2d 677, 602 N.W.2d 543 (Ct. App. 1999); *Socha v. Socha*, 204 Wis. 2d 474, 481, 555 N.W.2d 152 (Ct. App. 1996); *see also Joyce v. Joyce (In re Estate of Joyce)*, 2008 WI App 92, 312 Wis. 2d 745, 754 N.W.2d 515.

c. Gifts of Marital Property Assets at Death of One Spouse [§ 12.9]

If one spouse dies having made a nonprobate disposition of marital property assets to a third person, the surviving nondonor spouse has a remedy against the third person under section 766.70(6)(b). However, the remedy differs from the remedy available for gifts made by one spouse during the marriage. Under section 766.70(6)(a), which applies to gifts during marriage, the nondonating spouse may recover the property donated or a compensatory judgment as marital property. Under section 766.70(6)(b), which applies to nonprobate transfers at death, the surviving spouse may recover one-half of the gift of marital property from the recipient as his or her own property; the surviving spouse has no remedy against the decedent's estate. Since the surviving spouse's remedy is limited to one-half of the marital property given, the first spouse to die may effectively give his or her one-half interest in marital property to a third person by nonprobate means. Such a gift of a one-half interest that severs the spouse's interests is not possible during the marriage.

> ➢ ***Note.*** The remedies provided by the Marital Property Act, in particular those provided by section 766.70, are the exclusive

remedies for a spouse who disputes a nonprobate transfer of marital property. *Jackson*, 230 Wis. 2d 677; *Socha*, 204 Wis. 2d at 481; *see also Joyce*, 2008 WI App 92, 312 Wis. 2d 745.

A spouse's nonprobate transfers are arranged while that spouse is alive. If that spouse has the right, acting alone, to manage and control a certain asset, that spouse may transfer the entire asset at death by nonprobate means, subject to the surviving spouse's remedy. For example:

1. The record owner of a life insurance policy may designate a third person as the sole beneficiary of the proceeds. *See* Wis. Stat. § 766.51(1)(d). Section 766.61(2) permits life insurance companies to make payments in accordance with the policy. If the proceeds are marital property and the insurance company pays all the proceeds to the third person, the third person receives the surviving spouse's interest in the proceeds subject to the surviving spouse's remedy under section 766.70(6)(b).

2. Subject to possible application of other laws, an employee spouse may designate a third person as the sole beneficiary of deferred employment benefits. *See* Wis. Stat. § 766.51(1)(e). Section 766.62(4) permits a deferred-employment-benefit plan administrator to make payments in accordance with the plan. Receipt by the third person is subject to the surviving spouse's remedy under section 766.70(6)(b).

   ➤ ***Note.*** Federal law restricts a spouse's right to designate a third person as beneficiary of certain deferred-employment-benefit plans. *See supra* ch. 2. Wisconsin law restricts the choice of retirement annuities by a participant under the Wisconsin Retirement System. Wis. Stat. § 40.24(7).

3. If marital property is used to create a joint tenancy with right of survivorship with a third person, the incidents of the joint tenancy control, *see* Wis. Stat. § 766.60(4)(a), subject to the nondonating spouse's remedy against the surviving tenant or the decedent's estate under section 766.70(6)(c).

4. Financial institutions may make payments in accordance with multiple-party-account contracts, *see* Wis. Stat. 705.06, subject to the

surviving spouse's remedy against the recipient under section 766.70(6)(b).

5. Marital property in a revocable trust containing dispositive provisions is managed by the trustee according to the terms of the trust document, Wis. Stat. § 766.51(3), subject to the surviving spouse's remedy under section 766.70(6)(b).

6. If marital property is used to purchase a United States bond and the bond is registered in joint names or made payable on death to a third person, federal regulations control the disposition of the bond when one spouse dies, 31 C.F.R. §§ 353.70–.71, subject to the surviving spouse's remedy under section 766.70(6)(b). See section 12.14, *infra*, with respect to federal preemption.

d. Effect of Nonprobate Disposition on Surviving Spouse's Marital Property Interest [§ 12.10]

Subsection 861.01(1) provides that when one spouse dies, the surviving spouse retains his or her undivided one-half ownership interest in each item of marital property. Subsection 861.01(2) provides that when a third party succeeds to the decedent's interest in marital property, that third party is a tenant in common with the surviving spouse. Subsections 861.01(1) and (2) appear to be limited to property that is subject to administration.

If a spouse having the right of management and control makes a gift of a marital property asset to a third person during the marriage, the gift is complete at the time it is made. Wis. Stat. Ann. § 766.51(4) Legis. Council Comm. Supplemental Notes Relating to 1985 Act 37 (West 2009). The nondonating spouse has the choice of bringing an action to recover the property given or to receive a compensatory judgment equal to the amount by which the gift exceeded the safe-harbor limits in section 766.53. Wis. Stat. § 766.70(6)(a).

When a spouse with management and control rights arranges for a nonprobate disposition of marital property assets, does the surviving spouse retain his or her ownership interest, as happens when there is a probate disposition of marital property assets, or is the surviving spouse divested of ownership, as happens when there is a lifetime gift? Section 766.70(6)(b) permits the surviving spouse to bring an action with respect to certain types of transfers against the gift recipient to recover "one-half of the gift of marital property." The meaning of section 766.70(6)(b) is not clear from a reading of the statute. To harmonize the various sections involved (sections 766.53, 766.70(6)(a) and (b), and 861.01(1) and (2)), the logical conclusion is that a nonprobate disposition of marital property assets is analogous to a lifetime gift of marital property assets, with the result that the surviving spouse is divested of an ownership interest and has a remedy to recover an amount from the beneficiary of the nonprobate disposition rather than half the property itself. However, section 766.70(6)(b) can be interpreted to mean that the surviving spouse can recover half of the particular item of nonprobate property given away.

In summary, if a spouse having the right of management and control makes either a lifetime gift effective during marriage or a nonprobate disposition of marital property assets effective at death, the nondonating spouse is divested of any ownership interest in the donated property but has remedies. Subsection 766.70(6)(a) provides the remedy for lifetime gifts. Subsections 766.70(6)(b) and (c) provide the remedies for nonprobate dispositions. If a spouse dies owning marital property assets subject to administration, the surviving spouse retains his or her marital property interest whether or not the decedent spouse attempted to make a testamentary disposition of the survivor's marital property interest. Sometimes, however, the decedent's attempt to dispose of the surviving spouse's interest in a marital property asset may put the surviving spouse to an equitable election. *See infra* §§ 12.22–.26.

Generally, there are no restrictions on a spouse's lifetime gifts of nonmarital property assets. The nondonating spouse has no remedy during the marriage for a gift of nonmarital property assets. However, if a nonmarital property asset is given away by the owner spouse during the marriage and the asset given away is deferred marital property, the provisions of the deferred marital property election may apply if the gift was made within two years of death or the donor retained certain rights. Wis. Stat. § 861.02; *see infra* § 12.11. Thus, lifetime gifts of deferred marital property assets are subject to a two-year rule, whereas lifetime gifts of marital property assets are not. In addition, the surviving spouse has certain remedies for fraudulent transfers; these remedies apply regardless of the property's classification. Wis. Stat. § 861.17; *see infra* § 12.168.

3. Gifts of Deferred Marital Property Assets During Lifetime [§ 12.11]

The augmented deferred marital property estate includes the value of any deferred marital property transferred by the decedent within the two years immediately preceding the decedent's death. Wis. Stat. § 861.03(4)(b); *see infra* § 12.155. Original recipients of the decedent's transfers of deferred marital property are personally liable to make a prorated contribution toward satisfaction of the surviving spouse's deferred marital property elected amount. Wis. Stat. § 861.07(2). The recipient has the option of returning a portion or all of the gift or paying a monetary amount. Wis. Stat. § 861.07(3).

Section 861.10(1) provides that a waiver of the right to make the deferred marital property election must be contained in a marital property agreement that is enforceable under section 766.58 or in a signed document filed with the probate court. *See infra* § 12.140 (waiver of right to elect). Thus, it would appear that a simple joinder or consent to a gift of deferred marital property is insufficient to waive the elective right. However, section 861.05(1)(c) provides that gifts of deferred marital property with the written joinder or written consent of the nondonee spouse are excluded from the augmented deferred marital property estate.

> ➢ ***Note.*** The section 861.05(1)(c) standard of "written joinder or written consent" for purposes of the deferred marital election differs from the section 766.53 standard of "act together" for purposes of lifetime gifts. Section 861.05(1)(c) requires a writing. "Acting together" in section 766.53 does not require a writing. The filing of a tax return reflecting the gift signed by both spouses satisfies the tests of sections 861.05(1)(c) and 766.53. *See supra* ch. 4, ch. 9.

B. Remedies of Surviving Spouse [§ 12.12]

If the predeceasing spouse makes a nonprobate disposition, to a third person, of an asset that is marital property or that has a marital property component, the Act provides remedies by which the surviving spouse may recover his or her former marital property interest in the asset. *See* Wis. Stat. § 766.70(6)(b), (c).

If a transfer of a marital property asset to a third person during marriage by a spouse acting alone becomes a completed gift upon the spouse's death, or if an arrangement during marriage made by one spouse acting alone involving marital property is intended to be and becomes a gift to a third person upon the spouse's death, the surviving spouse may bring an action against the gift recipient to recover one-half of the gift of marital property. Wis. Stat. § 766.70(6)(b)1. This provision is intended to apply, inter alia, to multiple-party accounts under chapter 705, revocable trusts, life insurance policies, and certain bonds. Wis. Stat. Ann. § 766.70(6)(b) Legis. Council Notes—1985 Act 37, §§ 89, 130 to 138 (West 2009).

➢ ***Comment.*** It is not clear whether "one-half of the gift of marital property" requires that the actual item transferred be divided in half or whether the surviving spouse has a claim for an amount. The better view is that the spouse has a claim.

If marital property is used by one spouse acting alone to create a joint tenancy with right of survivorship with a third person, the incidents of the joint tenancy control. Wis. Stat. § 766.60(4)(a). However, if the spouse has given a gift of a marital property asset in the form of a joint tenancy, the nondonating spouse has a remedy under section 766.70(6)(c). *See supra* § 8.48.

➢ ***Note.*** The remedies provided by the Marital Property Act, in particular those provided by section 766.70, are the exclusive remedies for a spouse who disputes a transfer of marital property. *Jackson*, 230 Wis. 2d 677; *Socha*, 204 Wis. 2d at 481.

See chapter 8, *supra*, for further discussion of remedies.

C. Statutes of Limitation [§ 12.13]

If one spouse effects a donative nonprobate disposition of marital property assets to a third person, the surviving spouse must commence an action within a time limit under the remedy statutes. Section 766.70(6)(b)1. states that the surviving spouse may not commence an action under section 766.70(6)(b) later than one year after the death of the decedent spouse. *Jackson*, 230 Wis. 2d 677; *see also Joyce*, 2008 WI App 92, 312 Wis. 2d 745. Section 766.70(6)(b)1. applies if the spouse effecting the nonprobate disposition predeceases the nondonating spouse.

If the nondonating surviving spouse dies before commencing the action, that spouse's personal representative may commence the action within the original time limits.

The nondonating spouse might predecease the spouse who arranged for the nonprobate disposition. Usually, if the nondonating spouse predeceases the donor spouse, the nondonating spouse's marital property interest in the asset is subject to administration. The surviving spouse is a tenant in common with the nondonating spouse's personal representative or other successor.

The situation is more complex when both spouses die. Assume that the nondonating spouse dies first and that the donor spouse dies 10 days later. The surviving spouse (the donor) may effect a nonprobate disposition of former marital property assets. In that event, the nondonating spouse's personal representative (or other successor) may commence an action within a limited time to recover the nondonating spouse's former marital property interest. Section 766.70(6)(b)2. provides that if the nondonating spouse predeceases the donor spouse, no action may be commenced later than one year "after the decedent's death." Unfortunately, it is not clear which decedent is referred to in section 766.70(6)(b)2. when both spouses have died. To be consistent with section 766.70(6)(b)1., the one-year period should begin to run from the death of the donor spouse.

Another ambiguity in section 766.70(6)(b)2. is that the recovery is "valued at the date of death of the spouse entitled to recover." This provision makes no sense and appears to be an error in the statute. The nondonating spouse's personal representative should be able to recover one-half the value of the former marital property asset that was given away, valued as of the date of the donor spouse's death.

It appears that the purpose of subdividing section 766.70(6)(b) into subsections 1. and 2. was to subject the recipient of the nonprobate disposition to the same one-year limitation period no matter which spouse dies first.

Subsections 766.70(6)(b)1. and 2. and the questions discussed above may be illustrated by the following examples.

- ***Example 1.*** A husband is the insured and the record owner of a term life insurance policy having a death benefit of $100,000 and a fair market value of $50 (unearned premium). The husband designates his brother as the beneficiary of the policy. The policy is marital property. The husband predeceases his wife.

Under section 766.70(6)(b)1., the wife has one year after her husband's death to commence an action to recover one-half of the $100,000 proceeds. *Jackson*, 230 Wis. 2d 677; *see also Joyce*, 2008 WI App 92, 312 Wis. 2d 745.

➢ ***Example 2.*** Same facts as Example 1, except the wife predeceases the husband. The wife has a will leaving everything to her children.

The insurance policy is marital property. The value of the wife's interest in the insurance policy is frozen at its $25 value on her death. Wis. Stat. § 766.61(7). The husband has the option to purchase his wife's frozen one-half interest in the policy under section 766.70(7). If the husband does not purchase his wife's frozen one-half interest, the husband and the beneficiaries of his wife's estate will be tenants in common of the policy. Questions as to the payment of premiums, right to exercise incidents of ownership during the insured's lifetime, and so forth should be resolved if the surviving spouse does not purchase the decedent's frozen interest.

➢ ***Example 3.*** Same facts as example 2, except the husband dies 10 days after his wife dies. The proceeds are paid to the husband's children.

In the third example, section 766.70(6)(b)2. applies because marital property assets have in fact been given to a third person. The wife's personal representative (or other successor) has one year from the husband's death to commence an action to recover the wife's frozen marital property interest, which has a value of $25. The freezing of the wife's interest at $25 appears to be an unfair result, but section 766.61(7) is clear.

The above examples involve life insurance policies. The same issue will arise in other uses of nonprobate dispositions such as funded revocable living trusts.

➢ ***Note.*** If the nondonating spouse has a right of recovery with respect to a nonprobate disposition of marital property assets but does not commence an action to recover one-half of the marital property component of the property within the applicable time limit, the remedy is barred. *Jackson*, 230 Wis. 2d 677. A gift subject to federal gift tax laws may result. *See supra* ch. 9; *see also Joyce*, 2008 WI App 92, 312 Wis. 2d 745.

For further discussion of remedies with respect to nonprobate transfers, see sections 8.46–.49, *supra*.

D. United States Obligations [§ 12.14]

Before the Act, section 851.61 provided as follows:

> Where a resident of this state dies possessed of bonds or certificates of indebtedness of the United States of America which are registered in his name, payable on death to another, the unqualified ownership and the proceeds shall, on the death of the original owner, belong to the named alternate payee, any law of this state to the contrary notwithstanding.

The Act repealed section 851.61. Presumably, there was concern that one spouse could use section 851.61 to effect a nonprobate disposition of his or her one-half interest in marital property bonds or certificates. For example, one spouse could use marital property to purchase U.S. bonds payable to a third person.

The Code of Federal Regulations, 31 C.F.R. §§ 353.70, .71, permits U.S. bonds to be registered in two ways, either of which results in a nonprobate disposition when the registered owner dies. United States bonds may be registered jointly or registered in the name of one person and payable on death to another.

In *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964), the husband invested Washington community property in U.S. savings bonds. The husband was the registered owner of the bonds, which were payable on his death to his brother. After the husband's death, the brother asserted that he was the sole and absolute owner of the bonds. The U.S. Supreme Court held that federal regulations that have the force of law cannot be used as a shield for fraud or to prevent relief in situations in which the circumstances manifest fraud or a breach of trust tantamount to fraud.

The Supreme Court remanded the case to the Washington Supreme Court for a decision on whether the wife had an ownership interest in the bonds under state law. The U.S. Supreme Court implied that it would not take much to show fraud if indeed the bonds were community property.

➢ ***Comment.*** A fascinating sidelight of this 1964 case is that the lawyers who argued the case openly stated that they did not know whether Washington's community property regime had an item-by-item rule or an aggregate rule. *See supra* § 10.10. One would think that issue would have been settled by 1964.

In Wisconsin, if the federal regulations for U.S. bonds are used by one spouse to effect a nonprobate disposition of marital property, the disposition occurs in accordance with the regulations. However, it appears there is no preemption with respect to ownership under Wisconsin property law. Therefore, the nondonating spouse seems to have a remedy under section 766.70(6)(b). This is the same remedy that exists for other nonprobate transfers, such as life insurance and multiple-party accounts.

IV. Intestacy [§ 12.15]

A. In General [§ 12.16]

Chapter 852 governs the disposition of a decedent's interest in property subject to administration if the decedent does not leave a will that is admitted to probate. It does not apply to property that is not subject to administration.

Subsections 852.01(a) and (b) provide as follows:

852.01. Basic rules for intestate succession. (1) Who are heirs. Except as modified by the decedent's will under s. 852.10 (1), any part of the net estate of a decedent that is not disposed of by will passes to the decedent's surviving heirs as follows:

(a) To the spouse or domestic partner:

1. If there are no surviving issue of the decedent, or if the surviving issue are all issue of the surviving spouse or surviving domestic partner and the decedent, the entire estate.

2. If there are surviving issue one or more of whom are not issue of the surviving spouse or surviving domestic partner, one-half of decedent's property other than the following property:

a. The decedent's interest in marital property.

b. The decedent's interest in property held equally and exclusively with the surviving spouse or surviving domestic partner as tenants in common.

(b) To the issue, per stirpes, the share of the estate not passing to the spouse or surviving domestic partner under par. (a), or the entire estate if there is no surviving spouse or surviving domestic partner.

The reason for limiting a tenancy in common to an equal interest is not clear. Tenancy in common interests need not be equal.

B. Decedent Leaves Surviving Spouse and No Issue [§ 12.17]

If the decedent leaves a surviving spouse and no issue, the surviving spouse inherits the decedent's entire net estate. Wis. Stat. § 852.01(1)(a)1. This occurs regardless of the classification of the assets subject to probate administration.

C. Decedent Leaves Surviving Spouse and Issue; All Issue Are of Surviving Spouse and Decedent [§ 12.18]

If the decedent leaves a surviving spouse and one or more issue and all issue are of the decedent and the surviving spouse, the surviving spouse inherits the decedent's entire net estate regardless of its classification. Wis. Stat. § 852.01(1)(a)1. The net estate consists of the decedent's one-half interest in former marital property, entire interest in former individual property, and entire interest in predetermination date property. The surviving spouse already owns a one-half interest in the former marital property assets subject to administration.

The net estate does not contain the decedent's interest in nonprobate assets such as joint tenancy and life insurance proceeds because they are not subject to administration. With respect to assets not subject to administration, the surviving spouse may make the deferred marital property election provided for by section 861.02. *See infra* §§ 12.136–.147.

D. Decedent Leaves Surviving Spouse and Issue; One or More Issue Are Not of Surviving Spouse and Decedent [§ 12.19]

If the decedent leaves a surviving spouse and issue and one or more of the issue are not the surviving spouse's issue, the surviving spouse receives half of the decedent's estate subject to administration other than marital property, and the issue receive the balance of the decedent's estate. Wis. Stat. § 852.01(1)(a)2., (b). The surviving spouse may make the deferred marital property election with respect to assets not subject to administration. Wis. Stat. § 861.02; *see infra* §§ 12.136–.147; *Carroll v. Ansley (In re Estate of Carroll)*, 2001 WI App 120, 244 Wis. 2d 280, 628 N.W.2d 411.

V. Wills [§ 12.20]

A. In General [§ 12.21]

Chapter 853 governs the execution and effect of wills. A married decedent's will is effective to transfer all the decedent's interest in property subject to administration. *See supra* §§ 12.4–.11.

B. Equitable Election [§ 12.22]

1. In General [§ 12.23]

The doctrine of equitable election exists in Wisconsin. Wis. Stat. § 853.15; *Schaech v. Schaech (Will of Schaech)*, 252 Wis. 299, 31 N.W.2d 614 (1948). In general, the doctrine applies if the testator attempts to dispose by will of assets that belong to a beneficiary of the will. If the doctrine applies, the will beneficiary is required to choose between the benefits under the will and the assets that the testator is attempting to transfer. In such cases, the beneficiary must forfeit benefits under the will if the beneficiary decides to retain ownership of the assets that the testator attempted to transfer.

The doctrine of equitable election applies more frequently since the Act was adopted because the maker of the will may believe that he or she owns an entire asset when, in reality, it is marital property or deferred marital property.

2. The Statute [§ 12.24]

Section 853.15(1) provides in part as follows:

> (1) Necessity for Election. (a) *Unless the will provides otherwise*, this subsection applies if a will gives a devise to one beneficiary and also clearly purports to give to another beneficiary property that does not pass under the will but belongs to the first beneficiary by right of ownership, survivorship, beneficiary designation or otherwise.
>
> (b) If the conditions in par. (a) are fulfilled, the first beneficiary must elect either to take under the will and transfer his or her property in accordance with the will or to retain his or her property and not take under the will. If the first beneficiary elects not to take under the will, *unless the will provides otherwise* his or her devise under the will shall be assigned to the other beneficiary.
>
> (c) This section does not require an election if the property belongs to the first beneficiary because of transfer or beneficiary designation made by the decedent after the execution of the will.

(Emphasis added.) The italicized portions of the statute quoted above indicate that the maker of the will may indicate in the will whether or not the doctrine of equitable election is to apply.

- ***Note.*** The 1985 Trailer Bill amended the statute so that election of the deferred marital property share under section 861.02 could trigger the equitable election. 1997 Wisconsin Act 188 changed the election from the right to elect a fractional interest to the right to elect an amount. Since the surviving spouse cannot elect an ownership interest in assets, section 853.15(1) was amended to delete the deferred marital property election as a trigger of the equitable election. 1997 Wis. Act 188, § 142.

3. Examples [§ 12.25]

- ***Example 1.*** A husband owned and operated a closely held corporation, XYZ, Inc., before and after the determination date. The stock of the corporation has always been titled in the husband's name. The husband has children who are now active in the business. Other assets are also titled in the husband's name. The stock and all other assets held by the husband are marital property or individual property. The husband has a will that provides the following: "I leave all the outstanding shares of stock in XYZ, Inc., to my children in equal shares, and I leave the residue of my estate to my spouse if my spouse survives me, otherwise to the children."

The husband predeceases his wife. Assume the full value of the stock titled in the husband's name is $300,000 and the full value of the other assets titled in the husband's name is $300,000. Also, assume that one-half of each asset is marital property and the other half of each asset is the husband's individual property. The husband's gross estate is $450,000: marital property of $150,000 and individual property of 300,000.

H	W
Stock 75,000 Stock 150,000	75,000
Other 75,000 Other 150,000[1]	75,000
Total Estate 450,000	150,000[2]

[1] Take $150,000
[2] Keep right column

The will can be interpreted in either of two ways. The first interpretation is that the husband's interest in the stock (his marital property interest of $75,000 plus his $150,000 interest in the balance of the stock, for a total of $225,000) is left to the children and the residue (his $75,000 marital property interest in the other assets and his $150,000 interest in the balance of the other assets, for a total of $225,000) is left to the spouse. This is not what the testator intended.

The second interpretation is that the will puts the surviving spouse to an equitable election under section 853.15. Under the doctrine of equitable election, if the predeceasing spouse attempts to dispose of an asset owned by the surviving spouse (in this case, a marital property interest in the stock), the surviving spouse is required to elect

1. To accept the benefits under the will and consent to the predeceasing spouse's disposition of the asset; or

2. To reject the benefits of the will and retain the asset.

Section 853.15(1)(a) provides that a will should require an election only if it "clearly purports" to dispose of the property. Therefore, if the will may be construed as attempting to dispose of the surviving spouse's one-half interest in marital property, a factual determination must be made whether the doctrine of equitable election applies.

In the above example, if the doctrine of equitable election applies, the wife must elect either to take under the will (which would involve the other assets) and transfer her marital property interest in the stock to the children or to retain her marital property interest in the stock and other assets and forfeit any benefits under the will.

If the doctrine of equitable election applies in the example, the wife can choose between two elections. First, she can affirm the will, take the residue ($225,000), and transfer her interest in the stock ($75,000) to the children. This is the result the testator intended. The children get all the stock, and the spouse gets all the other assets. Second, the spouse can elect not to take under the will and keep her marital property interest in the stock ($75,000) and her marital property interest in the other assets ($75,000). If the wife makes the equitable election against the will, she ultimately owns $75,000 plus $75,000 for a total of $150,000.

The wife will probably not reject the will.

➢ ***Example 2.*** The full value of a duplex inherited by a wife from her mother is $50,000. The full value of the residue of the wife's estate is $200,000. Assume that the duplex is marital property because of the application of the mixing rules contained in section 766.63. Assume that the residue is individual property. The will contains the following provision: "I leave the duplex that I inherited from my mother to my son, John, by my first marriage. I leave the residue of my estate to my second husband."

H		W
Duplex	25,000	25,000
Residue		200,000

Is the husband put to an election under section 853.15? There is very little guidance as to when the will "clearly purports" to dispose of the surviving spouse's interest in property within the meaning of section 853.15(1)(a). If the husband is not put to an election, he may retain his marital property interest in the duplex ($25,000) and receive all the residue, for a total of $225,000. If the husband is put to an election, he must elect between his marital property interest in the duplex ($25,000) and the residue ($200,000). Section 853.15(1)(a) does not take values into account.

➢ ***Practice Tip.*** The complications of the doctrine of equitable election illustrate the importance of understanding the classification of assets at the time the will is executed. A marital property agreement can be very helpful in clarifying classification. It is necessary to consider whether the doctrine of equitable election has been invoked; the procedural requirements in section 853.15(2) may apply even if one is unaware that they apply.

4. Procedure [§ 12.26]

Section 853.15(2) provides that *if an election is required*, the following provisions apply:

1. The court may, by order, set a time within which the beneficiary must file with the court a written election either to take under the will and forgo, waive, or transfer his or her property interest in favor of the person to whom it is given by the will or to retain the property interest and not take under the will. Wis. Stat. § 853.15(2)(a). The time set must be no earlier than one month after the necessity for such an election and the nature of the interest given to the beneficiary under the will have been determined. *Id.*

2. If a written election to take under the will has not been filed with the court within the time set by order, *or if no order setting a time has*

been entered before final judgment, the beneficiary is deemed to have elected not to take under the will. Wis. Stat. § 853.15(2)(b).

➢ ***Comment.*** The procedure for making an equitable election is very rigid and can result in adverse consequences. For example, assume that the will puts the surviving spouse to an equitable election and the surviving spouse is unaware of that fact. Under section 853.15(2)(b), the surviving spouse is deemed to have elected against the will, so the surviving spouse forfeits all benefits under the will. Alternatively, assume that the surviving spouse is not sure whether he or she has been put to an equitable election. In this instance, the surviving spouse should consider requesting the court to determine whether the equitable election has been triggered, and if it has, should consider requesting the court to set the time within which the election must be made.

➢ ***Practice Tip.*** The personal representative may wish to consider bringing on a hearing regarding equitable election. This would avoid problems that may arise subsequently if the court never sets the time for making the election, with the result that the surviving spouse is deemed to have elected against the will.

VI. Powers and Duties of Personal Representatives [§ 12.27]

A. Management and Control [§ 12.28]

1. In General [§ 12.29]

During administration, the management and control rules under section 766.51 apply to a married decedent's property that is subject to administration and to the surviving spouse's property. Wis. Stat. § 857.01. If the surviving spouse makes the deferred marital property election, *see infra* §§ 12.136–.147, the personal representative may manage and control the property elected while the property is subject to administration. Wis. Stat. § 857.01. The management and control rules of the Act are described in chapter 4, *supra*.

2. Manner in Which Assets Titled or Held [§ 12.30]

a. Assets Titled or Held Solely in Decedent Spouse's Name [§ 12.31]

When one spouse dies, predetermination date property or individual property subject to probate administration may be titled solely in the name of the deceased spouse. Marital property assets may also be held in the name of the deceased spouse. In any case, the authority of the personal representative to manage all such property is free of doubt. If the asset is predetermination date property or individual property and is titled solely in the decedent's name, the personal representative owns the property and has the authority to manage it. Wis. Stat. §§ 766.51(1)(a), 857.01. If the asset is marital property or has a marital property component and is held solely in the decedent's name, the personal representative has authority to manage the entire asset, Wis. Stat. §§ 766.51(1)(am), 857.01, but owns only an undivided one-half interest in the former marital property, Wis. Stat. § 861.01(1).

Section 766.31(3)(b) permits divisions of marital property on an aggregate rather than on an item-by-item basis. For a general discussion of this provision, see section 2.22, *supra*. For a discussion of the federal and Wisconsin tax issues relative to this change, see section 9.20, *supra*. For suggested provisions to include in a marital property agreement to accommodate this change, see section 7.151, *supra*.

b. Assets Titled or Held in Both Spouses' Names [§ 12.32]

Usually, if predetermination date property subject to probate administration is titled in both spouses' names, the personal representative and the surviving spouse must manage the asset together. However, some accounts expressly permit management by either party. Likewise, if an asset that is individual property is titled in both spouses' names (for example, tenancy-in-common property), the personal representative and surviving spouse must usually manage the asset together. Some accounts expressly permit management by either party.

If marital property assets are held in both spouses' names in the "and" form, the personal representative and the surviving spouse must both manage the asset. Wis. Stat. § 766.51(2). If an asset is 100% marital property and is held in the "or" form, it may be managed by either the personal representative or the surviving spouse. Wis. Stat. § 766.51(1)(b); *see also supra* § 2.249. If an asset is mixed property—that is, partly marital and partly nonmarital—and the asset is held in the "or" form, it must be managed by both the personal representative and the surviving spouse because of the rules applicable to the nonmarital portion.

Section 766.31(3)(b) permits divisions of marital property on an aggregate rather than on an item-by-item basis. For a general discussion of this provision, see section 2.22, *supra*. For a discussion of the federal and Wisconsin tax issues relative to this change, see section 9.20, *supra*. For suggested provisions to include in a marital property agreement to accommodate this change, see section 7.151, *supra*.

c. Assets Titled or Held Solely in Surviving Spouse's Name [§ 12.33]

Assets that are titled or held solely in the name of the surviving spouse may be the surviving spouse's predetermination date property, the surviving spouse's individual property, or former marital property. Since assets titled or held solely in the surviving spouse's name may be former marital property or have a former marital property component, the personal representative must ascertain whether the surviving spouse is holding former marital property. If so, the estate's interest in the former marital property assets is subject to administration and must be reflected on the personal representative's inventory and accounts, even though the surviving spouse has the exclusive right to manage the property.

➢ ***Practice Tip.*** The personal representative should consider causing the personal representative's name to be added to the title for management and control purposes. Liability can result from the manner in which an asset is managed during administration.

Section 766.31(3)(b) permits divisions of marital property on an aggregate rather than on an item-by-item basis. For a general discussion of this provision, see section 2.22, *supra*. For a discussion of the federal and Wisconsin tax issues relative to this change, see section 9.20, *supra*.

For suggested provisions to include in a marital property agreement to accommodate this change, see section 7.151, *supra*.

d. Assets Titled or Held in Third Person's Name [§ 12.34]

Assets that are not titled or held solely by the decedent or the surviving spouse may be held or titled in the name of a third person. For example, one spouse may die when there are assets in a revocable living trust held by an independent trustee. Some or all of the assets in the trust may be marital property or have a marital property component, which normally is subject to administration. However, the trustee is authorized to manage the assets under the trust instrument's terms. Wis. Stat. § 766.51(3). The personal representative may have to work out the details of management with the trustee.

3. Petitions for Relief with Respect to Management and Control [§ 12.35]

Section 857.01 permits the personal representative or surviving spouse to petition the court for an order providing the equitable relief necessary for the management and control of marital property during the administration of an estate. Therefore, if former marital property assets are held solely in the name of the surviving spouse, the personal representative may petition the probate court for an order requiring either that the former marital property assets be titled in the names of the personal representative and the surviving spouse as tenants in common or that the property be divided. The statute permits many possibilities, including the following:

1. If the asset is reregistered, the new title could be registered as "XYZ Bank, as personal representative of the estate of John Jones, deceased, and Mary Jones, as tenants in common of an undivided one-half interest each."

2. The asset could be divided, with one-half registered solely in the personal representative's name and the other half registered solely in the surviving spouse's name.

3. The asset could be registered in one name, either the personal representative's or the surviving spouse's.

An asset might not be entirely marital property; it might be mixed property. In that case, the personal representative and the surviving spouse are tenants in common, but their fractional interests are not each 50%. If an asset is 70% marital property, the balance was nonmarital property owned by the decedent spouse, the asset was not partitioned, and the new registration is in both names, the new registration could read, "XYZ Bank, as personal representative of the estate of John Jones and Mary Jones, as tenants in common, XYZ Bank having a 65% undivided interest and Mary Jones having a 35% undivided interest."

4. Statutory Buy-Sell Procedure [§ 12.36]

If a decedent spouse held an interest in a partnership or closely held corporation, the personal representative must determine whether the decedent executed a directive under section 857.015 necessitating a mandatory exchange under sections 766.51(10) and 861.015. Together, these sections create a statutory buy-sell procedure. The personal representative may be involved in two ways:

1. If the decedent did execute a written directive, the personal representative is obligated to carry it out. The personal representative must satisfy the surviving spouse's marital property interest in the designated property within one year of death. Wis. Stat. § 861.015(1). The surviving spouse's interest may be satisfied from other property that is of equal clear market value at the time of satisfaction. *Id.*

2. If the decedent did not execute a written directive, the personal representative may not execute a directive on the decedent's behalf. Wis. Stat. § 857.015.

   ➢ ***Note.*** If the surviving spouse is the holding spouse, he or she may execute a written directive within 90 days of the decedent's death. *Id.* Since 90 days is a short period, the personal representative may wish to consider advising the surviving spouse to seek separate counsel regarding the written directive.

➢ ***Note.*** The statutory buy-sell provision applies to both marital property assets and deferred marital property. However, with the change of the deferred marital property election to an amount instead of a fractional interest in individual assets, use of the statutory buy-sell procedure is no longer necessary with respect to deferred marital property. If the surviving spouse makes the deferred marital property election, the spouse receives cash. See section 4.81, *supra*, for an additional discussion of the statutory buy-sell provision.

B. Classification of Assets [§ 12.37]

1. Classification Presumptions During Administration [§ 12.38]

The presumption contained in section 766.31(2), that all assets are presumed to be marital property, applies during administration of a decedent's estate. Wis. Stat. § 854.17.

If the marital property presumption is rebutted, a second presumption applies. Section 861.02(2)(a) provides that if the presumption under section 766.31(2) is overcome, the property is presumed to be deferred marital property.

Therefore, there are two presumptions during administration of a decedent's estate. All assets, whether titled or held in the name of the decedent spouse, the surviving spouse, or both spouses, are presumed to be marital property. If the marital property presumption is overcome, predetermination date property owned by the decedent spouse is presumed to be deferred marital property. If the second presumption is overcome, the property is not classified as former marital property, and the surviving spouse has no deferred marital property election because the property is not deferred marital property.

➢ ***Example.*** A decedent spouse inherited IBM stock in 1976 during marriage. The stock was registered in the name of the decedent spouse. The certificate was dated April 1, 1976. In 1998, the decedent spouse sold the IBM stock and used the proceeds to purchase AT&T stock. The new stock certificate is dated April 1, 1998.

How is the stock classified for purposes of administration? First, the stock is presumed to be marital property. Records may be available to show that the AT&T stock is traceable to nonmarital property, thus overcoming the presumption. If the presumption is not overcome, the stock is classified as marital property stock. Assume that the personal representative can show that the AT&T stock was purchased with the proceeds from the sale of the IBM stock. Since the IBM stock certificate was dated April 1, 1976, the IBM stock was predetermination date property. Predetermination date property cannot be marital property, so the first presumption is overcome. However, the second presumption now applies. The IBM stock is presumed to be deferred marital property. To overcome the second presumption, the personal representative must show that the IBM stock was acquired by gift or disposition at death. If the second presumption is not overcome, the AT&T stock is deferred marital property and is in the augmented deferred marital property estate, and the surviving spouse has the right to make the deferred marital property election under section 861.02. *See infra* §§ 12.136–.147 (deferred marital property election), .148–.162 (augmented deferred marital property estate).

2. Manner in Which Assets Titled or Held [§ 12.39]

a. Classification of Assets Titled or Held Solely in Decedent Spouse's Name [§ 12.40]

Assets that are titled or held solely in the decedent spouse's name may be the decedent's predetermination date property, the decedent's individual property, or marital property of the spouses. An asset may also be mixed property—that is, a mixture of marital property and nonmarital property—if the nonmarital property component can be traced. Wis. Stat. § 766.63.

If an asset titled or held solely in the decedent spouse's name is marital property or has a marital property component, the personal representative and surviving spouse are tenants in common with respect to the former marital property. Wis. Stat. § 861.01(2).

b. Assets Titled or Held in Both Spouses' Names [§ 12.41]

If an asset is titled or held in both spouses' names, the asset is co-owned. If predetermination date property or individual property is co-owned and subject to administration, it is tenancy-in-common property. The personal representative owns a fractional ownership interest in the property. If the property was marital property, it becomes tenancy-in-common property upon the death of the first spouse to die. Wis. Stat. § 861.01(2).

c. Assets Titled or Held Solely in Surviving Spouse's Name [§ 12.42]

Assets titled or held solely in the surviving spouse's name may be marital property or have a marital property component. If so, the personal representative and the surviving spouse are tenants in common as to the former marital property. Wis. Stat. § 861.01(2). Since the asset is titled or held solely in the surviving spouse's name, the surviving spouse has the sole authority to manage and control the asset. Wis. Stat. §§ 861.01(1), 857.01. However, the personal representative's ownership interest is subject to administration.

The personal representative must ascertain the classification of all assets that are either titled in the surviving spouse's name or untitled and in the surviving spouse's possession. Such assets may be marital property or have a marital property component. If so, the decedent's interest is subject to administration. The burden of proof that the asset is not marital property is on the surviving spouse. Wis. Stat. §§ 854.17, 861.02(2)(a).

If the surviving spouse makes the deferred marital property election, it is necessary to determine whether any assets titled or held solely in the surviving spouse's name are deferred marital property. *See infra* §§ 12.156–.159.

d. Assets Titled or Held in Trustee's Name [§ 12.43]

(1) In General [§ 12.44]

A spouse may die while marital property assets are owned by the trustee of a revocable living trust. Sections 12.45–.47, *infra*, discuss (1) issues that arise when the sole settlor spouse dies first, (2) issues that arise when the nonsettlor spouse dies first, and (3) tax consequences of holding marital property assets in a revocable trust.

(2) Sole Settlor Spouse Dies First [§ 12.45]

If the sole settlor of a revocable living trust dies survived by the other spouse, the trust becomes irrevocable by reason of the settlor's death. Under section 861.01, the surviving spouse (a nonsettlor) owns a one-half interest in any former marital property assets as a tenant in common with the trustee. If the trust instrument provides for the disposition of the surviving spouse's marital property interest, the trustee should comply with the direction for disposition.

If the trust instrument does not provide for a disposition of the surviving spouse's one-half marital property interest upon the death of the settlor spouse, the trustee has the authority to manage the surviving spouse's one-half tenancy-in-common interest. Section 766.51(3) provides that the right to manage and control marital property transferred to a trust is determined by the trust's terms. Presumably, if the trustee holds marital property, section 766.51(3) continues to apply when the marital property ceases being marital property, as it would when one spouse dies. Section 766.575(2) provides that the "classification" of property in the trust does not affect the trustee's right and duty to administer, manage, and distribute the trust property. Again, presumably, if marital property is converted to tenancy-in-common property by reason of a spouse's death, the statute continues to apply even though, technically, the marital property assets are no longer classified when they become tenancy-in-common assets upon the death of one spouse.

Section 766.575(4) provides that a trustee is not liable to any person for any claim for damages as a result of a distribution of property in accordance with the terms of the governing instrument before the trustee's receipt of a notice of claim under section 766.575(3).

➢ ***Comment.*** The longer the trustee continues to hold the surviving spouse's one-half tenancy-in-common interest, the more complicated the situation may become. At some point, it may be argued that the predeceasing settlor spouse has made a nonprobate transfer of marital property assets to the beneficiaries of the revocable living trust. Section 766.70(6)(b)1. provides that in the event of a nonprobate transfer of marital property assets to a third person, the surviving spouse may bring an action against the third person to recover one-half of the marital property assets transferred. The surviving spouse may not commence such an action later than one year after the death of the decedent spouse. Wis. Stat. § 766.70(6)(b)1.; *see supra* § 12.12. If the statute of limitation expires, the surviving spouse may have no means of recovering the former marital property assets, *see supra* ch. 8, and a gift for tax purposes may result, *see supra* ch. 9.

➢ ***Practice Tip.*** Given the complexity of the issues that may arise upon the death of a spouse when a trust holds marital property assets, the trust instrument should contain provisions alerting the trustee to the potential situation and creating a procedure for dealing with the situation. Provisions for the distribution of marital property interests are discussed in chapter 10, *supra*. In many cases, using a joint revocable living trust agreement is preferable to a trust with one settlor because the issues are more likely to come to light.

(3) Nonsettlor Spouse Dies First [§ 12.46]

Section 12.45, *supra*, describes the situation that may exist if the settlor of a revocable living trust dies survived by a spouse and the trust holds marital property assets or income. A similar situation exists if the nonsettlor spouse dies survived by the settlor spouse.

If a personal representative has been appointed for the decedent nonsettlor spouse, as long as the predeceasing spouse's estate is open, it appears that the personal representative can recover the decedent's one-half interest in former marital property assets that are now tenancy-in-common assets. It appears that the personal representative has the option of either recovering the one-half interest or simply permitting the one-half interest to remain in the trust subject to administration by the probate court and management by the trustee. Of course, the personal representative's right to recover can be enforced at any time.

If administration of the decedent's estate is formal administration and a final judgment is entered assigning all the decedent's assets, it would appear the final judgment would transfer the decedent's interest in the trust. If the administration is informal administration, no transfer would have occurred since transfers in informal administration occur by express assignment executed by the personal representative. There is no general statute of limitation regarding the expiration of the decedent's ownership in the trust assets.

- ***Comment.*** This is a situation showing the advantage of a formal administration over an informal administration—namely, finality regarding decisions made determining ownership of assets.

(4) Tax Consequences of Holding Marital Property Assets in Revocable Trust [§ 12.47]

If the settlor dies survived by the other spouse and the trust contains marital property assets that are generating income, the income from the deceased settlor's interest is reported for tax purposes as the income of an irrevocable trust. The income from the surviving spouse's interest is reported as the income of a grantor trust.

If the nonsettlor spouse dies survived by the settlor, the income from the decedent's portion of the trust is reported as income of the decedent's estate, and the income from the surviving settlor's portion is reported as the income of a grantor trust. *See supra* ch. 9 (taxation of revocable trusts).

If a revocable living trust holds marital property assets and the settlor spouse predeceases the other spouse, a taxable gift may result if the surviving spouse fails to withdraw his or her interest in former marital property assets from the trust. *See* Wis. Stat. §§ 766.53, .70(6). This gift may be a gift of a future interest and may therefore be ineligible for the federal annual gift tax exclusion under I.R.C. § 2503. As to when gifts take place for gift tax return filing requirements, see chapter 9, *supra*.

With respect to the federal estate tax, a transfer of marital property assets to a revocable trust does not by itself change the classification of the property in the trust. Wis. Stat. § 766.31(5). If one spouse predeceases the other, the predeceasing spouse's one-half interest in the marital property assets in the trust will be included in his or her gross estate under I.R.C. § 2033.

One of the most important considerations when marital property assets are in a revocable trust is whether they retain their classification for purposes of the full-adjustment-in-basis rule of I.R.C. § 1014(b)(6). As noted above, a transfer of marital property assets to a revocable living trust does not by itself change the classification of the assets. Wis. Stat. § 766.31(5). Assuming that nothing in the trust instrument would change the classification, assets held by the trust receive the full adjustment in basis on the death of the first spouse to die. Rev. Rul. 66-283, 1966-2 C.B. 297.

3. Rebutting the Presumption [§ 12.48]

Practices will evolve for rebutting the presumption that property is marital property or deferred marital property. *See supra* ch. 3. If the decedent's will leaves everything to the surviving spouse or if the surviving spouse inherits the entire estate through intestacy, classification will not be as important as it would be if the decedent's will left assets to someone other than the surviving spouse (e.g., a trust, children, or a charity). If the decedent's will leaves everything to the surviving spouse, the extent of the efforts that the personal representative must apply to rebut the presumption of marital property is unknown. If the personal representative permits the marital property presumption to apply, the personal representative's fee and inventory filing fee may be reduced because the value of property subject to administration is reduced. Wis. Stat. §§ 857.05, 814.66. There is a potential income tax advantage to marital property—namely, the full adjustment in basis. *See supra* § 9.22.

4. Petitions Regarding Classification of Property [§ 12.49]

Depending on the situation, the personal representative or the surviving spouse may need to petition the probate court, as authorized by section 857.01, for an order determining the classification of certain assets.

➢ ***Example.*** A wife inherited stock worth $10,000 when her mother died in 1976. Thereafter, the wife sold some of the stock, reinvested some of the proceeds, spent some of the proceeds, made additions to the portfolio from her wages, and reinvested some of the dividends. She did not maintain adequate records. Her actions occurred before and after the determination date. The wife's will leaves the stock to her children by a prior marriage for their college educations. The husband dies first. His will leaves his estate to his children by a prior marriage. The value of the stock fund is $25,000 on the husband's death.

It must be determined whether the husband has a marital property interest in the stock fund. The stock fund appears to be hopelessly mixed to the extent that original certificates no longer exist. If so, the presumption that the securities are marital property cannot be overcome. If the presumption is not overcome, the personal representative must take the position that the stock is marital property. Depending on the circumstances, the personal representative may need to petition the court for an order determining classification. A petition would give all parties concerned an opportunity to be heard regarding the classification of the stock fund.

In the above example, the surviving spouse may be the personal representative. If so, the surviving spouse may have a conflict of interest. *See infra* § 12.51.

5. Traceable Mixing: Ownership vs. Right of Reimbursement [§ 12.50]

Section 766.63(1) provides that, except as provided otherwise in section 766.61 (life insurance) and section 766.62 (deferred employment benefits), mixing marital property with nonmarital property reclassifies the nonmarital property to marital property unless the nonmarital property can be traced. The court of appeals has held that when mixing is traceable, the surviving spouse has a right of reimbursement, not an ownership interest, in the mixed asset. *Kobylski v. Hellstern (In re Estate of Kobylski)*, 178 Wis. 2d 158, 503 N.W.2d 369 (Ct. App. 1993).

So, for example, if the decedent owned nonmarital real estate subject to traceable mixing, the personal representative must classify the real estate as nonmarital property on the inventory. If the surviving spouse intended the mixing to be a gift to the decedent, the remedies for gift recoveries are available. If the surviving spouse did not intend a gift, the surviving spouse has a claim for reimbursement, which must be filed pursuant to section 859.01. *See infra* §§ 12.124–.128.

C. Conflicts of Interest [§ 12.51]

Lawyers who advise personal representatives and surviving spouses may have potential and actual conflicts of interest. For further discussion, see chapter 14, *infra*.

Potential or actual conflicts of interest may also exist between the personal representative and the surviving spouse. If there is a potential or actual conflict of interest between the duties of the personal representative and the interests of the surviving spouse, it may be that the surviving spouse should not serve as personal representative. The probate court has inherent power to refuse to appoint the surviving spouse as personal representative, even though nominated by the decedent, or to remove the surviving spouse if the surviving spouse has already been appointed. *Oak Park Trust & Savings Bank v. Tressing (In re Estate of Tressing)*, 86 Wis. 2d 502, 273 N.W.2d 271 (1979); *see also Keske v. Marshall & Ilsley Bank (In re Estate of Keske)*, 18 Wis. 2d 47, 117 N.W.2d 575 (1962).

A number of circumstances may trigger situations in which there is a potential or actual conflict of interest between the surviving spouse and the personal representative. Areas of potential conflict of interest include:

1. Classification of property when the surviving spouse is not the sole beneficiary of the estate;

2. The right to make the deferred marital property election;

3. Advice concerning the deferred marital property election;

> ➢ ***Note.*** In *Schadde v. Estate of Schadde*, No. 90-0542-FT, 1991 WL 97310 (Wis. Ct. App. Apr. 25, 1991) (unpublished opinion

not citable per section 809.23(3)), the court held that the personal representative does not have a duty to inform the surviving spouse of the six-month deadline for filing the deferred marital property election, citing *Ludington v. Patton*, 111 Wis. 208, 230, 86 N.W. 571 (1901).

4. Decisions on whether the marital property presumption and deferred marital property presumption can be rebutted;

5. Enforceability of marriage agreements, marital property agreements, unilateral statements, and written consents;

6. Decisions on whether actions for recovery of marital property or breach of the good-faith duty under section 766.70 should be commenced;

7. Determination of whether the will puts the surviving spouse to an equitable election; and

8. Satisfaction of obligations and expenses of administration.

D. Apportioning Expenses of Administration Between Marital and Nonmarital Property [§ 12.52]

1. The Statute [§ 12.53]

Section 857.04 provides as follows:

Distribution of Marital and Other Expenses. (1) Except as provided in sub. (2), the personal representative shall pay expenses of administration out of the decedent's interests in marital property and in property other than marital property on a prorated basis according to the value of those interests.

(2) To the extent possible, the personal representative shall pay special expenses attributable to the management and control of marital property from the marital property generating the expenses, and special expenses attributable to the management and control of the decedent's property other than marital property from the other property generating the expenses.

2. General Expenses of Administration [§ 12.54]

Section 857.04(1) directs the personal representative to pay expenses of administration out of the decedent's interests in marital property and nonmarital property on a prorated basis. This book refers to these expenses as *general expenses of administration*.

➢ ***Example.*** A decedent's interests in marital probate property are valued at $50,000, and the decedent's interests in nonmarital probate property are valued at $50,000. The total estate is $100,000. General expenses of administration are $2,000.

Section 857.04(1) requires the personal representative to pay one-half of the general expenses of administration from the decedent's interest in marital property and the other half of the general expenses of administration from the nonmarital property. The statute does not distinguish specific bequests and devises from residue.

A number of practical questions arise from section 857.04(1). First, assume that a will leaves everything to the surviving spouse. Is it necessary to apportion expenses as dictated by section 857.04(1)? Under a literal reading of the statute, the decedent's marital property interests must be determined and valued. After classification and valuation, administration expenses must be prorated between the marital property and the nonmarital property. However, if the surviving spouse is receiving the entire estate anyway, apportioning expenses should not be necessary. Second, assume that the will provides for a $5,000 pecuniary bequest to a child. Does the pecuniary bequest bear any portion of the general expenses of administration? Presumably not, otherwise the legatee would not receive $5,000. In addition, section 857.04(1) charges a portion of the expenses of administration to marital property, without specifying the apportionment of the expenses within the classification. Section 854.18, which deals with abatement, apportions expenses within classifications. Third, assume that the will leaves a specific bequest of stock to a child. Must expenses of administration be charged to the stock? Presumably not, because otherwise the child would not receive all the stock. In addition, as with pecuniary bequests, the abatement section, section 854.18, appears to apportion expenses within classifications of property. Section 857.04(1) does not require apportionment of administration expenses on an asset-by-asset basis within a classification. Fourth, what if an asset is not liquid? Read literally, the statute does not make any exceptions for illiquidity. Must illiquid assets be sold? A sale might produce a harsh result, depending on the circumstances.

In the absence of legislative clarification, the following is offered as a way to harmonize the various ambiguities regarding section 857.04(1). Section 854.18 provides an order in which assets abate to pay expenses of administration. Section 854.18 controls within a classification. Therefore, expenses of administration are payable out of the residue of each classification to the extent that the residue is sufficient.

The application of section 857.04(1) may require a court order in certain circumstances. If informal administration is being used, it may be necessary to switch to formal administration temporarily.

- ***Practice Tip.*** The statute is silent on whether the decedent's will can negate the application of section 857.04. However, there is certainly no harm in putting a clause in the will attempting to negate section 857.04(1). At the very least, such a clause would support a court order. See section 10.185, *supra*, for a form giving the personal representative discretion to apportion administration expenses.

  Likewise, it is unknown whether the probate court can change the effect of section 857.04. However, probate courts are courts of equity. Presumably, the court's equitable powers would permit the court to alter the effect of section 857.04(1) when warranted by the circumstances.

3. Special Expenses of Administration [§ 12.55]

Section 857.04(2) provides that to the extent possible the personal representative is to prorate special expenses attributable to management and control between marital property and nonmarital property. Unlike section 857.04(1), section 857.04(2) does not refer to the decedent's interest in marital property. Section 857.04(2) refers to marital property, which presumably includes the interests of both spouses. Also, unlike section 857.04(1), which refers to a classification of property, section 857.04(2) refers to a particular asset. Whether the asset is residue or not appears to make no difference.

➢ ***Example.*** Assume that a husband solely held a duplex, which was marital property. The husband dies. The husband's will specifically devises his interest in the duplex to his wife. The personal representative and the wife decide that the personal representative will manage the duplex. Special expenses of administration relating to the management and control of the duplex are prorated to the personal representative's one-half interest and the wife's one-half interest in the duplex.

Section 857.04(2) only applies "[t]o the extent possible" and does not distinguish between residue and specific bequests and devises. Presumably, if the particular asset being managed is not liquid, special expenses of administration are not charged to the asset because they cannot be charged unless the asset is sold. It remains an open question whether there is a right of reimbursement if the asset *is* sold.

If special expenses of administration are charged to the surviving spouse's one-half interest in former marital property, a portion of the deduction is lost for federal estate and Wisconsin inheritance tax purposes but may be an addition to basis. *See supra* ch. 9.

E. Notice of Adverse Claim to Third Parties [§ 12.56]

The decedent's marital property interest may be in the hands of one or more third parties after the decedent's death. If so, the personal representative may consider either (1) giving a notice of adverse claim to the third party, to discourage the third party from transferring the decedent's property to someone else, or (2) requesting a court order, including a temporary restraining order, if necessary. Examples include the following:

1. The decedent may have had a "marital account" with the surviving spouse under section 705.01(4m). Section 705.06(1)(d) provides that after receipt of "actual notice" of the death of one party to a marital account, the financial institution may pay on request not more than 50% of the sums on deposit to the surviving party. Therefore, this section permits the financial institution to pay the entire balance in the marital account to the surviving party before "actual notice" is received. To prevent payment of the entire balance, the personal representative can give notice of the death to the financial institution.

2. The decedent may have had a marital property interest in a life insurance policy insuring the surviving spouse. Under section 766.61(2), the policy issuer is not liable for payments or actions taken unless, at the time of the payments or actions, it had actual knowledge of an inconsistent decree, marital property agreement, or adverse claim. If the life insurance company does pay the proceeds to someone other than the personal representative (e.g., the cash-surrender value is withdrawn), the personal representative has a remedy against the payee. Wis. Stat. § 766.70(6)(b).

3. The decedent may have had a marital property interest in a mutual fund, an account at a financial institution, or an account with a stock broker. If the account is titled in the surviving spouse's name, the personal representative may consider giving notice to the financial institution or stock broker in an attempt to prevent the third party from making payments to the surviving spouse. A question that may arise is whether the financial institution or stock broker is a bona fide purchaser under section 766.57. If so, notice of the existence of the marriage or termination of the marriage does not affect the status of the institution or broker as a bona fide purchaser under section 766.57(2).

F. Gift Recoveries [§ 12.57]

1. Lifetime Gifts of Marital Property Assets by Decedent Spouse [§ 12.58]

Section 766.70(6)(a) grants the surviving spouse a remedy if the decedent spouse, acting alone, gave marital property assets to a third person in excess of the limits set forth in section 766.53. The surviving spouse must commence the action for the remedy within the earlier of one year after he or she has notice of the gift, one year after a dissolution, or on or before the deadline for filing a claim under section 859.01 after the death of either spouse. *See* Wis. Stat. § 766.70(6)(a). Section 859.01 provides that all claims must be filed within a three- to four-month period commencing with the date that the order limiting time for filing claims is entered. Thus, assuming that the surviving spouse's remedy is not barred by the one-year limitation, the action by that spouse must be commenced during the three- to four-month limitation period or the expiration of the one-year period, if earlier.

➢ ***Query.*** Does the personal representative have a duty to advise the surviving spouse of this right? The better view is that the personal representative has no such duty. Rather than specifically advising the surviving spouse of this right and other rights, the personal representative may wish to advise the surviving spouse to have separate representation. That way, the personal representative would not be encouraging the exercise of specific rights the surviving spouse may have that may conflict with the personal representative's duty to the other beneficiaries. *See infra* ch. 14.

➢ ***Note.*** In *Schadde v. Estate of Schadde*, No. 90-0542-FT, 1991 WL 97310 (Wis. Ct. App. Apr. 25, 1991) (unpublished opinion not citable per section 809.23(3)), the court held that the personal representative does not have a duty to inform the surviving spouse of the six-month deadline for filing the deferred marital property election, citing *Ludington v. Patton*, 111 Wis. 208, 230, 86 N.W. 571 (1901).

2. Lifetime Gifts of Marital Property Assets by Surviving Spouse [§ 12.59]

The surviving spouse, acting alone, may have made gifts of marital property assets to a third person in excess of the limits in section 766.53. If so, the personal representative must commence an action regarding the gift within the earlier of (1) one year after the decedent spouse had notice of the gift or (2) the three- to four-month filing time under section 859.01, if either spouse dies. *See* Wis. Stat. § 766.70(6)(a); *see also supra* § 12.58. Assuming that the action is not already barred under the notice provision, the personal representative must commence the action during the earlier of these two periods.

If a potential cause of action exists against the surviving spouse for gifts of marital property assets, the personal representative must consider several difficult matters, including the following:

1. The action is barred if not commenced after the decedent's death. The personal representative might want to investigate the possibility of gift recoveries.

2. A conflict of interest exists if the personal representative is the surviving spouse and residue passes to beneficiaries other than the surviving spouse. One solution is for the will to contain provisions permitting the surviving spouse to serve as personal representative despite conflicts of interest. The problem with such a provision in the will is that it is difficult to anticipate in advance all the conflicts of interest that may arise. Despite such a provision in the will, the probate court has inherent authority, if there is a conflict of interest, to refuse to appoint the surviving spouse or to remove the surviving spouse. *See supra* § 12.51.

   ➢ ***Comment.*** Apparently, an action against the surviving spouse for a recovery with respect to excessive gifts of marital property assets must be commenced in circuit court by a summons and complaint. Commencing an action in circuit court could lead to a delay in the probate proceedings. *See supra* § 8.45. Under section 766.70(6)(a), the personal representative may sue the surviving spouse and the donee. To commence the action, the personal representative must know the donee's identity. It may be difficult to discover the donee's identity within the three- to four-month filing period. Presumably, if a party is discovered after the action is commenced, the party can be added as a party defendant.

3. Right of Reimbursement as a Result of Traceable Mixing [§ 12.60]

Section 766.63(1) provides that, except as provided otherwise in section 766.61 (life insurance) and section 766.62 (deferred employment benefits), mixing marital property with nonmarital property reclassifies the nonmarital property to marital property unless the nonmarital property can be traced. The court of appeals has held that when mixing is traceable, the surviving spouse has a right of reimbursement, not an ownership interest in the mixed asset. *Kobylski*, 178 Wis. 2d 158. So, for example, if the decedent owned nonmarital real estate subject to traceable mixing, ownership of the marital property funds has been transferred to the decedent. If the surviving spouse intended the mixing to be a gift to the decedent, the remedies for gift recoveries are available. If the surviving spouse did not intend a gift, the surviving spouse has a claim for reimbursement, which must be filed pursuant to section 859.01. See the discussion of claims at section 12.125, *infra*.

G. Breach of Good-faith Duty [§ 12.61]

Section 766.15(1) requires each spouse to act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. *See supra* § 8.18. If one spouse breaches the good-faith duty, the other spouse has a claim under section 766.70(1). Under section 766.70(1), a spouse has six years after acquiring actual knowledge of the facts giving rise to the claim in which to commence an action, except as limited in section 766.70(6). Section 766.70(6) contains the remedies for excessive gifts of marital property. Actions with respect to gifts of marital property have a shorter statute of limitation. *See supra* §§ 12.58–.59. Presumably, if a surviving spouse breached the good-faith duty and the decedent spouse, who owned the cause of action, died during the six-year limitation period, the personal representative succeeds to the decedent spouse's cause of action.

The decedent spouse may be the spouse who breached the good-faith duty. If so, the surviving spouse has a cause of action against the estate. This is another reason why the personal representative may wish to advise the surviving spouse to have separate representation. *See supra* § 12.58; *see also infra* ch. 14.

If the surviving spouse has a claim against the decedent spouse for breach of the good-faith duty and the claim sounds in tort, the claim is not subject to the three- to four-month claim period specified in section 859.01. If the claim does not sound in tort, however, it must apparently be filed within the section 859.01 claim period or it is barred, notwithstanding section 766.70(1).

Section 767.331 provides that no action under section 766.70 may be brought by a spouse against the other spouse while an action for divorce is pending. Some actions are section 766.70 actions and others are not. In *Gardner v. Gardner*, 175 Wis. 2d 420, 499 N.W.2d 266 (Ct. App. 1993), the court held that an action for intentional misrepresentation brought by the wife during the divorce proceeding was a section 766.70 action and the court therefore dismissed her case. In *Caulfield v. Caulfield*, 183 Wis. 2d 83, 515 N.W.2d 278 (Ct. App. 1994), the court held that an action for recovery on a note brought during the divorce proceeding was not a section 766.70 action.

In *Knafelc v. Dain Bosworth, Inc.*, 224 Wis. 2d 346, 591 N.W.2d 611 (Ct. App. 1999), the court held that an action by the wife against her stockbroker-husband regarding securities trades in the course of his employment was not a section 766.70 action. In *Stuart v. Stuart*, 140 Wis. 2d 455, 410 N.W.2d 632 (Ct. App. 1987), *aff'd*, 143 Wis. 2d 347, 421 N.W.2d 505 (1988), the ex-wife commenced a tort action after the judgment of divorce against her ex-husband for assault, battery, and intentional infliction of mental distress arising from incidents that allegedly took place during the marriage. The court of appeals and the supreme court upheld the ex-wife's action and held that a tort action for personal injury and divorce proceedings do not have an identity of causes of actions or claims.

H. Marital Property Agreements [§ 12.62]

1. Obligations of Decedent Under Marital Property Agreement or Marriage Agreement [§ 12.63]

One spouse may die having undertaken certain obligations in a marital property agreement or other marriage agreement. Unless the surviving spouse files a claim against the estate pursuant to section 859.01 or against a trust under section 701.065, the decedent's obligations are generally barred. The fact that the surviving spouse may have a claim against the estate or trust is another reason why the personal representative may wish to advise the surviving spouse to consider having separate representation. *See supra* § 12.58.

Section 766.58(13)(b) provides that no action on a marital property agreement may be brought later than six months after the inventory is filed. Section 766.58(13)(b) also contains provisions that apply when the inventory is amended. Section 766.58(13)(c) permits the court to extend the time for filing. Section 859.02(2)(a) provides that a claim based on a marital property agreement is generally subject to the limitations in subsections 766.58(13)(b) and (c).

➢ ***Practice Tip.*** Section 766.58(13)(b) applies to many situations not covered by section 859.02, which is limited to claims against the decedent's estate. Section 766.58(13)(b) would permit an action by the personal representative against the surviving spouse. It would also permit an action by the surviving spouse against the personal representative for something that is not a claim against the decedent's estate—for example, a construction of a marital property agreement. The word *action* in section 766.58(13)(b) implies an action in circuit court commenced by summons and complaint. Also, section 766.58(13)(b) is not limited to use by the spouses or personal representative. It appears to apply to any action concerning a marital property agreement.

2. Breach of Marital Property Agreement or Marriage Agreement [§ 12.64]

The decedent spouse or the surviving spouse may have breached a marital property agreement or other marriage agreement. Under section 766.58(13)(b), after the death of a spouse, no action concerning a marital property agreement may be brought later than six months after the inventory is filed. If an amended inventory is filed, the action may be brought within six months after the filing of the amended inventory, if the action relates to information contained in the amended inventory that was not contained in a previous inventory. Wis. Stat. § 766.58(13)(b). The court may extend the six-month period for cause if a motion for extension is made within the applicable six-month period. Wis. Stat. § 766.58(13)(c).

➢ ***Note.*** Section 766.58(13)(b) only applies to marital property agreements. A marriage agreement executed by spouses before their determination date may or may not be a marital property agreement. *See supra* ch. 7.

➢ ***Note.*** Probate is a series of special proceedings, not one proceeding. If a marital property agreement or marriage agreement is contested in the probate court and the court rules in favor of one party, the order is an appealable order. The rules for a timely appeal apply to that order. *Olson v. Dunbar (In re Estate of Olson)*, 149 Wis. 2d 213, 440 N.W.2d 792 (Ct. App. 1989) (holding that appeal from order upholding validity of agreement taken after final judgment in probate proceeding is not timely).

The considerations regarding breach of a marital property agreement or other agreement are similar to the matters that must be considered with respect to gift recoveries and breach of the good-faith duty discussed in sections 12.57–.60 and 12.61, *supra*, respectively.

See section 12.63, *supra*, for a discussion of the limitation periods described in sections 766.58(13)(b) and 859.02.

I. Life Insurance and Deferred-employment-benefit Plans [§ 12.65]

1. Notice to Surviving Spouse of Life Insurance Policy or Deferred-employment-benefit Plan [§ 12.66]

Section 857.35 states that if a personal representative who is not the surviving spouse becomes aware that any beneficiary other than the surviving spouse is designated as beneficiary of more than 50% of the proceeds of a life insurance policy or deferred-employment-benefit plan, the personal representative must give the surviving spouse written information sufficient to identify the policy or plan and its beneficiary. Section 857.35 also states that the surviving spouse may recover life insurance proceeds and deferred employment benefits under section 766.70(6).

Section 857.35 applies to all life insurance policies and all deferred-employment-benefit plans no matter how classified. Section 857.35 applies to all life insurance policies whether the insured is the decedent spouse or the surviving spouse. Presumably, the personal representative must give notice in every case to permit the surviving spouse to consider independently the classification of the asset and decide whether to assert a claim. If the proceeds are marital property and a claim is not asserted, a gift may result.

➢ ***Caution.*** The statute does not contain a time limit for notification. It simply states that the personal representative is obligated to notify the surviving spouse whenever the personal representative "becomes aware" that a third person was designated. By the time the personal representative becomes aware of such a beneficiary designation, the statute of limitation with respect to a recovery by the surviving spouse may have expired. *See supra* §§ 12.57–.60.

2. Surviving Spouse's Option to Purchase Decedent's Interest in Life Insurance Policy or Deferred-employment-benefit Plan [§ 12.67]

a. Life Insurance [§ 12.68]

Section 766.70(7) states that after the date of death and within 90 days after the earlier of (1) receipt of the inventory listing any life insurance policy or deferred-employment-benefit plan or (2) the discovery of the existence of such a policy or plan, the surviving spouse may purchase the decedent's interest in the policy or plan from the decedent's estate at fair market value as of the date of death if all or part of the policy or plan is included in the decedent spouse's estate. Section 766.70(7) also states that it only applies to life insurance policies and deferred-employment-benefit plans described by sections 766.61 and 766.62.

Section 766.70(7) applies when the surviving spouse is the insured. The life insurance policy may be the individual property of the predeceasing spouse if, for example, the predeceasing spouse was the record owner of the policy. Wis. Stat. § 766.61(3)(c). Or the predeceasing spouse may have had a marital property interest in the life insurance policy if the surviving spouse was the insured and the record owner. Wis. Stat. § 766.61(3)(a), (b). Finally, section 766.70(7) appears to apply if a life insurance policy insuring the surviving spouse is owned by a third person and at least one premium was paid from marital property funds after the determination date. Wis. Stat. § 766.61(3)(d).

Section 766.70(7) applies only if all or part of the policy is in the decedent spouse's probate estate. Some life insurance policies contain contractual provisions permitting a nontestamentary transfer of ownership upon the owner's death. If such a contractual provision applies to the predeceasing spouse's interest in the policy, section 766.70(7) will not apply.

Section 766.70(7) applies only to life insurance policies described in section 766.61. Therefore, it does not apply to other types of life insurance policies—for example, a life insurance policy owned by the decedent spouse insuring a child, a parent, or a business partner.

b. Deferred Employment Benefits [§ 12.69]

It is difficult to imagine when the option to purchase contained in section 766.70(7) would apply to a deferred-employment-benefit plan. Section 766.70(7) applies only if all or part of the plan is included in the decedent spouse's probate estate. Generally, death benefits from deferred-employment-benefit plans are not subject to administration. Wis. Stat. § 853.18(1)(c). Also, if the nonemployee spouse dies first, that spouse's marital property interest in deferred-employment-plan benefits terminates. Wis. Stat. §§ 766.31(3), .62(5).

Therefore, section 766.70(7) seems to apply only if the employee spouse dies first and designates his or her estate as beneficiary of the plan benefits. In the unlikely event of such a designation, the surviving spouse would be able to purchase from the estate the decedent's interest in the plan. *See supra* §§ 2.110, 8.59.

J. Elections by Surviving Spouse [§ 12.70]

1. In General [§ 12.71]

Under section 861.02, the surviving spouse has the right to make the deferred marital property election. *See infra* §§ 12.136–.147. If this election is not made within prescribed time limits, it is lost. *See infra* § 12.139. In certain circumstances, moreover, the decedent's will may put the surviving spouse to an equitable election under section 853.15. *See supra* §§ 12.22–.26. The existence of the spousal elections is another reason why the personal representative may wish to consider advising the surviving spouse to have separate representation. *See supra* § 12.58.

2. Disclaimer by Surviving Spouse [§ 12.72]

Section 854.13(9) provides that a disclaimed interest in survivorship marital property passes to the decedent's probate estate. Section 854.13(7) permits the transferor of the property to specify how the disclaimed property devolves. It appears that section 854.13(7) conflicts with section 854.13(9). Thus, it may be necessary to commence a probate proceeding, otherwise unnecessary, to receive the decedent's interest in disclaimed survivorship marital property.

VII. Inventory [§ 12.73]

Section 858.01 requires the personal representative to file an inventory of the decedent's property "within a reasonable time" but no later than six months after appointment unless the court extends or shortens the time. An inventory must be prepared but is not required to be filed for informal administration. Wis. Stat. § 865.11. The inventory required by section 858.01 must show, as of the date of death, the value of all property, what property is marital property, and the type and amount of existing obligations relating to any item of property.

➢ ***Comment.*** Section 858.07, which governs the contents of the inventory, differs in some respects from section 858.01. First, section 858.01 requires the personal representative to file an inventory of "all property owned by the decedent." Section 858.07 requires the personal representative to include in the inventory "all property subject to administration." Second, section 858.01 requires the personal representative to show "the type and amount of any existing obligation relating to any item of property." Section 858.07 requires the personal representative to include in the inventory "a statement of any encumbrance, lien or other charge upon each item." Presumably, the phrase, "all property owned by the decedent" in section 858.01 means property subject to administration. Likewise, the types of obligations required to be listed by section 858.01 are the same as the obligations required to be listed by section 858.07.

➢ ***Practice Tip.*** As noted above, section 858.01 requires the personal representative to show on the inventory what property is marital property. For purposes of the inventory, the personal representative should simply list the decedent's interest in marital or nonmarital property, whether it is a fractional interest or an entire interest. It is not necessary to distinguish between individual property and predetermination date property, nor is it necessary to subdivide predetermination date property into deferred marital property and nondeferred marital property. The surviving spouse has no elective rights with respect to deferred marital property. The surviving spouse has the right to elect an amount, not an interest in property. *See infra* §§ 12.136–.147.

Showing marital property assets on the inventory is substantially the same as showing tenancy-in-common assets. In both cases, the decedent spouse had a fractional ownership interest in the asset. If the entire asset was marital property, the decedent's interest in the asset is one-half. If the asset was mixed property, the decedent's interest will be one-half of the former marital property component plus any other interest the decedent may have had in the asset. Listing marital property assets on the inventory is illustrated by the following example:

Property Subject to Administration		**Value of Decedent's Interest at Date of Death**
200 shares of XYZ stock, value of $130 per share, 30% marital property, 70% solely owned by decedent.		
15% marital property interest =	$ 19.50	
70% nonmarital property interest =	$ 91.00	
85% interest =	$ 110.50	
200 shares × $110.50 =		**$ 22,100**

VIII. Accounts [§ 12.74]

A. In General [§ 12.75]

Section 862.05 requires an accounting by the personal representative of the decedent's property and all profits and income from the estate:

> Every personal representative shall be charged in the personal representative's accounts with all the property of the decedent which comes to the personal representative's possession; with all profit and income which comes to the personal representative's possession from the estate and with the proceeds of all property of the estate sold by the personal representative.

B. Property Owned by Surviving Spouse and in Possession of Personal Representative [§ 12.76]

Under the Act, the personal representative may possess property in which the surviving spouse has an ownership interest. For example, if an entire asset is marital property, the personal representative and the surviving spouse are tenants in common as to an undivided one-half interest each. The personal representative and the surviving spouse should discuss how the asset will be managed during administration. If the asset was held solely by the decedent, the personal representative manages the entire asset, absent an order of the probate court, until other arrangements are made. However, only one-half of the asset is subject to administration, and the personal representative's accounts must reflect that fact. If the personal representative is receiving and disbursing all items of income and expense regarding the asset, the personal representative may conclude that an account reflecting the surviving spouse's interest in the net income of the property is necessary. This provides a record for the personal representative. However, this *suspense account* should not be part of the probate accounting. It is a separate account and not subject to administration.

- ***Practice Tip.*** If the personal representative is administering the entire asset, including the surviving spouse's one-half interest, the personal representative may request a management fee from the surviving spouse. Section 857.04(2) provides that to the extent possible, the personal representative is to pay special expenses attributable to management and control of marital property from the marital property generating the expenses. *See supra* § 12.55. This section does not authorize the personal representative to charge a management fee, but that certainly would be a reasonable request in most circumstances. Section 857.04(2) appears to apply to the situation in which the personal representative is managing both halves of the marital property.

C. Property Owned by Personal Representative and in Possession of Surviving Spouse [§ 12.77]

There will be situations in which the decedent spouse had a marital property interest in property titled or held solely in the surviving spouse's name. The decedent's marital property interest is subject to administration. The decedent's interest is shown on the inventory, and items of income and expense attributable to that interest are reflected on the final account. Wis. Stat. § 862.05. The personal representative will need to work with the surviving spouse to determine how the decedent's interest will be managed during administration. The asset may be retitled in accordance with its classification. Wis. Stat. § 857.01. The personal representative may choose to permit the surviving spouse to manage the decedent's interest, receive the income, and pay expenses. In this case, the surviving spouse may ask the estate to pay a management fee. However, the personal representative's fractional interest in such income and expenses must be reflected on the final account.

D. Net Probate Income Attributable to Elected Deferred Marital Property Amount [§ 12.78]

In addition to accounting for the decedent's fractional interest in an asset's income, the personal representative must determine any net probate income payable to the surviving spouse if the deferred marital property election is made.

The question arises whether section 701.20 applies to net probate income attributable to the elected deferred marital property amount. Section 701.20(5)(d) provides that a legatee of a specific amount of money not determined by pecuniary formula may not be paid any part of the income of the estate but must receive interest on any unpaid amounts at the legal rate set forth in section 138.04 for the period commencing one year after the decedent's death. Section 701.20(5)(b)2. provides that net probate income must be distributed proportionately to all other legatees and devisees.

A surviving spouse who has elected the deferred marital property amount is not a legatee or devisee. Thus, the distribution of net probate income attributable to the elected deferred marital property appears not to be covered by section 701.20. Rather, it appears that the electing spouse is treated as a general creditor with respect to the deferred marital property amount and is not entitled to any net probate income.

IX. Tax Accounting During Administration [§ 12.79]

In addition to preparing an account for purposes of the probate proceeding, the personal representative must file necessary federal and Wisconsin fiduciary income tax returns. *See supra* ch. 9. One-half the income attributable to marital property is taxable to the decedent's estate and the other half is taxable to the surviving spouse. *United States v. Merrill*, 211 F.2d 297 (9th Cir. 1954); *Bishop v. Commissioner*, 152 F.2d 389 (9th Cir. 1945).

X. Satisfaction of Obligations After Death of Spouse [§ 12.80]

A. In General [§ 12.81]

Sections 12.82–.131, *infra*, discuss satisfaction of obligations after the death of a spouse. The subject is extraordinarily complicated. For purposes of discussion, it is assumed that one spouse (either the decedent or the survivor) is obligated and one spouse is not obligated. If both spouses are obligated, much of the discussion is immaterial. For an extensive discussion of obligations generally, see chapters 5 and 6, *supra*.

Section 766.55(2) applies to the satisfaction of obligations during the marriage. That section creates six categories of obligations:

1. Duty of support, Wis. Stat. § 766.55(2)(a);

2. Family-purpose obligation, Wis. Stat. § 766.55(2)(b);

3. Premarital obligation, Wis. Stat. § 766.55(2)(c)1.;

4. Pre-Act obligation, Wis. Stat. § 766.55(2)(c)2.;

5. Tort obligation, Wis. Stat. § 766.55(2)(cm); and

6. Other obligation, Wis. Stat. § 766.55(2)(d).

See also supra § 5.32.

➢ ***Comment.*** The availability of marital property to satisfy family-purpose obligations is one of the very significant concepts in the Marital Property Act. *See supra* chs. 5, 6. This provision has a significant effect on the allowance and satisfaction of claims at the death of a spouse.

Section 766.55(8) provides that after the death of a spouse, property is available for satisfaction of obligations as provided in section 859.18. If a claim filed against the decedent's estate is one for which property is available under section 859.18, the claim must describe which of the six types of obligations under section 766.55(2) applies to the claim. Wis. Stat. § 859.13.

➢ ***Note.*** The Legislative Council notes on section 859.18 include a chart outlining property available for satisfaction of obligations at the death of a spouse. *See* Wis. Stat. Ann. § 859.18 Legis. Council Notes—1985 Act 37, § 169 (West 2002).

➢ ***Note.*** Section 701.065 sets forth a claims procedure that limits the time within which creditors can recover from trustees who have a duty or power to pay a decedent's debts. While the claims procedure in chapter 701 does not contain a reference to the extensive marital property provisions and exemptions contained in chapter 859 of the Probate Code, it appears that the provisions of section 859.18 apply to property held by a trustee at the time of death. Notwithstanding its location in the Probate Code, section 859.18 is not limited to assets subject to administration.

If the trust was irrevocable before the date of the decedent's death, the trust normally would not contain marital property because a completed gift would have been made. *See supra* § 2.102 (irrevocable trusts). However, if the trust was revocable, the trust could contain former marital property.

B. Effect of Marital Property Agreements [§ 12.82]

Section 859.18(6) provides that a marital property agreement as defined under section 766.01(12) does not affect property available for satisfaction of obligations under section 859.18. Section 766.01(12) defines a marital property agreement as an agreement that complies with sections 766.58, 766.585, 766.587, 766.588, and 766.589.

According to section 766.55(4m), no provision of a marital property agreement or a decree under section 766.70 adversely affects the interest of a creditor unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred, or in the case of an open-end plan as defined in section 766.555(1)(a), when the plan was entered into.

It appears that section 859.18(6) is designed to apply when a marital property agreement is used to effect a nontestamentary disposition pursuant to section 766.58(3)(f) (the "Washington will" provision). As previously noted, section 859.18(6) states that a marital property agreement may not affect property that is available for satisfaction of obligations under section 859.18. Section 859.18(2) provides that property that would have been available to the creditor under section 766.55(2) continues to be available after the death of a spouse. Therefore, if the creditor had actual knowledge of a marital property agreement, marital property reclassified by the agreement is not available under section 859.18. Wis. Stat. § 766.55(4m). If the creditor did not have actual knowledge of an agreement, the property is available under section 859.18. *Id.* Thus, it appears that section 859.18(6) is designed to apply to nontestamentary dispositions under marital property agreements pursuant to section 766.58(3)(f). The reason for this is set forth in the Legislative Council notes on section 859.18:

> In deciding what property should be available to satisfy an obligation at the death of a spouse, the special committee first looked to whether the property is available under current law. Thus, joint tenancy, deferred employment benefits and insurance were made exceptions to the general rule of availability and certain trusts and accounts are available subject to the limitations under existing law. The special committee also recommended that survivorship marital property not be generally available because survivorship marital property is similar to joint tenancy …. To balance the latter exclusion [survivorship marital property] from the pool of property available to creditors, the special committee concluded that a marital property agreement [under section 766.58(3)(f)] should not be able to affect the property available for satisfaction of an obligation at the death of a spouse. In practice, the latter rule may not be as significant as it initially appears because if [nontestamentary dispositive provisions of] marital property agreements could affect property available to satisfy obligations at the death of a spouse, a creditor would only be bound by agreement if the

> creditor had actual knowledge of the relevant term of the agreement [i.e. the nontestamentary dispositive provision]; if the creditor has actual knowledge, it is likely that the amount of credit extended would be reduced.

Wis. Stat. Ann. § 859.18 Legis. Council Notes—1985 Act 37, § 169 (West 2002).

In sum, if the creditor relies on the availability of marital property assets in extending credit and the marital property assets subsequently become joint tenancy property or survivorship marital property, the property is not available to the creditor after the spouse's death. This was the case before the Act. On the other hand, if the creditor relies on the availability of marital property assets in extending credit and the property is transferred at death by will or by marital property agreement, the marital property assets remain available to the creditor.

C. Wisconsin Tax Obligations [§ 12.83]

Section 71.91(3) provides that all tax obligations to Wisconsin, including interest, penalties, and costs incurred during marriage by a spouse after December 31, 1985, or after both spouses are domiciled in Wisconsin, whichever is later, are incurred in the interest of the marriage or family and may be satisfied only under sections 766.55(2)(b) and 859.18. However, section 71.91(3) also provides that if one spouse is relieved of liability under section 71.10(6)(a), (b), or (6m), the other spouse's tax obligation to Wisconsin may be satisfied only under section 766.55(2)(d) or by set-off under section 71.55(1), 71.61(1), or 71.80(3) or (3m). *See supra* ch. 9 (when spouse relieved of liability).

Thus, for the most part, Wisconsin tax obligations are family-purpose obligations. When a family-purpose obligation is discussed in this chapter, it may include a Wisconsin tax obligation.

Section 859.18(3) contains a special rule that applies when credit is granted by a person who regularly extends credit. That rule is discussed in section 12.90, *infra*. It should be noted, however, that the special rule in section 859.18(3) is expressly made applicable to Wisconsin tax obligations as well.

➢ ***Note.*** The Act does not contain specific provisions applicable to United States tax obligations or county or municipal obligations. *See supra* § 6.19.

D. Obligations of Spouses Under Section 766.55(2) [§ 12.84]

1. Support Obligations and Family-purpose Obligations [§ 12.85]

a. In General [§ 12.86]

Section 766.55(2)(a) provides that after the determination date, a spouse's obligation to satisfy a duty of support owed to the other spouse or to a child of the marriage may be satisfied only from all marital property and all other property of the obligated spouse. *See supra* ch. 5, 6.

Section 766.55(2)(b) provides that after the determination date, an obligation incurred by the spouse in the interest of the marriage or the family may be satisfied only from all marital property and all other property of the incurring spouse. *See supra* chs. 5, 6.

Sections 12.87–.94, *infra*, discuss the satisfaction of support and family-purpose obligations after one spouse dies.

b. Obligated Spouse Dies First [§ 12.87]

(1) Obligated Spouse's Probate Property [§ 12.88]

Under the common law property system, if the obligated spouse died first, creditors could file a claim in the estate under section 859.01. All assets in the probate estate were available for payment of the claim. The result under the marital property system is the same and for the same reason: the decedent spouse was personally liable.

(2) Obligated Spouse's Nonprobate Transfers [§ 12.89]

If the obligated spouse dies first and has transferred assets by nonprobate means, some of those assets are exempt from creditors' claims under section 859.18(4)(a). The exempt property is

1. Survivorship marital property, except for certain encumbrances specified in section 766.60(5)(b) and (c);

2. Joint tenancy property in which the decedent spouse was a tenant, subject to any judgment lien on which execution was issued before death;

3. Deferred employment benefits arising from the decedent's employment; and

4. Proceeds of a life insurance policy insuring the decedent if the proceeds are not payable to the decedent's estate and are neither assigned to the creditor as security nor payable to the creditor.

> ➢ ***Note.*** Notice that section 859.18(4)(a)4. applies if life insurance proceeds are paid to the decedent's estate, but that section 859.18(4)(a)3., which applies to deferred employment benefits, is not so limited.

Section 859.18(5) states that if certain specified assets transferred by nonprobate means are otherwise available under section 859.18, they remain available. The list is not exclusive. The assets are

1. Trusts described in section 701.07(3) (funded revocable trusts);

2. Spendthrift trusts described in section 701.06; and

3. Accounts in financial institutions governed by chapter 705 and described in section 705.07.

Under section 859.18(2), when one spouse dies, property that would have been available to the creditor if the marriage had continued remains available except as provided in subsections 859.18(3)–(5). Section

859.18(2) specifically provides for tracing if the property is sold or exchanged.

➢ ***Comment.*** The extent to which section 859.18(2) applies to nonprobate transfers is unclear. Under Wisconsin's common law property system before 1986, assets transferred by nonprobate means were not available to a creditor unless made available by a specific statute. Section 859.18(2) may enlarge creditor's rights with respect to nonprobate assets.

(3) Surviving Nonobligated Spouse's Property [§ 12.90]

Under the pre-Act common law property system, assets of the surviving nonobligated spouse were not available to a creditor because collection depended on personal liability. The result under the marital property system is quite different. Under section 859.18(2), if the obligated spouse dies first, the surviving spouse's property that would have been available to the creditor had the marriage continued remains available to the creditor. Section 859.18(2) specifically provides for tracing in the event of a subsequent sale or exchange. Unless the obligation resulted either from an extension of credit by a person who regularly extends credit or from a tax obligation to the state of Wisconsin, the surviving spouse's income is not available, and the surviving spouse's interest in former marital property is available only to the extent of the value of the marital property at the decedent's death. Wis. Stat. § 859.18(3). However, if the obligation resulted from an extension of credit by a person who regularly extends credit or if the obligation was a Wisconsin tax obligation, the surviving spouse's income is available, and the surviving spouse's interest in former marital property is not limited to the value of the marital property at the decedent's death. In effect, the marital property regime continues for the surviving spouse with respect to certain creditors. *Park Bank-West v. Mueller*, 151 Wis. 2d 476, 444 N.W.2d 754 (Ct. App. 1989).

c. Nonobligated Spouse Dies First [§ 12.91]

(1) Nonobligated Spouse's Probate Property [§ 12.92]

Under the pre-Act common law property system, if the nonobligated spouse died first, the creditor did not file a claim in the estate of the nonobligated spouse. Collection depended on personal liability. The marital property system differs considerably. Under section 859.18(2), when a spouse dies, property that was available to the creditor during the marriage continues to be available. That section specifically provides for tracing in the event of a sale or exchange. Therefore, if the nonobligated spouse's probate estate contains former marital property assets and those assets were available to the creditor during the marriage, the assets continue to be available after the nonobligated spouse's death. The creditor must file a timely claim under section 859.01 to preserve the creditor's rights against the property.

If the obligation is not in default, the creditor may not be able to accelerate the obligation by filing a claim. However, if the claim is not filed in a timely manner as a contingent claim, it is barred against the estate in the event of a subsequent default.

(2) Nonobligated Spouse's Nonprobate Transfers [§ 12.93]

If the nonobligated spouse dies first and has transferred assets by nonprobate means, some of those assets may be available to the creditor, and some may not be. Section 859.18(4)(b) states that transfers of certain nonprobate assets to a third person are exempt. These assets are

1. The decedent's interest in joint tenancy property, subject to any judgment lien on which execution was issued before death;

2. Deferred employment benefits arising from the decedent's employment; and

3. The proceeds of a life insurance policy insuring the decedent's life if the proceeds are not payable to the decedent's estate and are neither assigned to the creditor as security nor payable to the creditor.

➢ ***Note.*** Notice that section 859.18(4)(b)3. applies if life insurance proceeds are paid to the decedent's estate, but that section 859.18(4)(b)2., which applies to deferred employment benefits, is not so limited.

Under the pre-Act common law property system, collection depended on personal liability, and unsecured creditors were not able to reach nonprobate assets in the hands of the recipients unless those assets were made specifically available by statute. Under section 859.18(5), certain nonprobate assets, if otherwise available under section 859.18, remain available under other statutes. These assets are

1. Trusts described in section 701.07(3) (funded revocable trusts);

2. Spendthrift trusts described in section 701.06; and

3. Accounts in financial institutions governed by chapter 705 and described in section 705.07.

➢ ***Note.*** Section 701.065 sets forth a claims procedure that limits the time in which creditors can recover from trustees who have a duty or power to pay a decedent's debts.

Under section 859.18(2), when one spouse dies, property that would have been available to the creditor if the marriage had continued remains available except as provided in subsections 859.18(3)–(5). Section 859.18(2) specifically provides for tracing if the property is sold or exchanged.

➢ ***Comment.*** The extent to which section 859.18(2) applies to nonprobate transfers is unclear. Under Wisconsin's common law property system before 1986, assets transferred by nonprobate means were not available to a creditor unless made available by a specific statute. Section 859.18(2) may enlarge creditor's rights with respect to nonprobate assets.

(3) Surviving Obligated Spouse's Property [§ 12.94]

Under the common law property system, if the nonobligated spouse died first, all the assets owned by the surviving spouse were available because the surviving spouse was personally liable. The same result generally obtains under the marital property system, for the same reason: the obligated spouse is personally liable.

➢ ***Query.*** What if assets in the nonobligated spouse's probate estate were available to the creditor, the creditor did not file a claim on a timely basis under section 859.01, and those assets are distributed to the surviving obligated spouse? Section 859.02(1) provides that claims not filed on a timely basis are forever barred against the estate, the personal representative, and the decedent's heirs and beneficiaries. However, section 859.02(3) provides that the failure to file a timely claim against a decedent's estate does not bar the claimant from satisfying the claim from property other than the decedent's estate. Since the surviving spouse is personally liable, assets that are immune from claims of creditors in the probate estate seem to lose their immunity if distributed to the surviving spouse. However, if such immune assets are distributed to someone other than the surviving spouse, the immunity continues.

2. Premarriage Obligations and Pre-Act Obligations [§ 12.95]

a. In General [§ 12.96]

Section 766.55(2)(c) provides that

> 1. An obligation incurred by a spouse before or during marriage that is attributable to an obligation arising before marriage or to an act or omission occurring before marriage may be satisfied only from property of that spouse that is not marital property and from that part of marital property which would have been the property of that spouse but for the marriage.
>
> 2. An obligation incurred by a spouse before, on or after January 1, 1986, that is attributable to an obligation arising before January 1, 1986, or to an act or omission occurring before January 1, 1986, may be satisfied only from property of that spouse that is not marital property and from that part of

marital property which would have been the property of that spouse but for the enactment of this chapter.

Section 766.55(2)(c) introduces a new concept in Wisconsin. *See supra* §§ 5.32, ch. 6. Under the common law property system, a creditor's collection rights depended on personal liability. *See supra* § 5.3. Once a judgment establishing personal liability was entered, the creditor could use the collection process to reach the debtor's property. The Marital Property Act modifies that concept as it applies to premarital and pre-Act obligations.

Under section 766.55(2)(c), some property may be available for an obligation, and other property may not. The personal representative must keep this in mind while administering the estate. It may be necessary to segregate certain assets.

The purpose of section 766.55(2)(c) is to prevent a windfall to the creditor merely by virtue of the marriage or the application of the Act. Conversely, the purpose of that section is also to prevent the creditor from being adversely affected by the marriage or application of the Act. Therefore, the usual collection rules based on the availability of marital property and personal liability do not apply. Under section 766.55(2)(c), a creditor may not be able to reach all property owned by the debtor spouse even though that spouse is personally liable.

➢ ***Example.*** Assume that a debtor spouse owns a marital property interest in the other spouse's wages. Even though the debtor owns part of the other spouse's wages, those wages are not available to the creditor if the obligation is a premarital obligation or predetermination date obligation.

➢ ***Note.*** The chart in the Legislative Council notes on section 859.18 does not appear to take section 766.55(2)(c) into account. *See* Wis. Stat. Ann. § 859.18 Legis. Council Notes—1985 Act 37, § 169 (West 2002). There is a statement in the notes to the effect that the chart is only a general outline. Section 766.55(2)(c) is one instance in which the chart is not technically accurate.

➢ ***Comment.*** Section 766.55(2)(c) is a "straddle provision" that will diminish in significance as Wisconsin moves away from the Act's effective date. However, there will always be some "straddle obligations” because the obligation was incurred either before the effective date of the Act or before the decedent’s determination date, which may be after January 1, 1986.

b. Obligated Spouse Dies First [§ 12.97]

(1) Obligated Spouse’s Probate Property [§ 12.98]

Under the pre-Act common law property system, if the obligated spouse died first, the assets in the probate estate were available to the creditor if a timely claim was filed. That is not true under Wisconsin’s marital property system. All the assets in the probate estate are available (assuming a timely claim was filed under section 859.01) unless the obligation is a premarriage or pre-Act obligation. In that event, if the probate estate contains any property that would not have been the decedent’s but for the marriage or the enactment of the Act, it is not available. *See* Wis. Stat. § 766.55(2)(c). For example, if the decedent’s estate contains any former marital property derived solely from the surviving spouse’s wages, that property is not available to the creditor, even though the decedent was personally liable to the creditor.

(2) Obligated Spouse’s Nonprobate Transfers [§ 12.99]

If the obligated spouse dies first and has transferred assets by nonprobate means, some of those assets are specifically exempt from creditors’ claims, and some are not. *See supra* § 12.89.

➢ ***Note.*** Apparently, the straddle provisions of section 766.55(2)(c) do not apply to nonprobate assets. Section 859.18(2) incorporates the straddle provisions of section 766.55(2)(c), but subsections 859.18(4) and (5), which apply to nonprobate transfers, are an express exception to section 859.18(2).

(3) Surviving Nonobligated Spouse's Property [§ 12.100]

Generally, if the obligated spouse dies first and the obligation is a predetermination date obligation, the surviving spouse's assets are not available to the creditor. However, section 766.55(2)(c) has a special rule for these obligations. Property owned by the surviving spouse that would have been the property of the obligated spouse but for the marriage or but for the Act is available to the creditor. Wis. Stat. §§ 859.18(2), 766.55(2)(c). The chart that is part of the Legislative Council notes on section 859.18 does not reflect this fact. *See* Wis. Stat. Ann. § 859.18 Legis. Council Notes—1985 Act 37, § 169 (West 2002).

➢ ***Example.*** At the time of his death, a husband held a savings account in his sole name. The account contained marital property solely derived from his wages. The wages were deposited in the account after the determination date and, thus, were marital property. One-half of the account is included in the decedent's probate estate. The other half of the account, which belongs to the surviving spouse, is available to the decedent's pre-Act creditor even though the surviving spouse is not obligated to the creditor.

c. Nonobligated Spouse Dies First [§ 12.101]

(1) Nonobligated Spouse's Probate Property [§ 12.102]

Under the common law property system, when the nonobligated spouse died first, creditors did not file a claim in the estate because collection depended on personal liability. However, under the marital property system, some of the nonobligated spouse's interests in probate assets may be available. Therefore, creditors can file claims under section 859.01. Under section 766.55(2)(c), when there is a predetermination date obligation and the nonobligated spouse dies first, the nonobligated spouse's interest in former marital property that would have been the property of the obligated spouse but for the marriage or but for the Act remains available. Wis. Stat. § 859.18(2).

➢ ***Example.*** Assume that a surviving obligated spouse's wages were used to purchase an asset in the decedent's probate estate that was marital property. The decedent's former marital property interest in the asset is available.

(2) Nonobligated Spouse's Nonprobate Transfers [§ 12.103]

If the nonobligated spouse dies first and has transferred certain assets by nonprobate means to a third person, some assets are specifically exempt from the claims of creditors, and some may not be. Wis. Stat. § 859.18(4)(b); *see supra* § 12.93.

(3) Surviving Obligated Spouse's Property [§ 12.104]

Generally, if the surviving spouse is the obligated spouse, all assets owned by the obligated spouse are available to the creditor. However, because of the special rule in section 766.55(2)(c), *see supra* § 12.100, which is made applicable by section 859.18(2), some assets owned by the surviving spouse may not be available to the creditor. These are assets that would not have belonged to the surviving spouse had there been no marriage or no Act.

➢ ***Example.*** Assume that the wages of a nonobligated now-deceased spouse were used to purchase an asset that is marital property. Even though the surviving obligated spouse owns a one-half interest in the former marital property, it is not available to the creditor.

If a creditor has a claim against the estate of the deceased nonobligated spouse but fails to file the claim, the claim is barred against the estate. However, if assets in the estate are distributed to the surviving obligated spouse, it appears that the assets are no longer barred from the creditor's claim. *See supra* § 12.94.

3. Torts [§ 12.105]

a. In General [§ 12.106]

Section 766.55(2)(cm) provides as follows: "An obligation incurred by a spouse during marriage, resulting from a tort committed by the spouse during marriage, may be satisfied from the property of that spouse that is not marital property and from that spouse's interest in marital property."

It is not clear whether section 766.55(2)(cm) applies to all torts or only to family-purpose torts (i.e., torts committed in the interest of the marriage or the family). Read literally, section 766.55(2)(cm) applies to all torts. However, if it does, why does section 766.55(2)(d) refer to "acts or omissions"? *See infra* §§ 12.115–.123 (discussing obligations under section 766.55(2)(d)). One construction is that section 766.55(2)(cm) applies to family-purpose torts and section 766.55(2)(d) applies to other torts. Another interpretation is that section 766.55(2)(cm) applies to all torts and section 766.55(2)(d) applies to acts or omissions that are not torts (e.g., contractual liabilities and civil and criminal forfeitures). This book adopts the latter construction. *See supra* §§ 5.32, 6.26–.28.

➢ ***Note.*** Different results may occur depending on the correct construction of section 766.55(2)(cm). Section 766.55(2)(d) has an order of satisfaction, whereas section 766.55(2)(cm) does not. *See infra* § 12.115.

Another ambiguity exists with respect to torts committed during the marriage and before the determination date. Section 766.55(2)(cm) does not distinguish between torts committed before and after the determination date. It applies to all torts committed by a spouse "during marriage." On the other hand, section 766.55(2)(c)2. applies to obligations incurred by a spouse before, on or after January 1, 1986. For a discussion of this ambiguity, see section 5.32, *supra*.

➢ ***Note on Terminology.*** This chapter refers to torts committed during marriage before January 1, 1986, as *straddle torts*.

b. Obligated Spouse Dies First [§ 12.107]

(1) Obligated Spouse's Probate Property [§ 12.108]

If section 766.55(2)(cm) applies and the spouse who committed the tort dies first, all of that spouse's probate assets are available to the injured person on the theory of personal liability. This includes the decedent's interest in former marital property. However, if the tort is a straddle tort, *see supra* § 12.106, so that section 766.55(2)(c)2. applies, then the obligation is satisfied in the same manner that a predetermination date obligation is satisfied. *See supra* §§ 12.97–.100.

(2) Obligated Spouse's Nonprobate Transfers [§ 12.109]

If the tortfeasor spouse dies first and transfers both halves of items of marital property by nonprobate means, some of the items transferred by nonprobate means are available, and some are not. *See supra* § 12.89. Again, the result may differ depending on whether section 766.55(2)(c)2. or section 766.55(2)(cm) applies. *See supra* § 12.106.

(3) Surviving Nonobligated Spouse's Property [§ 12.110]

If section 766.55(2)(cm) applies and the tortfeasor spouse dies first, none of the surviving spouse's property is available to the injured person. Section 859.18(2) provides that property that would have been available under section 766.55(2) during the marriage remains available. If section 766.55(2)(cm) applies, the nonobligated spouse's marital property interest is not available under section 766.55(2). However, if section 766.55(2)(c)2. applies, the tort obligation may be satisfied in the same manner as a predetermination date obligation, and certain property of the surviving spouse may be available. *See supra* §§ 12.97–.100.

c. Nonobligated Spouse Dies First [§ 12.111]

(1) Nonobligated Spouse's Probate Property [§ 12.112]

If section 766.55(2)(cm) applies and the nonobligated spouse predeceases the tortfeasor spouse, none of the assets in the estate are available. Wis. Stat. §§ 766.55(2)(cm), 859.18(2). However, if section 766.55(2)(c)2. applies, then the tort obligation may be satisfied in the same fashion as a predetermination date obligation is satisfied, and certain assets in the probate estate may be available. *See supra* §§ 12.101–.104.

(2) Nonobligated Spouse's Nonprobate Transfers [§ 12.113]

If the nonobligated spouse dies first and transfers both halves of items of marital property by nonprobate means, certain of the assets so transferred to a third person are specifically exempt from creditors' claims. Wis. Stat. § 859.18(4)(b); *see supra* § 12.103.

(3) Surviving Obligated Spouse's Property [§ 12.114]

If section 766.55(2)(cm) applies, all the surviving tortfeasor spouse's assets are available because the surviving spouse is obligated. However, if section 766.55(2)(c)2. applies, then the tort is satisfied just as a predetermination date obligation is satisfied, and certain property of the surviving tortfeasor may not be available. *See supra* §§ 12.101–.104.

4. Other Obligations [§ 12.115]

Section 766.55(2)(d) provides that after the determination date "[a]ny other obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, may be satisfied only from property of that spouse that is not marital property and from that spouse's interest in marital property, in that order."

➢ ***Comment.*** It appears that section 766.55(2)(d) does not apply to torts. *See supra* § 12.106. The distinction is important because section 766.55(2)(d) has a requirement that obligations be satisfied in a prescribed order, whereas section 766.55(2)(cm) does not.

Except for the order-of-satisfaction requirement, creditors' rights under section 766.55(2)(d) closely approximate creditors' rights under the pre-Act common law property system: collection depends on establishing personal liability. *See supra* §§ 5.32, 6.29.

a. Obligated Spouse Dies First [§ 12.116]

(1) Obligated Spouse's Probate Property [§ 12.117]

If the obligated spouse dies first, all of that spouse's probate assets are available if a timely claim is filed under section 859.01. However, it appears that the obligation must be satisfied first from nonmarital property, then from the decedent's interest in marital property. *See* Wis. Stat. § 766.55(2)(d); *see also supra* § 12.115.

(2) Obligated Spouse's Nonprobate Transfers [§ 12.118]

If the obligated spouse dies first, some nonprobate assets are available to the creditor, and some are not. *See supra* § 12.89.

(3) Surviving Nonobligated Spouse's Property [§ 12.119]

If the surviving spouse is not obligated, none of the surviving spouse's property is available to the creditor.

b. Nonobligated Spouse Dies First [§ 12.120]

(1) Nonobligated Spouse's Probate Property [§ 12.121]

If the nonobligated spouse dies first and the obligation is an "other" obligation under section 766.55(2)(d), none of the assets in the probate estate are available.

(2) Nonobligated Spouse's Nonprobate Transfers [§ 12.122]

If the nonobligated spouse dies first, the obligation is an "other" obligation under section 766.55(2)(d), and the predeceasing spouse effects transfers of property by nonprobate means, nonprobate transfers of the decedent's nonmarital property and the decedent's interest in marital property are not available to creditors. However, a nonprobate transfer of the surviving obligated spouse's interest in marital property may be available. *See supra* § 12.93.

(3) Surviving Obligated Spouse's Property [§ 12.123]

If the nonobligated spouse dies first and the surviving spouse is obligated, all the surviving spouse's property is available to satisfy an "other" obligation under section 766.55(2)(d).

➢ ***Comment.*** It is not clear whether the order of satisfaction contained in section 766.55(2)(d) must be followed. Administration can be viewed as a continuation or winding up of the marriage. However, once the administration has terminated and the assets are in the surviving spouse's hands, the property of the marriage has clearly been distributed. Once the administration has terminated, it would appear that the order prescribed by section 766.55(2)(d) need not be followed because the marriage has terminated, the property in the surviving spouse's hands is no longer marital property, and the surviving spouse is personally liable.

E. Claims [§ 12.124]

1. Filing a Claim [§ 12.125]

Under section 859.02(1), claims against a decedent's estate, including claims of Wisconsin and any subdivision of Wisconsin, are forever barred against the estate, the personal representative, and the decedent's heirs and beneficiaries unless the claims are filed with the court within the time for filing claims. Under section 859.01, when an application for administration is filed, the court or the probate registrar is required to fix by order the time within which claims are to be filed. The time is three to four months from the date of the order. Wis. Stat. § 859.01.

Section 859.01 does not apply to claims based on

1. Tort;
2. A marital property agreement subject to time limitations under section 766.58(13)(b) or (c);
3. Wisconsin income, franchise, sales, withholding, gift, or death taxes;
4. Unemployment insurance contributions due or benefits overpaid;
5. A claim for funeral or administrative expenses;
6. A state claim under section 46.27(7g), 49.496, or 49.682;
7. A claim of the United States; or
8. A claim involving an action that is pending against the decedent at the time of death and the action survives.

Wis. Stat. §§ 859.02(2)(a), .03.

Under section 701.065, a trustee who has a duty or power to pay the debts of a decedent may commence a claims procedure similar to the claims procedure for estates described above.

2. Effect of Failure to File a Claim [§ 12.126]

a. Obligated Spouse Dies First [§ 12.127]

Assume that the obligated spouse incurred a family-purpose obligation, that the credit was extended by a person who regularly extends credit, and that the obligated spouse dies first. Under section 859.18(2), all property that would have been available to the creditor during the marriage is available after death. However, even if the creditor fails to file a claim in the decedent's estate, the surviving spouse's interest in former marital property is still available to the creditor. Section 859.02(3) provides as follows: "Failure of a claimant timely to file a claim against a decedent's estate does not bar the claimant from satisfying the claim from property other than the decedent's estate."

- ***Query.*** What if assets in the estate against which claims are barred are transferred to the surviving spouse? It appears those assets lose their exemption. Furthermore, the surviving spouse's marital property that was not subject to probate administration remains available.

b. Nonobligated Spouse Dies First [§ 12.128]

Assume that a family-purpose obligation exists and that the nonobligated spouse dies first. What is the effect of section 859.02(3) if the creditor fails to file a claim in the estate? Since the surviving spouse is obligated, all assets owned by that spouse are available to the creditor. However, because the creditor failed to file a claim in the estate, estate assets otherwise available become exempt, and this exemption continues if the assets are not transferred to the surviving spouse. However, if the assets are transferred to the surviving spouse, the assets seem to lose their exemption as a result of the surviving spouse's personal liability.

F. Contribution [§ 12.129]

1. In General [§ 12.130]

Assume that only one spouse is obligated to a creditor for a family-purpose obligation. The Wisconsin Marital Property Act does not require the creditor to proceed first against property owned by the obligated spouse. Likewise, the Act does not contain any provisions regarding rights of contribution between spouses. *Cf.* Wis. Stat. § 766.70(5). The subject of contribution is beyond the scope of this chapter, and the Act does not deal with the subject. If a right of contribution exists, it is not derived from the Marital Property Act.

2. Claims for Reimbursement as a Result of Traceable Mixing [§ 12.131]

If marital property funds are mixed with nonmarital property assets, mixing occurs. Wis. Stat. § 766.63(1). The court of appeals has held that when mixing is traceable, the surviving spouse has a right of reimbursement, not an ownership interest in the mixed asset. *Kobylski v. Hellstern (In re Estate of Kobylski)*, 178 Wis. 2d 158, 503 N.W.2d 369 (Ct. App. 1993). So, for example, if the decedent owned nonmarital real estate subject to traceable mixing, ownership of the marital property funds has been transferred to the decedent. If the surviving spouse intended a gift to the decedent, the remedies for gift recoveries are available. If the surviving spouse did not intend a gift, the surviving spouse has a claim for reimbursement, which must be filed pursuant to section 859.01.

XI. Family Rights [§ 12.132]

A. History of Surviving Spouse's Elective Share [§ 12.133]

1. Surviving Spouse's Elective One-Third Share Under Common Law Property System [§ 12.134]

Historically, Wisconsin has protected the surviving spouse against disinheritance by the decedent spouse. Until 1971, the surviving wife had an *inchoate dower right* and the surviving husband had a *curtesy right*. Inchoate dower and curtesy were abolished, effective March 31, 1971, and replaced by a one-third elective share termed *dower* (to be distinguished from inchoate dower). Wis. Stat. §§ 861.03, .05 (1983–84). The elective share consisted of one-third of the net probate estate reduced by any property given outright to the spouse under the decedent's will. Except for property given outright to the spouse under the will (up to such one-third), an election to take the one-third elective share forfeited any other right of the surviving spouse to take under the will and under the laws of intestate succession. Wis. Stat. § 861.05(2) (1983–84).

The one-third elective share was subject to bar by the terms of a written agreement signed by both spouses. Wis. Stat. § 861.07(1) (1983–84). The one-third elective share was also barred if the surviving spouse received at least one-half the total of certain property that generally approximated the adjusted gross estate of the deceased spouse for federal estate tax purposes. Wis. Stat. § 861.07(2) (1983–84).

Wisconsin's one-third elective share did not apply to nonprobate assets.

2. Surviving Spouse's Elections Under Marital Property Act 1986–98 [§ 12.135]

The Wisconsin Marital Property Act repealed the one-third elective share and replaced it with two new elections: a *deferred marital property election* for assets subject to administration and an *augmented marital property estate election* for nonprobate assets. The rights to make the deferred marital property election and the augmented marital property estate election became effective on January 1, 1986, and continued for 12 years until December 31, 1998, when they were repealed by 1997 Wisconsin Act 188 and replaced with a single, unified deferred marital property election. *See infra* §§ 12.136–.165.

For an in-depth discussion of the two former elections and their relationship to UMPA's deferred marital property concept, see the second edition of *Marital Property Law in Wisconsin*. Keith A. Christiansen et al., *Marital Property Law in Wisconsin* (2d ed. 1986 & Supp. 1995). The two prior elections are not discussed in this fourth edition of *Marital Property Law in Wisconsin*.

B. Deferred Marital Property Election [§ 12.136]

1. In General [§ 12.137]

1997 Wisconsin Act 188, effective for deaths occurring on or after January 1, 1999, combined the former deferred marital property election in probate assets and the former augmented marital property estate election against nonprobate assets into a single, unified deferred marital property election.

The *Drafting Committee Notes to 1997 Wisconsin Act 188—Revision of Wisconsin Probate Code*, *reprinted in* Howard S. Erlanger, *Wisconsin's New Probate Code—A Handbook for Practitioners* app. C at 42 (1998), describe the following major changes from Wisconsin's prior deferred marital property election:

1. The election is now based on the amount of all deferred marital property owned by both spouses (the *augmented deferred marital property estate*), not just that owned by the decedent. The surviving spouse is entitled to half that total, rather than half the deferred marital property owned by the decedent.

2. Separate elections for probate and nonprobate deferred marital property have been eliminated and replaced by a single election.

3. The "all or nothing" bar in the prior probate election, *see* Wis. Stat. § 861.13 (1995–96), has been eliminated.

4. The election is for a pecuniary amount, rather than a fractional interest in assets.

5. All nonprobate assets are in the augmented deferred marital property estate regardless of the date of execution of the governing instrument. The April 4, 1984, effective date for the prior augmented marital property estate election has been repealed.

6. The election is made by verified petition rather than election form.

2. Who May Make the Election [§ 12.138]

A surviving spouse is eligible to make a deferred marital property election if at the time of the decedent's death, the decedent was domiciled in Wisconsin. Wis. Stat. § 861.02(7)(a). The decedent's representatives, successor, or assigns may not make a deferred marital property election. An exception applies if the surviving spouse unlawfully and intentionally killed the decedent. In that case, the decedent's estate has the right to elect no more than 50% of the augmented deferred marital property estate. Wis. Stat. § 861.02(8). This provision is intended to reverse *Krueger v. Rodenberg*, 190 Wis. 2d 367, 527 N.W.2d 381 (Ct. App. 1994), in which the court held that a decedent wife's estate had no right to claim any interest in predetermination date property owned by her surviving husband, even though the husband had murdered the wife. The election must be made by the surviving spouse or by the surviving spouse's conservator, guardian, guardian ad litem, or agent under a power of attorney. Wis. Stat. § 861.09. The right of election is personal to the surviving spouse. If the surviving spouse dies before the election is made, the right to elect terminates. *Id.*

3. Procedure for Making Election [§ 12.139]

Section 861.08 sets forth the procedure the surviving spouse must follow to make a deferred marital property election. Unless the time is extended, the surviving spouse must, within six months after the date of the decedent's death, do all the following:

1. File a petition for the deferred marital property election with the probate court or, if no judicial proceeding is pending, with the court

that has jurisdiction of probate proceedings located in the county of the decedent's residence;

> ➢ ***Note.*** All petitions to the probate court must be verified. Wis. Stat. § 879.01.

2. Mail or deliver a copy of the petition to the personal representative, if any, of the decedent's estate; and

3. Give notice, in the manner provided in chapter 879, of the time and place set for hearing the petition to any persons who may be adversely affected by the election.

> ➢ ***Comment.*** Presumably, persons adversely affected include the transferees of deferred marital property even though the probate court may not have jurisdiction over the transferees.

Wis. Stat. § 861.08.

> ➢ ***Practice Tip.*** Note that the surviving spouse, not the personal representative or the court, must give notice of the hearing. The surviving spouse will most likely need assistance with the mailing of the notice as well as with the preparation of the verified petition.

The court may grant the surviving spouse an extension of time for making the election with cause shown. Wis. Stat. § 861.08(3)(a). The petition for extension of time must be filed within six months of the decedent's death unless (1) the surviving spouse was prevented from filing the petition for reasons beyond the spouse's control, and (2) failure to extend the time would result in hardship. Wis. Stat. § 861.08(3)(b).

> ➢ ***Note.*** Since the election is made by petition filed with the court, it is not possible to make the election in informal administration.

The surviving spouse may not be aware of the existence of the deferred marital property election or may not have the information necessary to calculate the election amount. There is no statutory duty, however, on the part of the personal representative to advise the surviving spouse about the existence of the election or to assist the spouse with the calculations. *See Schadde v. Estate of Schadde*, No. 90-0542-FT, 1991 WL 97310 (Wis. Ct. App. Apr. 25, 1991) (unpublished opinion not citable per section 809.23(3)) (holding that personal representative does not have duty to inform surviving spouse of six-month deadline for filing deferred marital property election, citing *Ludington v. Patton*, 111 Wis. 208, 230, 86 N.W. 571 (1901)). In fact, advising the surviving spouse on the deferred marital property election may create a conflict of interest with the personal representative's duties. *See supra* § 12.51 (conflicts of interest).

➢ ***Practice Tip.*** The personal representative, or the personal representative's lawyer, may not be comfortable with representing the surviving spouse regarding the election. If this is the case, the surviving spouse may need to retain independent representation. The lawyer may wish to bring this situation to the attention of the personal representative in an engagement letter. For more discussion of potential conflicts of interest, see chapter 14, *infra*.

4. Waiver of Right to Elect [§ 12.140]

The surviving spouse may waive the right to make the deferred marital property election in whole or in part. Wis. Stat. § 861.10(1). The waiver may take place before the parties are married, during the marriage, or after the marriage has ended. *Id.* The waiver must be contained in a marital property agreement that is enforceable under section 766.58 or in a signed document described in section 861.08(1)(a) filed with a court after the decedent's death. *Id.* Unless the waiver provides otherwise, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse, or in a complete property settlement agreement entered into because of separation or divorce, is a waiver of the right to make the deferred marital property election. Wis. Stat. § 861.10(2).

5. What Is Elected [§ 12.141]

The surviving spouse has the right to elect "an amount equal to no more than 50% of the augmented deferred marital property estate." Wis. Stat. § 861.02(1); *see infra* §§ 12.148–.162 (augmented deferred marital property estate). Thus, the surviving spouse has the right to elect a pecuniary amount, not an interest in assets as under the prior election for deferred marital property assets subject to administration. The surviving spouse may elect less than a 50% amount.

6. Protection of Third Parties [§ 12.142]

If a beneficiary requests payment for a proportionate share of the elected amount, a third party who has received satisfactory proof of the decedent's death but has not received written notice that the surviving spouse has filed a petition for the deferred marital property elective share is not liable for (1) making a transfer to the beneficiary from property included in the augmented deferred marital property estate or (2) taking any other action in good-faith reliance on the validity of the governing instrument. Wis. Stat. § 861.11(2)(a).

For purposes of section 861.11, written notice of the surviving spouse's petition for the election must either (1) be mailed to the third party's main office or home by registered or certified mail, return-receipt requested, or (2) be personally served on the third party. Wis. Stat. § 861.11(3).

Upon receiving notice of the surviving spouse's petition, the third party may deposit any amount owed or any item of property with the probate court. Wis. Stat. § 861.11(4).

A financial institution as defined in section 705.01(3) is not liable for having transferred an account included in the augmented deferred marital property estate regardless of whether the financial institution received written notice of the surviving spouse's election petition. Wis. Stat. § 861.11(5)(b)(2). If a financial institution has reason to believe that a dispute exists with regard to the account, it may, but is not required to (1) deposit the funds in the account with the probate court as noted above, or (2) refuse to transfer the account to any person. Wis. Stat. § 861.11(5)(c). It is not clear whether the definition of *financial institution* in section 705.01(3) includes a life insurance company and brokerage house.

7. Equitable Election [§ 12.143]

Under the doctrine of equitable election, a beneficiary under a will may be required to choose between the benefits under the will and an asset that the testator is attempting to transfer. Wis. Stat. § 853.15; *see supra* § 12.23. A prior version of the equitable-election statute included exercise of the former deferred marital property election as a trigger of the equitable election. *See* Wis. Stat. § 853.15 (1995–96); *see also supra*

§ 12.24. Since the new deferred marital property election is of a pecuniary amount rather than an ownership interest in assets, the deferred marital property election is no longer a trigger of the equitable election. *See* 1997 Wis. Act 188, § 142 (amending section 853.15 to remove reference to deferred marital property election).

8. Nondomiciliary Surviving Spouse [§ 12.144]

There is no requirement that the surviving spouse be domiciled in Wisconsin at the moment of the decedent spouse's death to make the deferred marital property election. The surviving spouse is eligible to make the deferred marital property election as long as the decedent was domiciled in Wisconsin at the time of death. Wis. Stat. § 861.02(7)(a).

- ***Example.*** A husband and wife are domiciled in Illinois. The husband moves to Wisconsin, and the wife stays behind in Illinois. The husband dies after having established a domicile in Wisconsin but before the wife establishes a domicile in Wisconsin. The wife may make the deferred marital property election.

9. Nondomiciliary Decedent [§ 12.145]

If a decedent who was not domiciled in Wisconsin at the moment of death owned real property in Wisconsin, the right of the surviving spouse to make the deferred marital property election in that property is governed by section 861.20. Wis. Stat. § 861.02(7)(b). Section 861.20 provides that the surviving spouse has the same right to elect to take a portion of or interest in that real property as if the property were located in the decedent's domicile. The procedure of the decedent's domicile applies to the election.

- ***Example.*** Generally speaking, if an Illinois resident dies owning a summer home in Wisconsin, the surviving spouse's elective rights are governed by Illinois law.

10. Repeal of Grandfather Provision [§ 12.146]

The prior augmented marital property estate election included a grandfather provision exempting certain nonprobate transfers from the election. Specifically, the provision exempted nonprobate transfers for which the instrument of transfer was executed before April 4, 1984. Wis. Stat. § 861.05(4) (1995–96). 1997 Wisconsin Act 188, section 194, repealed the grandfather provision. Therefore, a number of assets exempt from the former augmented marital property estate election are now subject to the deferred marital property election.

➢ ***Practice Tip.*** Estate plans created in reliance on the grandfather provision should now be reexamined.

See chapter 1, *supra*, for a discussion of the constitutional implications of a retroactive change in legislation.

11. Tax Considerations [§ 12.147]

A number of tax issues attend the deferred marital property election, such as the realization of capital gain if appreciated assets are used to fund the elected amount, the possibility that distribution of the elected amount to the surviving spouse might be deemed to carry out the estate's distributable net income to the surviving spouse, and so forth. See chapter 9, *supra*, for a discussion of the tax consequences attending the deferred marital property election.

C. Augmented Deferred Marital Property Estate [§ 12.148]

1. Definitions [§ 12.149]

Section 861.02(2)(b) defines the augmented deferred marital property estate as follows:

> The augmented deferred marital property estate is the total value of the deferred marital property of the spouses, irrespective of where the property was acquired, where the property was located at the time of a relevant transfer, or where the property is currently located, including real property located in another jurisdiction. It includes all types of property that fall within any of the following categories:
>
> 1. Probate and nonprobate transfers of the decedent's deferred marital property under s. 861.03(1) to (3).

2. Decedent's gifts of deferred marital property made during the 2 years before the decedent's death under s. 861.03(4).
3. Deferred marital property of the surviving spouse under s. 861.04.

➢ ***Note.*** The augmented deferred marital property estate is the total value of *both* spouses' deferred marital property, not just that of the decedent, as was the case under prior law.

See also Wis. Stat. § 861.018(1) (defining augmented deferred marital property estate by reference to section 861.02(2)).

Deferred marital property is defined in section 851.055 as any property that satisfies all the following requirements:

1. It is not classified by chapter 766.

2. It is not classified as individual property or marital property under a valid marital property agreement, unless the marital property agreement provides otherwise.

3. It was acquired while the spouses were married.

4. It would have been classified as marital property under chapter 766 if the property had been acquired when chapter 766 applied.

The amount of the surviving spouse's deferred marital property election is determined by creating a hypothetical estate (the augmented deferred marital property estate) analogous to the hypothetical estate created for purposes of determining federal and Wisconsin estate taxes. Items are excluded or included, valued, and then aggregated. When the final value of the hypothetical estate is known, it is multiplied by a percentage to determine the amount to which the surviving spouse is entitled. The full values of whole assets are included in the augmented deferred marital property estate. The percentage is used to replicate the value of the marital property interest.

➢ ***Example.*** If a decedent owned $100,000 of deferred marital property, the surviving spouse owns no deferred marital property, and there are no adjustments, the surviving spouse has the right to elect an amount equal to 50% of $100,000 or $50,000.

2. What Is Included [§ 12.150]

a. Decedent's Property [§ 12.151]

(1) Deferred Marital Property in Decedent's Probate Estate [§ 12.152]

The augmented deferred marital property estate includes the value of deferred marital property in the decedent's probate estate. Wis. Stat. § 861.03(1). The term *probate estate* is not defined. Technically, the term applies only to estates for which a will has been admitted to probate. However, it is apparent that the term is intended to apply to all estates subject to administration, including intestate estates and estates for which a will has been admitted to probate.

(2) Deferred Marital Property Passing By Nonprobate Means at Decedent's Death [§ 12.153]

The augmented deferred marital property estate includes the value of deferred marital property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Wis. Stat. § 861.03(2). These items include the following:

1. The decedent's fractional interest in deferred marital property that was held by the decedent with the right of survivorship;

2. The decedent's ownership interest in deferred marital property that was held by the decedent in a form payable or transferable on death, including deferred employment benefits, individual retirement accounts, annuities, and transfers under marital property agreements or in co-ownership with the right of survivorship;

3. Deferred marital property in the form of proceeds of insurance on the decedent's life, including accidental death benefits, that were payable at the decedent's death, if the decedent owned the insurance policy immediately before death or if the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds; and

4. Deferred marital property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment, to the extent that the property passed at the decedent's death by exercise, release, lapse, default, or otherwise.

Id.

(3) Deferred Marital Property Transferred with Retained Rights or Benefits [§ 12.154]

The augmented deferred marital property estate includes the value of any deferred marital property transferred by the decedent in which the decedent retained rights or benefits. Wis. Stat. § 861.03(3). These items include the following:

1. Deferred marital property in which the decedent retained the right to possession, use, enjoyment, or income and that was irrevocably transferred, to the extent that the decedent's right terminated at death or continued beyond death;

   ➢ ***Note.*** A grantor-retained annuity trust, commonly known as a GRAT, would be included in this category if the grantor died before the expiration of the annuity. A qualified personal-residence trust, commonly known as a QPRT, would also be included, if the grantor died before the expiration of the retained term.

2. Deferred marital property in which the decedent retained the right, either alone or in conjunction with any person: (1) to designate the persons who are to possess or enjoy the property or the income from the property, (2) to control the time at which designated persons are to possess or enjoy the property or income from the property, or (3) to alter or amend the terms of the property transfer, to the extent that the decedent's right terminated at death or continued beyond death; and

3. Any transfer of deferred marital property, including the transfer of an income interest, in which the decedent created a power of appointment, including the power to revoke or terminate the transfer

> or to consume, invade, or dispose of the principal or income, if the power was exercisable by the decedent alone, by the decedent in conjunction with another person, or by a nonadverse party, and if the power is for the benefit of the decedent, the decedent's creditors, the decedent's estate, or creditors of the decedent's estate.

Id.

(4) Deferred Marital Property Transferred Within Two Years of Death [§ 12.155]

The augmented deferred marital property estate includes the value of any deferred marital property transferred by the decedent within two years of death. Wis. Stat. § 861.03(4). These items include the following:

1. Deferred marital property that passed as a result of the termination of the right or interest in, or power of appointment over, property that would otherwise have been included in the augmented deferred marital property estate;

2. Transfers of or relating to the deferred marital property component of a life insurance policy on the decedent's life if the proceeds would otherwise have been included; and

3. Any transfer of deferred marital property to the extent that it is not otherwise included in the augmented deferred marital property estate, but only if the aggregate transfers to any one donee in either of the two years exceed $10,000.

Id.

b. Surviving Spouse's Property [§ 12.156]

(1) In General [§ 12.157]

Under section 861.04, the augmented deferred marital property estate includes the value of any deferred marital property that would have been included in the augmented deferred marital property estate had the surviving spouse been the decedent. Wis. Stat. § 861.04(1). When applying section 861.04(1), it is necessary to determine whether the surviving spouse is treated as dying before or after the decedent because the order of deaths of spouses affects property interests under the marital property law.

Section 861.04(2m) provides that "[w]hen the surviving spouse is treated as the decedent under sub. (1), the decedent is not treated as the surviving spouse for the purposes of s. 861.05(1)(e) or (2m)."

Section 861.05(2m)(a) provides in part that "[t]he surviving spouse shall be treated as having died after the decedent on the date of the decedent's death…."

Section 861.04(2m) implies that the surviving spouse is treated as dying before the decedent except for the stated exceptions. Section 861.05(2m)(a) expressly provides that the surviving spouse is treated as dying after the decedent. Notwithstanding section 861.04(2m), it appears that section 861.05(2m)(a) will apply in most cases..

The following example illustrates the determination of the property belonging to the surviving spouse that is included in the augmented marital property estate.

➢ ***Example.*** A husband dies on June 30, 2008, survived by his wife. The husband's only nonmarital property asset is a certificate of deposit (CD) with a value of $100,000. The CD is deferred marital property. His wife owns two items of nonmarital property that were deferred marital property. The first is a term life insurance policy insuring her life with a death benefit of $100,000 and a value on the date of her husband's death of $50, the amount of the unearned premium. Her second item of nonmarital property is a 401(k) plan having a value on the date of her husband's death of $100,000.

In the above example, the value of the husband's CD for purposes of determining the value of the augmented deferred marital property estate is clear: $100,000. However, the value of the life insurance and the 401(k) plan require some analysis.

(2) Life Insurance [§ 12.158]

Section 861.05 prescribes valuation methods for valuing the decedent's property and the surviving spouse's property to be included in the augmented deferred marital estate. Section 861.05(2) describes how the decedent's property is valued. Section 861.05(2m) describes how the surviving spouse's property is valued.

Section 861.05(2m)(b) has a special valuation rule for life insurance insuring the surviving spouse. Therefore, it is not necessary to determine whether the surviving spouse is treated as dying before or after the decedent. The special rule provides that the value of the term life insurance policy is the unearned premium, which is $50 in the example.

(3) 401(k) Plan [§ 12.159]

The 401(k) plan in the example is not marital property, but the example does not indicate whether it is deferred individual property or deferred marital property.

If it is deferred individual property, it is not necessary to determine whether the surviving spouse died before or after the decedent. The value is $100,000 for purposes of inclusion in the augmented deferred marital property estate.

If it is deferred marital property, it is necessary to determine whether the surviving spouse is treated as dying before or after the decedent. If the survivor is treated as dying before the decedent, the value is $100,000. However, if the survivor is treated as dying after the decedent, the terminable-interest rule in section 766.62(5) may apply. Under that rule, the marital property interest of the nonemployee spouse in a retirement plan terminates if the nonemployee dies first. Section 861.05(2m)(a) provides that the surviving spouse is treated as surviving the decedent, and so if the terminable interest rule is applied, the value is $0 for purposes of inclusion. If the terminable-interest rule is not applied, the value is $100,000. The Probate Code Drafting Committee intended that the terminable interest be applied. Erlanger, *supra* § 12.137, app. C at 44.

An issue that arises with respect to the 401(k) plan is federal preemption of ERISA. In *Boggs v. Boggs*, 520 U.S. 833 (1997), the U.S.

Supreme Court ruled that, in certain circumstances, state community property laws that would otherwise apply to retirement benefits are preempted by federal law. The application of *Boggs v. Boggs* generally is uncertain. *See supra* §§ 9.67, 10.136. One view of the *Boggs* case is that the nonemployee spouse (the husband in our example) has a marital property interest in the 401(k) plan but is unable to make a disposition of the interest if he predeceases the employee spouse. Under that view, Wisconsin can include the value of the 401(k) plan in the augmented deferred marital estate.

A second view of the *Boggs* decision is that the nonemployee spouse can have no community property interest at all. Under that view, the wife's 401(k) plan would be deferred individual property, not deferred marital property, and would not be in the augmented deferred marital property estate.

The better view is that the doctrine of preemption does not prevent the 401(k) plan from being deferred marital property for purposes of the deferred marital property election.

Section 861.07(4) provides that the recipient of deferred marital property is still personally liable to the spouse if an asset is included in the augmented marital property estate but cannot pass to the recipient because of federal preemption. Apparently, being designated a recipient is enough to create personal liability even though no property actually passed to the designated recipient.

3. What Is Excluded [§ 12.160]

The augmented deferred marital property estate excludes the following:

1. Transfers of deferred marital property to the extent that the decedent received full or partial consideration for the transfer in money or money's worth;

2. Transfers under the Social Security system;

3. Transfers of deferred marital property to third persons with the written joinder or written consent of the surviving spouse; and

4. Transfers of deferred marital property to the surviving spouse under section 861.33 (selection of personalty) or section 861.41 (exempt property).

Wis. Stat. § 861.05(1).

If the same property could be included in the augmented deferred marital property estate more than once, the property is included only once under the provision that yields the greatest value. Wis. Stat. § 861.05(4).

➢ ***Note.*** The above exclusions are the articulated exclusions. The application of federal preemption may result in other exclusions. Assets that might be affected by federal preemption include federal veterans' benefits, railroad retirement benefits, military retirement benefits, disability benefits, civil service retirement benefits, foreign service retirement benefits, and private retirement plan benefits. *See supra* § 2 .213.

4. Valuation of Included Items [§ 12.161]

Section 861.05(2) provides valuation rules for valuing the decedent's property included in the augmented deferred marital property estate. These rules include the following:

1. Section 861.05(2)(a) provides that certain assets—for example, probate assets and life insurance—are valued as of the decedent's date of death. Thus, if the decedent died on June 30, the assets are valued as of June 30.

2. Section 861.05(2)(b) provides that certain assets—deferred employment benefits and IRAs—are valued as of immediately before the decedent's death.

3. Section 861.05(2)(c) provides that certain assets are valued as of the date the decedent's right, interest, or power terminated.

4. Section 861.05(2)(d) provides that gifts of deferred marital property within two years of the decedent's death are valued as of the date of the transfer.

Section 861.05(2m) provides valuation rules for valuing the surviving spouse's property included in the augmented marital property estate. The surviving spouse's property is valued in the same manner as the decedent's property, with two exceptions. Section 861.05(2m)(a) provides that the surviving spouse will be treated as having died after the decedent on the date of the decedent's death. Section 861.05(2m)(b) has a special rule for valuing life insurance insuring the surviving spouse that, in effect, treats the surviving spouse as having died before the decedent.

5. Expenses [§ 12.162]

Section 861.05(3) provides that the value of deferred marital property included in the augmented deferred marital property estate is to be reduced by "an equitable proportion" of funeral and burial expenses, administrative expenses, other charges and fees, and enforceable claims. The statute does not define the word *equitable*.

- ***Comment.*** A number of practical questions will arise under section 861.05(3). For example, should charges relating to probate assets be chargeable only against probate assets? Should the financial or other circumstances of the decedent and the surviving spouse be taken into account?

- ***Note.*** An amount elected under the deferred marital property election is subject to equitable reduction under section 861.05(3) although it may be excepted from abatement under section 854.18. Section 854.18 provides for abatement of probate and nonprobate assets but excepts the elective share amount of a surviving spouse who elects under section 861.02."

D. Satisfaction and Collection of Amount Elected [§ 12.163]

1. In General [§ 12.164]

If a surviving spouse makes an election under section 861.02, the probate court determines, after notice and hearing, the deferred marital property elective-share amount and the property that satisfies that amount. Wis. Stat. § 861.08(5)(a). If the personal representative does not hold the money or property included in the augmented deferred marital property estate, the court determines the liability of any person or entity that has any interest in the money or property or that holds the money or property. Wis. Stat. § 861.08(5)(b).

The initial order of satisfaction of the elective-share amount is prescribed as follows:

1. All property included in the augmented deferred marital property estate belonging to the surviving spouse;

2. All marital property, individual property, deferred marital property, or deferred individual property transferred to the surviving spouse from the decedent; and

   ➢ ***Note.*** The following are excepted from this second rule: (a) transfers under section 861.33 (selection of personalty) and section 861.41 (exemption of property); (b) transfers under section 861.31 (family allowances) or section 861.35 (special allowance), unless the court orders otherwise; and (c) transfers under the Social Security system.

3. All gifts to the surviving spouse during the decedent's lifetime, except the first $5,000 of gifts each year and gifts received from the decedent that the surviving spouse can show were subsequently and gratuitously transferred in a manner that, had they been the deferred marital property of the surviving spouse, would not have been included in the augmented deferred marital property estate under section 861.04.

Wis. Stat. § 861.06(2).

After the above property has been applied toward satisfaction, the remainder of the elective-share amount is to be satisfied proportionally from transfers to persons other than the surviving spouse of property included in the augmented deferred marital property estate by reason of section 861.03(1), (2), (3), or (4)(b)2. Wis. Stat. § 861.06(3).

Finally, after the above property has been applied, the remainder of the elective-share amount is to be satisfied proportionally from transfers to persons other than the surviving spouse of property included under section 861.03(4)(b)1. or 3. Wis. Stat. § 861.06(4).

If all or a part of a prorated share is uncollectible, the court may increase the prorated liability of recipients if the court finds that an equitable adjustment is necessary to avoid hardship. Wis. Stat. § 861.06(5). No recipient or donee of a recipient is liable for an amount greater than the value of the deferred marital property received. Wis. Stat. § 861.06(5)(b).

2. Jurisdictional Considerations [§ 12.165]

Satisfaction of the augmented deferred marital property elected amount by third-party recipients will occur in two contexts: from property subject to the probate court's jurisdiction and from property not subject to the probate court's jurisdiction. Presumably, if a recipient is adjudicated to be personally liable to the surviving spouse and the personal representative holds assets to which the recipient is entitled, there can be an offset. However, if a third-party recipient is not entitled to property under the probate court's jurisdiction and does not submit to the probate court's jurisdiction, collection may be difficult. The following example is derived from *Jackson v. Employe Trust Funds Board*, 230 Wis. 2d 677, 602 N.W.2d 543 (Ct. App. 1999).

- ***Example.*** A spouse designated her sister in Wisconsin as the beneficiary of the $500,000 death benefit of a life insurance policy insuring the spouse. The spouse died, and the surviving spouse filed a petition for the deferred marital property election. The proceeds of the life insurance policy are deferred marital property. Assume that under section 861.07 (personal liability of recipients), the prorated amount for which the sister in Wisconsin is personally liable is $250,000. Assume the sister in Wisconsin received notice of the hearing on the election petition as required by section 861.08(2).

The mailing of a notice to the Wisconsin sister does not give the Wisconsin probate court jurisdiction over the sister if the sister is not entitled to property under the Wisconsin probate court's jurisdiction. At a minimum, a summons and complaint from a Wisconsin circuit court will be necessary for a Wisconsin court to have jurisdiction over the sister. The circuit court will be the court that adjudicates the sister's personal liability under section 861.07.

If the sister lives in California instead of Wisconsin, obtaining jurisdiction over the sister may be more difficult. Also, a California court may make the adjudication of personal liability.

The mailing of a notice to a California resident does not give the Wisconsin probate court jurisdiction over the California resident if the California resident is not entitled to property under the Wisconsin probate court's jurisdiction. At a minimum, a summons and complaint from a Wisconsin circuit court will be necessary for a Wisconsin court to have jurisdiction over the sister. However, if the sister has no contacts with Wisconsin, the Wisconsin circuit court may not be able obtain jurisdiction under Wisconsin's long-arm statute, section 801.05.

If the Wisconsin courts do not have jurisdiction over the sister, the action must be filed in California. The California court may choose not to apply the Wisconsin statute, section 861.07, that imposes personal liability on transfer recipients. The California court may choose to apply California law and hold that under California law, the beneficiary is entitled to death benefits of life insurance policies.

E. Assignment of Home to Surviving Spouse [§ 12.166]

If a married decedent had a property interest in a home, whether marital property or nonmarital property, the decedent's entire interest in the home is assigned to the surviving spouse if (1) the surviving spouse petitions the court requesting such a distribution, and (2) the governing instrument does not provide a specific transfer of the decedent's interest to someone else. Wis. Stat. § 861.21(2). The surviving spouse must file the petition within six months after the decedent's death, unless the court extends the time for filing. *Id.* The surviving spouse must pay for the value of the interest being assigned to the spouse. *See* Wis. Stat. § 861.21(4).

F. Allowances for Support of Spouse, Domestic Partner, and Dependent Children [§ 12.167]

Section 861.31 permits the probate court to order an allowance for the support of the surviving spouse, surviving domestic partner, and any minor children during the administration of the estate. Section 861.35 permits the probate court to order a special allowance for the support and education of each minor child and for the support of the surviving spouse or surviving domestic partner after administration of the estate has terminated.

G. Rights in Property Transferred in Fraud of Surviving Spouse [§ 12.168]

Section 861.17, governing rights in property transferred in fraud of the surviving spouse, predates the Wisconsin Marital Property Act. *See* ch. 339, Laws of 1969 (eff. Apr. 1, 1971). Section 861.17(1) provides that nothing in chapter 861 precludes a court from subjecting any property arrangement made by the decedent in fraud of the survivor's rights to the rights of the surviving spouse. A property arrangement in fraud of those rights is defined as "[a]ny transfer or acquisition of property, regardless of the form or type of property rights involved, made by the decedent during marriage or in anticipation of marriage for the primary purpose of defeating the rights of the surviving spouse" under

1. Chapter 852 (intestacy), or

2. Chapter 861 (family rights).

Wis. Stat. § 861.17(1).

> ➢ ***Query.*** The reason for the inclusion of intestacy is unclear. What rights of intestacy does the surviving spouse have? Section 861.17(1)(a) applies to all types of property: marital property, individual property, and predetermination date property. Under section 861.01, after the death of the predeceasing spouse, the surviving spouse and the decedent's successor each own an undivided one-half interest in former marital property as tenants in common. If the decedent dies intestate and there are children, all of whom are children of the decedent and the surviving spouse, the surviving spouse inherits the decedent's entire estate. Wis. Stat. § 852.01(1)(a). If the decedent chooses not to have a will and gives individual property and predetermination date property (which is not deferred marital property) to the children during his or her lifetime, might such a transfer be subject to section 861.17?

Arrangements that provide for the issue of a prior marriage and that were made before marriage, within one year after marriage, or before April 1, 1971, are not fraudulent property arrangements for purposes of section 861.17. Wis. Stat. § 861.17(2).

A surviving spouse's recovery under section 861.17 is limited to the share the spouse would receive under chapters 852 and 861. Wis. Stat. § 861.17(3). In addition to any recovery under section 861.17, the spouse may retain any assets passing to him or her as a result of the death of the predeceasing spouse, including any property received from the probate estate and any property passing to the surviving spouse under the fraudulent arrangement.

XII. Conflicts of Laws [§ 12.169]

A spouse domiciled in a common-law property state or community property state may die owning property located in Wisconsin. Conversely, a spouse domiciled in Wisconsin may die owning property in another common-law property state or community property state. For a discussion of the treatment of this property under conflict-of-law principles, see chapter 13, *infra*.

XIII. Summary Procedures [§ 12.170]

A. In General [§ 12.171]

The Probate Code contains three summary procedures for the confirmation of the nontestamentary vesting of property with a right of survivorship or the transfer of property subject to a nontestamentary disposition provision of a marital property agreement. These procedures may also be used to confirm the surviving spouse's interest in former marital property. The three summary procedures are (1) section 867.046(1m) (a judicial proceeding), (2) section 867.046(2) (an administrative proceeding before the register of deeds), and (3) section 865.201 (informal administration).

B. Survivorship Marital Property and Spousal Joint Tenancy: Summary Judicial Proceeding [§ 12.172]

Section 867.046(1m) permits a decedent's spouse to petition the probate court for a certificate setting forth the facts of death, the termination or transfer of the decedent's interest in the property, the petitioner's interest in the property, and any other facts essential to a determination of the rights of persons interested. Uniform Probate Form PR-1929 is used for this petition. Probate forms can be downloaded from the Wisconsin Court System Web site at http://www.wicourts.gov/forms1/circuit.htm#probate.

C. Washington Will Provisions: Summary Judicial Proceeding [§ 12.173]

Section 867.046(1m) permits the beneficiary of a marital property agreement to petition the probate court for a certificate setting forth the facts of death, the termination or transfer of the decedent's interest in the property, the interest of the petitioner in the property, and any other facts essential to a determination of the rights of persons interested. At present, there is no uniform form for a petition the court to confirm dispositions under a marital property agreement, pursuant to section 766.58(3)(f), the Washington will provision. However, there is a uniform form for use in informal administration, PR-1812. There is a form of petition and certificate for formal administration at Mark J. Bradley et al., *Eckhardt's Workbook for Wisconsin Estate Planners* §§ 7.36–.37 (5th ed. 2008).

In *Maciolek v. City of Milwaukee Employes' Retirement System Annuity & Pension Board*, 2006 WI 10, 288 Wis. 2d 62, 709 N.W.2d 360, the supreme court affirmed the court of appeals' holding that the pension board had the right to insist on a judicial confirmation proceeding under section 867.046(1m) before transferring assets pursuant to a Washington will provision of a marital property agreement. The retirement plan did not give the participant an opportunity to designate a beneficiary. Thus, the proceeds were part of the participant's estate subject to administration.

In response to *Maciolek*, the legislature amended the definition of governing instrument under section 854.23 to include all instruments described in section 854.01. This added the Washington will provision of chapter 766 (section 766.58(3)(f)) to the payer-protection provisions of section 854.23. Including Washington wills within the payer-protection provisions may induce a payer to forgo a summary confirmation proceeding under section 867.046(1m). However, under the holding of the *Maciolek* decision, payers may still require summary confirmation procedures before agreeing to transfer property pursuant to a Washington will provision.

D. HT-110: Administrative Proceeding Before County Register of Deeds [§ 12.174]

Section 867.046(2) permits a decedent's spouse or the beneficiary of a marital property agreement to obtain evidence of the termination of the decedent's interest in certain property and confirmation of the petitioner's interest in the property. The statute provides for an administrative procedure involving the county register of deeds. Form HT-110, published by the Wisconsin Register of Deeds Association, is used for this proceeding. Form HT-110 may be downloaded from the Wisconsin Register of Deeds Association Web site at http://www.wrdaonline.org/forms/index.htm. This administrative proceeding before the register of deeds applies to real property, a vendor's interest in a land contract, an interest in a savings or checking account, an interest in a security, or a mortgagee's interest in a mortgage. Form HT-110 may be used for transfers of survivorship marital property and for dispositions under marital property agreements.

In *Maciolek v. City of Milwaukee Employes' Retirement System Annuity & Pension Board*, 2006 WI 10, 288 Wis. 2d 62, 709 N.W.2d 360, the supreme court affirmed the court of appeals' holding that the summary procedure under section 867.046(2) did not apply to an interest in the city of Milwaukee retirement plan. The retirement plan did not provide the participant an opportunity to designate a beneficiary. Thus, the proceeds were part of the participant's estate subject to administration.

In response to *Maciolek*, the legislature amended the definition of governing instrument under section 854.23 to include all instruments described in section 854.01. This added the Washington will provision of chapter 766 (section 766.58(3)(f)) to the payer protection provisions of section 854.23. Including Washington wills to the payer protection provisions may induce a payer to forgo a summary confirmation proceeding under section 867.046(1m). However, under the holding of the *Maciolek* case, payers may still require summary confirmation procedures before agreeing to transfer property pursuant to a Washington will provision.

E. Survivorship Marital Property and Spousal Joint Tenancy: Summary Informal Proceeding [§ 12.175]

Section 865.201 provides that the personal representative may file with the probate registrar a verified statement describing property in which the decedent had an interest in marital property or in which any designated person, trust, or other entity has an interest passing by nontestamentary disposition under section 766.58(3)(f), including the recording data, if any, of the document creating the interest and any right of survivorship.

Upon filing, the statement constitutes prima facie evidence of the facts recited and evidences the termination of the decedent's interest and the confirmation of the surviving spouse's or the designated person's trust's or other entity's interest in the property listed, with the same effect as if a certificate had been issued by the court under section 867.046.

Uniform Probate Form PR-1812 is used for this Statement in Informal Administration. Form PR-1812 includes nontestamentary dispositions pursuant to section 766.58(3)(f), the Washington will provision. Form PR-1929, used for formal administration, does not include Washington will dispositions. However, there is a form of petition and certificate for formal administration at Mark J. Bradley et al., *Eckhardt's Workbook for Wisconsin Estate Planners* §§ 7.36–.37 (5th ed. 2008).

XIV. Closing Estates [§ 12.176]

A. In General [§ 12.177]

Section 863.27 permits the final judgment in the probate of an estate to confirm the nontestamentary vesting of a decedent's interest in survivorship marital property and the nontestamentary transfer of the decedent's interest in property by marital property agreement.

While in the estate, net probate income is not marital property even though the beneficiary who will ultimately receive the income is married. However, income distributed from estates to a married beneficiary is marital property. Wis. Stat. § 766.01(10); *see supra* § 2.85.

> ➢ ***Practice Tip.*** Since net probate income may be marital property upon receipt by a married beneficiary but assets inherited by the beneficiary are individual property, the personal representative may wish to consider separate distributions of income and principal to the beneficiary. If the personal representative combines income and principal in one distribution, the beneficiary will receive a mixed asset. It will be easier for the beneficiary to keep the inherited assets classified as individual property if separate distributions are received. Also, the beneficiary may wish to consider executing a unilateral statement classifying the income as individual property before the income is distributed. *See supra* §§ 2.70–.82.

B. Exchanges of Interests in Former Marital Property [§ 12.178]

Wisconsin adopted an item-by-item marital property rule instead of an aggregate rule. Wis. Stat. § 861.01; *see supra* §§ 2.22, 10.10. Under the item-by-item rule, after the death of one spouse, the surviving spouse owns an undivided one-half interest in every item of former marital property. Therefore, after the death of one spouse, the surviving spouse and the beneficiaries of the predeceasing spouse will own the former marital property as tenants in common. The surviving spouse and the beneficiaries may wish to exchange their undivided interests among themselves so that each person owns an entire asset.

> ➢ ***Query.*** If the surviving spouse and the decedent's beneficiaries agree to an exchange, is the transaction taxable for federal and Wisconsin income tax purposes? Two private letter rulings have held that a division of community property after the death of one spouse is not a taxable exchange. *See* Priv. Ltr. Rul. 8037124 (June 23, 1980), 8016050 (Jan. 23, 1980).

Section 766.31(3)(b)3. provides a procedure by which the surviving spouse and another person who succeeds to all or part of the decedent's one-half interest in marital property may petition the court to approve an exchange of interests in the marital property. The exchange must

1. Occur before the final distribution of the estate;

2. Be composed of items that are fairly representative of the appreciation and depreciation occurring since the decedent's death;

3. Be composed of items having a fair market value at the time of the exchange equal to what would have been distributed had no exchange request been made, including any money used in the exchange; and

4. Be reported in writing to the Wisconsin Department of Revenue (currently, there is no form for such reporting).

> ➢ ***Comment.*** Presumably, the above procedure is permissive and not exclusive. The Legislative Council Committee Note to section 857.03(2) (renumbered to 766.31(3)(b)3.) indicates that the procedure does not bind the IRS. *See* Wis. Stat. Ann. § 857.03(2) Legis. Council Comm. Notes—1987 Act 393 (West. 2002); *see also supra* chs. 9 and 10 (additional discussions of exchange procedure).

XV. Guardians and Wards [§ 12.179]

A guardian of the estate of an incompetent spouse may exercise, with the approval of the probate court, any management and control right over property and any right in the business affairs that the married person could exercise if competent. Wis. Stat. § 54.20(2)(h). The guardian may consent to "act together in or join in" any transaction for which consent or joinder of both spouses is required. Furthermore, the guardian may execute a marital property agreement with the other spouse but may not make, amend, or revoke a will. *Id.* These powers are in addition to powers otherwise provided for guardians of the estate. *See* Wis. Stat. § 54.20.

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Conflict of Laws

I. Scope of Chapter [§ 13.1]

This chapter examines the issues that arise when courts must determine whether to apply Wisconsin's marital property law or the common law property system of another state in a particular case. The general concepts and rules of conflict-of-laws jurisprudence are discussed, along with the rules that apply specifically to property. The chapter then discusses the application of choice-of-laws principles to the classification of property owned by spouses both in and outside of Wisconsin, including issues related to death, divorce, creditors' claims, marriage agreements, and tort causes of action and recoveries.[1]

II. General Conflict-of-laws Principles [§ 13.2]

A. Basic Concepts and Rules [§ 13.3]

Conflict of laws is a relatively specialized area of jurisprudence involving cases with a significant relationship to more than one state. Because the Wisconsin Marital Property Act, 1983 Wisconsin Act 186 (codified as amended at chapter 766 and scattered sections of the Wisconsin Statutes) [hereinafter the Act or the Wisconsin Marital Property Act], differs significantly from the substantive law of states with common law property systems, and because the American population is increasingly mobile, cases involving the application of conflict-of-laws rules to property interests of spouses will increasingly occur. These rules will be applied not only when married persons move

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2007–08 Wisconsin Statutes, as amended by acts through 2009 Wisconsin Act 189, and all references to the United States Code (U.S.C.) are current through Public Law No. 111-160 (excluding Pub. L. Nos. 111-148, 111-152, 111-159) (Apr. 26, 2010). Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

into or out of Wisconsin but also when spouses residing in common law property jurisdictions acquire property in Wisconsin and when spouses residing in Wisconsin use marital property to acquire property elsewhere.

Conflict-of-laws rules in the broadest sense cover such areas as judicial jurisdiction and competence—that is, rules relating to the ability of the courts of a state where an action is commenced (the forum state) to exercise jurisdiction when the suit involves incidents that occurred elsewhere or persons who are not physically present in the forum jurisdiction. Additionally, conflict-of-laws rules include rules regarding the effect that the courts in one state will give to judgments rendered in another. Lastly, conflict-of-laws rules include rules to determine choice of the law to be applied in resolving the rights and liabilities that flow from a transaction or occurrence when parts of it are connected with states other than the forum state. Restatement (Second) of Conflict of Laws § 2 (1971) (revised 1989) [hereinafter Restatement]. In practice, the term *conflict of laws* is often used as a synonym for *choice of laws* instead of being correctly applied to the broader array of conflict-of-laws rules.

In a case involving a significant relationship to more than one state, choice-of-laws considerations are at the heart of conflict-of-laws jurisprudence. The use of choice-of-laws rules rests on a determination that fairness and justice dictate applying all or part of the law of another state to resolve a controversy with multistate ramifications, rather than simply applying the law of the forum jurisdiction in its totality or refusing to hear the case in the forum state at all. Application of choice-of-laws principles necessarily involves weighing and balancing the potentially different policies and interests of the states affected by the transaction and entails considerable judicial subjectivity about which legal principles should be emphasized in resolving the dispute. The Restatement points out that the conflict-of-laws rules, especially those relating to choice of laws, are normally decisional, and thus, like other common law rules, are subject to periodic re-examination. Restatement § 5.

The choice-of-laws principles as set forth in Restatement section 6 illustrate the broad inquiry courts face in resolving conflict-of-laws questions:

§ 6. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

B. Wisconsin Conflict-of-laws Rules [§ 13.4]

1. Concept of Choice-influencing Considerations [§ 13.5]

In *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967), the Wisconsin Supreme Court adopted a conflict-of-laws methodology developed by Professor Robert A. Leflar. *See* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Cal. L. Rev. 1584 (1966); *see also* Robert A. Leflar et al., *American Conflicts Law* (4th ed. 1986). The methodology analyzes five choice-influencing considerations:

1. Predictability of results;

2. Maintenance of interstate and international order;

3. Simplification of the judicial task;

4. Advancement of the forum's governmental interests; and

5. Application of the better rule of law.

Although these considerations are more abbreviated than the considerations in Restatement section 6, discussed at section 13.3, *supra*, they contain most of the same elements.

In commenting on these five choice-influencing considerations, the court in *Heath* pointed out that the first consideration, predictability of results, deserves special emphasis in consensual arrangements and in those involving property rights:

> Predictability is an essential in the law of wills, descent and distribution, trusts, contracts, land titles, and conveyancing. It has little or no relevancy to … [a] tort that was never intended or planned.

35 Wis. 2d at 596.

According to the court, the second consideration, maintenance of interstate order, means

> that no state should impose its law in a situation when its parochial rules would unduly and without substantial reason so impinge upon another state as to interfere with the free flow of commerce or the exercise of another state's legitimate policies in such a manner that would invite retaliation from another jurisdiction. Deference to the substantial interests of another state are necessary and for a state that is only minimally concerned with a transaction or tort to thrust its law upon the parties would be disruptive of the comity between states.

Id.

As to the third consideration, simplification of the judicial task, the court explained that

> a court will not lightly consider a rule that will complicate its task or make the process of case deciding more onerous for itself or for the bar of its state. A simple and easily applied rule of substantive or procedural law is to be preferred, but simplicity may well be outweighed by other considerations.

Id. at 597.

The court said that the fourth consideration, advancement of the forum's governmental interests, would not necessarily be achieved through slavish application of the law of the forum but rather by ascertaining "whether the proposed nonforum rule comports with the standards of fairness and justice that are embodied in the policies of the forum law." *Id*. at 598.

Finally, the court described the fifth consideration, application of the better rule of law, as being at the heart of common law decision-making: "If the way is open to them, courts will select the law that most adequately does justice to the parties and has the greatest likelihood of being applicable with justness in the future." *Id*. The court saw the choice of better law as an objective one, grounded "not upon preferred parties but upon preferred law." *Id*. at 599.

Wisconsin courts have applied the analytical model in *Heath* primarily in tort cases, *see, e.g.*, *Hunker v. Royal Indem. Co*., 57 Wis. 2d 588, 204 N.W.2d 897 (1973); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); *Zelinger v. State Sand & Gravel Co*., 38 Wis. 2d 98, 156 N.W.2d 466 (1968), but also in contract cases, *see, e.g.*, *Schlosser v. Allis-Chalmers Corp*., 86 Wis. 2d 226, 271 N.W.2d 879 (1978); *Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc*., 58 Wis. 2d 193, 206 N.W.2d 414 (1973); *Haines v. Mid-Century Ins. Co*., 47 Wis. 2d 442, 177 N.W.2d 328 (1970). Nevertheless, the analytical model of *Heath* is not used in every situation. The courts have noted that sometimes a state's connection to a case may be so obviously limited or minimal that the detailed conflicts analysis described in *Heath* is not necessary. *Hunker*, 57 Wis. 2d at 598; *Gavers v. Federal Life Ins. Co*., 118 Wis. 2d 113, 118, 345 N.W.2d 900 (Ct. App. 1984). *But see Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶¶ 24–25, 270 Wis. 2d 356, 677 N.W.2d 298. In this event, the law of the state with the great majority of contacts is applied.

2. Concept of "Grouping-of-Contacts" [§ 13.6]

In several post-*Heath* conflict-of-laws cases involving contracts, the Wisconsin Supreme Court has used the *grouping-of-contacts* or *center-of-gravity* approach embodied in Restatement section 188 as the primary vehicle to resolve choice-of-laws questions. *Desert Palace, Inc. v. Jafari (In re Jafari)*, 385 B.R. 262 (W.D. Wis. 2008); *State Farm Mut. Auto. Ins. Co. v. Gillette*, 2002 WI 31, ¶ 26, 251 Wis. 2d 561, 641 N.W.2d 662; *Handal v. American Farmers Mut. Cas. Co*., 79 Wis. 2d 67, 74, 255 N.W.2d 903 (1977); *Haines*, 47 Wis. 2d at 446–47; *Urhammer v. Olson*, 39 Wis. 2d 447, 450, 159 N.W.2d 688 (1968); *American Family Mut. Ins. Co. v. Powell*, 169 Wis. 2d 605, 609, 486 N.W.2d 537 (Ct. App. 1992). This approach is used in conjunction with the choice-influencing considerations outlined in *Heath*. *Schlosser*, 86 Wis. 2d at 239–40; *Air Prods.*, 58 Wis. 2d at 202–03; *Haines*, 47 Wis. 2d at 446–47, 451.

The Restatement's grouping-of-contacts rule states as follows:

> § 188. Law Governing in Absence of Effective Choice by the Parties
>
> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.

Wisconsin has also applied the grouping-of-contacts analysis to marriage agreements. In *Knippel v. Marshall & Ilsley Bank (In re Estate of Knippel)*, 7 Wis. 2d 335, 96 N.W.2d 514 (1959), the court concluded that Wisconsin law should govern the validity and interpretation of a premarital agreement signed in Arizona before the parties married in that state. It appeared that the husband was at all times a Wisconsin resident, and that following the marriage and honeymoon, the wife left Arizona and came to Wisconsin to live, as both parties intended. Accordingly, Wisconsin was seen as having the most significant relationship to the parties and the performance of the agreement.

Knippel was decided before publication of the Restatement. However, it is a safe assumption that in future Wisconsin conflict-of-laws cases in which marriage agreements are silent on the choice of laws, the validity and interpretation of the agreement will be based on the analytical framework of Restatement section 188. See sections 13.38–.43, *infra*, for applicable rules when the law of a particular jurisdiction is chosen by agreement.

C. Choice-of-laws Rules Relating to Property [§ 13.7]

1. In General [§ 13.8]

No recent Wisconsin cases have applied choice-of-laws principles to interests in property. The most recent statement on the subject was in *Knippel*, 7 Wis. 2d 335, in which the Wisconsin Supreme Court said

> It is well established that regardless of the law of the place where a marriage is performed, the rights of the wife, in the absence of contract, with respect to her and her husband's personal property are governed by the law of the matrimonial domicile, and with respect to land, by the law of the situs.

Id. at 342. This position generally accords with the position taken in Restatement chapter 9 concerning choice-of-laws rules involving interests in movable and immovable property.

It is important to note that, as used in the following discussion and in the portions of the Restatement dealing with both immovable and movable property, the term *law* is defined as the *totality* of the law of the state where the immovable property is situated (or of the state that has the most significant relationship to the movable property or the parties), *including its choice-of-laws rules*, and not merely its "local law," that is, its domestic substantive rules. Restatement § 222 cmt. e. Application of the totality of the law may produce a different result than applying the local substantive rule. See the example at section 13.10, *infra*.

2. Immovables [§ 13.9]

Immovables are defined as land and things that are so attached or otherwise related as to be regarded a part of it. Restatement ch. 9 introductory note to topic 2 (Immovables). The rule stated in the Restatement pertaining to immovables generally favors a legal characterization in accordance with the law of the situs. Section 234 of the Restatement provides,

> § 234. Effect of Marriage on an Interest in Land Later Acquired
>
> (1) The effect of marriage upon an interest in land acquired by either of the spouses during coverture is determined by the law that would be applied by the courts of the situs.

> (2) These courts would usually apply their own local law in determining such questions.

Despite this tilt in favor of the law of the situs in Restatement section 234, the Reporter's Note to that section indicates that in disputes between the spouses alone, the courts may attempt to characterize the real estate by looking to the nature of the property used to acquire it. Restatement § 234 reporter's note.

The rule of Restatement section 234 has not been universally followed, particularly when spouses have changed domicile, thus opening the door to use of tracing principles in determining the character of the property interest in real estate. W.S. McClanahan, *Community Property Law in the United States* § 13:2, at 569–70 (1982 & Supp. 1992); *see also Rustad v. Rustad*, 377 P.2d 414 (Wash. 1963); *Scott v. Currie*, 109 P.2d 526 (Wash. 1941). One commentator argues that the law of the situs should define real-property interests only for property acquired by gift or inheritance or as direct payment for services. Harold Marsh, Jr., *Marital Property in Conflict of Laws*, 100–03 (1952); *see also Trapp v. United States*, 177 F.2d 1 (10th Cir. 1949); *Hammonds v. Commissioner*, 106 F.2d 420 (10th Cir. 1939); *infra* §§ 13.44–.47.

The view that the law of the situs may occasionally yield to the law of the domicile is also found in Restatement chapter 9, introductory note to topic 2 (Immovables), which states, in part, as follows:

> There will also be situations where the demands of certainty and the needs of a title recording system are not as pressing as are other demands. Thus, questions relating to the marital property interests of spouses, either upon divorce or at death, may be of greater concern to the state of domicil of the spouses than to the situs, and in such cases the situs courts might defer to the views of the domicil. That will particularly be so when the land is one item in an aggregate of things, both movable and immovable, which are situated in a number of states and which it is desirable to deal with as a unit.

A bias in favor of the law of the situs is also found in the provisions relating to contracts for the transfer of interests in land. Section 189 of the Restatement states,

> The validity of a contract for the transfer of an interest in land and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless, with respect to the particular issue, some other state has a more significant

> relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

The decision in *Mott v. Eddins*, 725 P.2d 761 (Ariz. Ct. App. 1986), illustrates the application of the rule. When a husband domiciled in California signed an agreement to purchase a residence in Arizona and later defaulted on the contract, the sellers sued both the husband and his wife for damages. The Arizona Court of Appeals concluded that Arizona had a more significant relationship to the transaction than California did, because the sellers were domiciled there, the real estate was located there, and the contract was executed and was to be performed there. Thus, Arizona law, which requires that both spouses must join in any transaction for the acquisition of real property, applied instead of California law, which allows a spouse acting alone to bind the community in a real estate purchase. Accordingly, the court directed that judgment be entered against the husband alone.

A similar result, albeit via a slightly different analysis, was achieved in *Wyss v. Albee*, 183 Wis. 2d 245, 515 N.W.2d 517 (Ct. App. 1994), *rev'd on other grounds*, 193 Wis. 2d 101, 532 N.W.2d 444 (1995), which involved a breach of contract for purchase of Wisconsin real estate from a Wisconsin resident by an Iowa partnership. One of the issues presented was whether the Wisconsin or the Iowa statute of frauds should apply to determine the validity of the land contract. Applying the choice-of-law considerations found in *Hunker*, 57 Wis. 2d at 598–99, the court concluded that the Wisconsin statute of frauds offered greater protection to Wisconsin residents and was the better choice of law. *Wyss*, 183 Wis. 2d at 263–64; *see also Triple Interest, Inc. v. Motel 6, Inc.*, 414 F. Supp. 589 (W.D. Wis. 1976).

3. Movables [§ 13.10]

Movables, defined as tangible or intangible things that are not immovables, are subject to different rules. Restatement ch. 9 introductory note to topic 3 (Movables). The introductory note states that in cases involving movables, the applicable law is generally the local law of the state that, with respect to the particular issue, has the most significant relationship to the parties, the thing, and the transaction. *Id*. This test is similar to the grouping-of-contacts rule for determining the choice of laws in contracts cases, found in Restatement section 188, a rule that has received judicial approval in Wisconsin. *See supra* § 13.6.

When marital property interests are involved, the state with the most significant relationship will generally be the state where the spouses were domiciled when the movable was acquired. A marital property interest acquired by either or both of the spouses while domiciled in one state is not affected by moving the property to a second state, regardless of whether the removal accompanies a change of domicile to the other state. Restatement section 258 contains the basic rule for movable personal property acquired during marriage:

> § 258. Interests in Movables Acquired during Marriage
>
> (1) The interest of a spouse in a movable acquired by the other spouse during the marriage is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the movable under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the spouses, greater weight will usually be given to the state where the spouses were domiciled at the time the movable was acquired than to any other contact in determining the state of the applicable law.

It follows from this general rule that moving a spouse's personal property from one state to another does not change its legal character. Restatement section 259 confirms this view:

> § 259. Removal of Movables of Spouses to Another State
>
> A [spousal] property interest in a chattel, or right embodied in a document, which has been acquired by either or both of the spouses, is not affected by the mere removal of the chattel or document to a second state, whether or not this removal is accompanied by a change of domicil to the other state on the part of one or both of the spouses. The interest, however, may be affected by dealings with the chattel or document in the second state.

Nor does the transmutation of the personal property into another form cause it to lose its character.

Restatement section 259 comment b states, in part the following:

> When a chattel or document is taken into a second state and is there exchanged for some other movable or immovable, the spouses acquire the same interests therein as they had in the original chattel or document.

Some exceptions to these basic rules exist when interests of third parties such as creditors or transferees for value are involved; in those situations, the local law of the jurisdiction where the movable or immovable was located when the interest is claimed to have been acquired will normally be applied. The application of choice-of-laws rules may be further muddied when transactions involve mixtures of property, contract, or tort law. In such cases, the laws of different states may be applied to different elements of the transaction.

Choice-of-laws questions in general, and those involving property law in particular, involve several levels of analysis. First, the issue must be characterized. For example, is it one of marital property or contract law? Marital property or tort? Marital property or the law of succession? Does it involve elements of more than one? Obviously, characterization can be a complicated process. It also can be used by the courts to control the result.

The following characterization cases illustrate the point. In *Polson v. Stewart*, 45 N.E. 737 (Mass. 1897), spouses, while domiciled in North Carolina, entered into a contract that involved mutual releases of any interest each had in the other's lands. After the wife died, the husband sought to assert an interest in the wife's Massachusetts lands in the courts of Massachusetts, claiming that his wife had lacked the power to make such a contract. Justice Holmes, writing for the majority, characterized the pivotal issue as the validity of the contract. Under the relevant Massachusetts choice-of-laws rule, the validity of such a contract was governed by the law of the place where it was made (North Carolina). Under North Carolina law, the wife had the capacity to make such a contract. Accordingly, the court held that the contract was valid and enforceable in Massachusetts. In dissent, Chief Justice Field characterized the contract as one for the conveyance of land. Under the applicable Massachusetts choice-of-laws rule, the validity of a conveyance was governed by the law of the situs of the land (i.e., Massachusetts). Under Massachusetts law, a husband and a wife could not convey lands directly to one another, and thus the contract for such a conveyance would have been void. 45 N.E. at 739–41 (Field, C.J., dissenting); *see also Jorgensen v. Crandell*, 277 N.W. 785 (Neb. 1938) (concerning postmarital agreement validly executed in California between California residents in which spouses gave up rights in each other's estates; holding that agreement was contract and not conveyance, thus barring wife from electing against husband's will in Nebraska with respect to devolution of Nebraska lands).

Another illustration of the difficulty inherent in characterizing the legal issue in a conflicts case is *Caruth v. Caruth*, 103 N.W. 103 (Iowa 1905). In *Caruth*, spouses executed a separation agreement in Illinois, where the wife resided and where the agreement was valid. Under the agreement, the wife gave up all rights against the husband's estate. The husband subsequently moved to Iowa, where he died, leaving personal property. The wife sought her statutory share. Under Iowa statutes, inchoate rights were not property rights, and contracts conveying them were void. The Iowa Supreme Court characterized the issue before it as one of descent and distribution of a decedent's estate rather than one of contract. Because the decedent had died domiciled in Iowa and his property was located there, the Iowa court applied its law and held that the contract was void, permitting the widow to receive her statutory share. Had the court characterized the issue as one of contract, it is arguable that the relevant law would have been that of Illinois, where the contract was entered into and where it would have been valid, preventing the widow from collecting a statutory share.

These cases highlight the fact that spousal contracts, in contrast to most commercial contracts, can involve a variety of substantive rights and relationships leading to difficulty in characterizing the legal issue. Cases involving interests in land tend to focus the point. In *Kyle v. Kyle*, 128 So. 2d 427 (Fla. Dist. Ct. App. 1961), spouses executed a valid premarital agreement in Quebec while domiciled there. In the agreement, the wife specifically gave up any dower rights. Following the spouses' separation, the husband acquired real estate in Florida, which he later sought to convey to a Florida corporation that he controlled. When the wife refused to join in the deed to give up her inchoate dower rights, the husband asserted the contract and sought judgment declaring that the wife's dower had been relinquished. The court characterized the issue as one affecting title to Florida real estate rather than as one of contract. The applicable Florida choice-of-laws rule for title to real estate looked to the law of the situs of the real estate, which in this case was Florida. Florida law required the signatures of two witnesses for relinquishment of dower. Because the contract was only notarized and did not contain the requisite signatures of witnesses, it was not enforceable to bar the wife's dower interest. For a contrary and arguably sounder approach, see *Hill v. Hill*, 262 A.2d 661 (Del. Ch.), *aff'd*, 269 A.2d 212 (Del. 1970) (deeming premarital agreement, validly executed in Maryland, enforceable with respect to property in Delaware, despite differing formal requirements for such agreements under Delaware law).

Once an issue is characterized, the state whose substantive law is to be applied must be selected. In Wisconsin this is done by using the choice-influencing considerations methodology, including grouping-of-contacts in contract cases. When the substantive law has been selected, the next step is to determine whether it includes only the substantive rules affecting the issue at bar or the other state's choice-of-laws rules as well. This is the doctrine of renvoi. If the other state's choice-of-laws rules (as well as its substantive rules) are adopted, the forum court may turn back to the substantive law of the forum. The following example illustrates the problem:

> ➢ ***Example.*** A married Wisconsin resident acquires farm real estate in Illinois in 1985 using property that is clearly deferred marital property under section 851.055. She dies a resident of Wisconsin in 1986, survived by a husband and two adult children, all domiciled in Wisconsin. Her will substantially disinherits her husband. Under the Wisconsin deferred marital property election statute, Wis. Stat. § 861.02, the husband may elect up to one-half of the deferred marital property; under the Illinois statute governing renunciation of the will by the surviving spouse, 755 Ill. Comp. Stat. Ann. 5/2-8(a) (current through P.A. 96-890 of the 2010 Reg. Sess.), the husband is entitled to one-third of the entire estate of the decedent. In Illinois ancillary probate proceedings, the husband asks the court to apply the Wisconsin deferred marital property election statute. One of the adult children objects, insisting that the husband is entitled to no more than the one-third share under Illinois law.

If Illinois has a strong *lex loci* conflict-of-laws rule for real estate, the local probate court would simply apply its own substantive law (i.e., the Illinois renunciation-of-will statute) to determine the outcome. Assume, however, that the Illinois probate court, applying relevant Illinois choice-of-laws principles, decides that because the spouses (and the children) resided in Wisconsin and the wife died there, and because Wisconsin's deferred marital property statute better evinces its policy of protecting surviving spouses, it will apply Wisconsin law. Assume further that Wisconsin has a strong *lex loci* conflict-of-laws rule for real estate, and that Wisconsin courts would apply Illinois law if the matter were before them for adjudication, with the result that the surviving husband would receive only a one-third interest in the real estate. The question is thus whether the Illinois court will apply only the Wisconsin substantive rule (i.e., the deferred marital property election statute) or its choice-of-laws rule as well. If it applies only the Wisconsin substantive rule, the Illinois court would give the husband one-half of the Illinois farm; if the court applies Wisconsin's choice-of-laws rule as well, it might end up using

Illinois substantive law (i.e., the Illinois renunciation-of-will statute), thus giving the husband only a one-third interest in the farm. *See* Marsh, *supra* § 13.9, at 69–75.

> ➢ ***Note.*** It is not clear that the Wisconsin court would unquestioningly apply the law of Illinois to the real estate located there under the rule stated in *Knippel*, 7 Wis. 2d 335, and Restatement section 234 in light of *Heath*, discussed in section 13.5, *supra*, and its progeny.

D. Conceptual Problems of Marital Property (i.e., Community Property) Versus Common Law Forms of Ownership [§ 13.11]

Most of the conflict-of-laws questions generated by Wisconsin's marital property regime will probably involve transfers of a married person's property from one state to another, whether or not accompanied by a change of domicile. Questions will arise as long as Wisconsin laws governing the ownership of property acquired by married persons differ substantially from those of states with common law property systems—and this includes all of Wisconsin's neighboring states—and differ to some extent from those of other community property states.

Under a community property regime like Wisconsin's marital property system, if either spouse acquires community property (marital property under the Act) during the marriage, each spouse has a present, vested, and equal ownership interest in it, regardless of who has title or possession. Under a community property system, separate property (individual property under the Act) refers generally to property owned before marriage, property acquired by a spouse after marriage through gift or inheritance, or property traceable to those sources. The nonowner spouse acquires no interest in this civil law separate property during the marriage or at death.

Under the common law system, there is no element of shared ownership for property acquired in the name of one spouse during marriage. Ownership rights are determined solely by title or possession. Property titled in the name of, or exclusively possessed by, either spouse is the solely owned property of that spouse. Common law solely owned property has also been referred to as *separate property*, although it frequently is burdened with legal rights favoring the other spouse (e.g., dower, curtesy, or statutory rights at divorce or death). These rights in favor of the other spouse are unknown to civil law separate property in all the community property states.

The right of a surviving spouse in the common law solely owned property of the decedent spouse typically consists of a statutory elective share in lieu of common law dower or curtesy or a right to elect against the provisions made in the decedent's will. In contrast, a surviving spouse under a community property system normally has no statutory or other rights to exercise against the civil law separate property of the deceased spouse. The difference arises because the classification rules and presumptions of a community property system tend to favor creation of community property in the hands of spouses and because of the vested one-half interest that automatically arises in each spouse upon creation of community property.

A major historic problem in choice-of-laws cases involving the property rights of married persons arose because of the semantic difficulty experienced by courts in community property jurisdictions in recognizing the substantial differences between the legal characteristics of common law solely owned separate property and the legal characteristics of civil law separate property under a community property system. Marsh, *supra* § 13.9, at 224. Similarly, the courts in common law jurisdictions have had equally great semantic difficulty in dealing with community property, a form of ownership unknown to the common law. Failing to recognize that significant differences exist in the legal characteristics of the forms of ownership being compared, courts in both kinds of jurisdictions have often incorrectly equated common law solely owned property to civil law separate property or have equated community property to some indigenous form of common law ownership such as tenancy in common or tenancy by the entireties. William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* § 3 (2d ed. 1971); McClanahan, *supra* § 13.9, at §§ 1:9, 1:13, 13:3–13:6; *see, e.g.*, *Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987) (discussed in section 13.15, *infra*). This has sometimes been referred to as the *play-on-words* approach.

The potential inequities of this approach are widely recognized. In community property states, several solutions have been advanced for dealing with property rights upon termination of a marriage by dissolution or death following a change of domicile. William Reppy and

Symeon Symeonides address this problem and possible solutions in the context of a proposed marital property statute. William Reppy, *Viewpoint: Louisiana's Proposed "Hybrid" Quasi-Community Property Statute Could Cause Unfairness*, Community Prop. J., Oct. 1986, at 1; Symeon Symeonides, *In Search of New Choice-of-Law Solutions to Some Marital Property Problems of Migrant Spouses: A Response to the Critics*, Community Prop. J., Oct. 1986, at 11.

Both Reppy and Symeonides discuss a proposed Louisiana statute governing successions in marital property. Both authors deal with the theoretical and practical difficulties of protecting spousal property rights either at dissolution or at death after a change of domicile from a common law jurisdiction to a community property state. Reppy discusses the principal solutions. One alternative is the *borrowed-law approach*, in which the forum court simply applies the property-division or spousal-election law of the former state of domicile to property that was acquired while the spouses lived in the former state. If the spouses have lived in only one other state, and if the property acquired there is readily identifiable, this approach can be a fair solution that accords with the spouses' expectations. It can pose obvious difficulties, however, if the spouses have been domiciled in several states before residing in the state in which their marriage ends. It can also be problematic if the property acquired by the spouses in the former and the current states of domicile is hopelessly commingled. Finally, it requires the courts of the forum state to educate themselves about the applicable laws of another jurisdiction. *See* Reppy, *supra* § 13.11, at 3–4.

A more generally favored solution in community property states has been to legislatively apply quasi-community property principles to the property acquired by the spouses while living in other jurisdictions. This was the choice made in Wisconsin. *See supra* §§ 2.222, 2.226 (general discussion of the quasi-community property principles adopted in Wisconsin as part of the Act). Under the quasi-community property approach, a domiciliary community property state analyzes assets acquired in other jurisdictions to determine how they would be classified under its own laws when the marriage terminates and treats the classification of the assets consistently with its own law.

Symeonides defends the Louisiana statute, which combines the traditional quasi-community property approach and the borrowed-law approach. Symeonides explains why the drafters believed that the statute would provide the fairest result under a variety of factual scenarios that might occur following a change of domicile. On the other hand, Reppy concludes that the "pure" quasi-community property approach produces the fairest result under most circumstances and argues that the proposed Louisiana statute should follow that route.

III. Application of Choice-of-laws Principles [§ 13.12]

A. Common Law Solely Owned Property Brought to Wisconsin Upon Change of Domicile to Wisconsin [§ 13.13]

1. In General [§ 13.14]

As a result of the Marital Property Act, choice-of-laws questions will arise more frequently upon death or dissolution of a marriage, or when a creditor's claim is asserted against movable common law property brought into Wisconsin or against assets acquired with such property. When the Act does not supply a solution, it is helpful to analyze the experience of other community property states in predicting how Wisconsin courts will deal with these matters.

A number of important early cases concerning movables brought from a common law state to a community property state in the course of a change of domicile are discussed by McClanahan, *supra* § 13.9, § 3:7. The general principle emerging from these cases is that property acquired in and brought from the common law state, and subsequently reinvested in personal property or real estate in the new state of domicile, will not lose its legal characteristics. *Id.*; *see also supra* §§ 13.7–.10. By the same token, property acquired after the change of domicile (and not traceable to an earlier acquisition in the common law state) will be characterized under the community property laws of the new domicile. *Id.*

The importance of this choice-of-laws rule for persons moving into Wisconsin is that, absent any specific statutory provision to the contrary, Wisconsin courts should continue to recognize the common law characteristics of property previously acquired in a common law jurisdiction, including property subsequently acquired in Wisconsin that is traceable to that property. Such treatment is consistent with section 766.31(8), which provides that except as provided otherwise in chapter

766, predetermination date property classifications and ownership rights are not altered by the Act. And, it should be recalled, the determination date for persons moving into Wisconsin after the effective date of the Act is the date that both spouses are domiciled here. Wis. Stat. § 766.01(5)(b).

This is not to imply that the Act has no effect on common law solely owned property brought into Wisconsin. It has an effect in a variety of ways. The presumption in section 766.31(2) that all property of spouses is marital property applies, and the spouse contending that the property has a different classification must overcome that presumption. Similarly, under the mixed-property reclassification rule of section 766.63(1), a spouse who contends that part of the mixed property is not marital property must be able to trace the nonmarital property to demonstrate that fact. The rule of section 766.63(2) that marital property can be created through the substantial efforts of a spouse that are not adequately compensated also applies to predetermination date "other" property as well as individual property, and this, too, affects the characterization process. Additionally, the income rule of section 766.31(4), which classifies the income "attributable to property of a spouse during marriage" as marital property, applies to the property of new residents, unless a spouse executes a unilateral statement under section 766.59. *See* Unif. Marital Property Act § 4 cmt., 9A U.L.A. 118 (1998). (The Uniform Marital Property Act [hereinafter UMPA] is reprinted in appendix A, *infra*.) And the augmented deferred marital property election in section 861.02 applies in the event of death while the spouses are domiciled in Wisconsin, aided by a presumption that the property of the spouses is deferred marital property if the presumption of marital property in section 766.31(2) is rebutted.

The crucial points for determining the legal characteristics of property are at death, dissolution of the marriage, or assertion of a creditor's claim. These are examined separately below.

2. Death of a Spouse [§ 13.15]

Sections 861.01, 857.01, 858.01, and 859.18 contemplate an early examination and classification of a deceased spouse's assets and obligations under chapter 766. If a surviving spouse wants to exercise elective rights under section 861.02, a determination of whether the decedent or the surviving spouse owned deferred marital property is also necessary. *Deferred marital property* is defined by section 851.055 as all property that is not classified by chapter 766; that was acquired while the spouses were married; and that would have been classified as marital property if the property had been acquired when chapter 766 applied. The probate and nonprobate deferred marital property assets of both spouses are included in the augmented deferred marital property estate under sections 861.03 and 861.04. The augmented deferred marital property estate is subject to various exclusions and adjustments described in section 861.05. This augmented deferred marital property estate is subject to a surviving spouse's right of election under section 861.02. The surviving spouse may elect no more than 50% of the augmented deferred marital property estate, subject to satisfaction rules contained in sections 861.06, 861.07, and 861.11. *See supra* §§ 12.148–.162.

The deferred marital property election statute represents a legislative effort to eliminate inequities that might occur when spouses move to Wisconsin after the determination date with common law solely owned property. Because the elective-share provisions of prior law (i.e., Wis. Stat. §§ 861.03–.15 (1983–84)) were repealed by the Act, the election also reaches predetermination date property owned by married persons who resided in Wisconsin before the effective date of the Act. To better understand the need for such a statute, a review of the judicial treatment of common law solely owned movables brought into a community property jurisdiction is helpful.

In other community property jurisdictions, early cases with the following choice-of-laws scenario proved troublesome. The spouses moved into the community property jurisdiction with common law solely owned assets. The titled spouse then died, leaving a will disinheriting the other spouse. In response to a challenge to this arrangement, the court in the community property jurisdiction might determine that the solely owned assets (or separate property) acquired in the common law jurisdiction were the same as civil law separate property in the community property state. Because the community property jurisdiction provided the surviving spouse with no rights, elective or otherwise, in civil law separate property, the decedent spouse was free to dispose of the solely owned assets as he or she saw fit, even to the extent of disinheriting the surviving spouse. What happened in this process, of course, was that judicial equation of common law solely owned property with civil law separate property under a community property regime stripped away all the common law spousal protections such as dower, curtesy, and statutory elections, that were legal characteristics of the solely owned property in the state of acquisition. *See In re Estate of Higgins*, 4 P. 389 (Cal. 1884); McClanahan, *supra* § 13.9, §§ 13:4–13:6.

The problems with this play-on-words approach to dealing with property acquired in a common law jurisdiction and brought to a community property jurisdiction are illustrated by the Texas Supreme Court's decision in *Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987). The spouses were married in Illinois and resided there for five years before moving to Texas, where they resided until the husband's death. Each spouse had accumulated substantial amounts of solely owned property before marriage and made efforts to keep this property segregated. The husband also acquired significant assets during the marriage. After moving to Texas, the husband, who had children by a prior marriage, prepared a will leaving his separate property to these children and his community property interest to his wife.

Following the husband's death, the wife and the husband's children disputed the proper allocation of the assets under the will. The wife contended that the court should extend the Texas quasi-community property rule at divorce, found in Texas Family Code Annotated section 3.63(b) (Vernon 1993) and amplified by *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982), to situations involving dissolution of a marriage by death. (Section 3.63(b) was repealed in 1997. The comparable provision of the current statutes is Texas Family Code section 7.002 (current through the end of the 2009 Regular and First Called Session of the 81st Legislature).) If the quasi-community property rule were applied, the substantial property interests acquired during the five years when the spouses resided in Illinois would be treated as if they were community property, and the wife would receive this property under the decedent's will.

The Texas Supreme Court declined to judicially extend the quasi-community property rule (which permits equitable division at divorce of property acquired in another jurisdiction that would have been community property if acquired in Texas) to situations involving the death of a spouse. The court reiterated its long-standing general rule that "property which is separate property in the state of the matrimonial domicile at the time of its acquisition will not be treated for probate purposes as though acquired in Texas." *Hanau*, 730 S.W.2d at 665. Thus the court equated solely owned assets acquired in a common law jurisdiction (Illinois) with Texas civil law separate property. This had the effect of depriving the surviving spouse of any protections that would have attached to the solely owned property if the spouses had remained domiciled in Illinois, such as the wife's right to elect a statutory share.

In response to the inequity of investing common law solely owned assets with the attributes of civil law separate property, several community property states have adopted statutes of succession, often referred to as quasi-community property statutes, that apply at the death of a spouse. California's statute was first, and provided that upon the death of a spouse, assets acquired during the marriage while the spouses were domiciled elsewhere that would not have been civil law separate property if the spouses had been domiciled in California, belong one-half to the decedent spouse and one-half to the surviving spouse, subject to the debts of the decedent. Cal. Prob. Code § 201.5 (West 1984); *see also* Idaho Code §§ 15-2-201 to 15-2-203 (current through (2010) Chs. 1-223 and HJRs 4, 5, and 7 that are effective on or before March 31, 2010). The California quasi-community property statute was revised effective January 1, 1985 and again effective July 1, 1991. Although it remains essentially the same in concept, the reach of the statute has been altered somewhat. *See supra* § 2.222.

Sections 851.055 and 861.018–.11 derive from these quasi-community property statutes. *See* UMPA § 18 cmt.; see also Wis. Stat. § 766.77(1) (before its repeal by 1985 Wisconsin Act 37 [hereinafter 1985 Trailer Bill]); *supra* §§ 2.222–2.238. The importance of these statutory provisions is that they apply the principles of the Act to all assets owned at the time of death by spouses domiciled in Wisconsin that were acquired during marriage and before the spouses' determination date and that would have been marital property if they had been acquired after the determination date. These statutes apply to assets acquired during marriage in common law and community property jurisdictions alike. If a surviving spouse wants to make an election under the statutes, a Wisconsin personal representative must investigate the time, manner, and sources of acquisition of the decedent's and the surviving spouse's assets. If all or part of the assets are shown to have been acquired before the marriage, through gift or inheritance, through distributions from a trust created by a third party, or with the reinvested proceeds of any of the above, they are not subject to the surviving spouse's right of election under the statutes. However, if an investigation shows that the assets would have been marital property under the Act, then they are included in the augmented deferred marital property estate and are subject to the elective rights of section 861.02 regardless of whether they are probate or nonprobate assets. Those probate deferred marital property assets not required for satisfaction of the augmented deferred marital property elective share continue to be subject to disposition by the deceased spouse's will or under the intestate succession statute. Those nonprobate deferred marital property assets remaining after the satisfaction of the augmented deferred marital property elective share would remain the property of the original transferees from or appointees of the decedent and any donees of those transferees.

3. Divorce [§ 13.16]

Before its repeal by the 1985 Trailer Bill, section 766.75(1) contained a statutory deferred marital property concept that applied at divorce. This statute provided that all property owned at the time of dissolution of the marriage by either or both spouses that was acquired during marriage and before the determination date, and that would have been marital property under the Act if acquired after the determination date, was to be treated as if it were marital property. This provision was repealed by the 1985 Trailer Bill because of concern that it might be interpreted as a constraint on a divorce court in arriving at an equitable division of property under section 767.61 (formerly section 767.255).

A number of community property states have adopted quasi-community property statutes that operate like former section 766.75(1) in the event of divorce. *See* Ariz. Rev. Stat. Ann. § 25-318 (current through legislation effective February 9, 2010 of the Sixth Special Session, and legislation effective April 16, 2010 of the Second Regular Session of the Forty-Ninth Legislature (2010)); Cal. Fam. Code § 125 (current with all 2009 Reg. Sess. Laws; all 2009-2010 1st through 5th, 7th, and 8th Ex. Sess. Laws; urgency legislation through Ch. 17 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot); Tex. Fam. Code Ann. § 7.002 (current through the end of the 2009 Regular and First Called Session of the 81st Legislature). Once again, the statutory provision is a response to the historic tendency of courts in community property jurisdictions to confuse common law solely owned property brought into a state with civil law separate property and thus to exclude it from division at divorce.

The issue of improper judicial characterization typically has arisen when a community property state's divorce statute equally divides the *community* property of the spouses but does not authorize dividing the *separate* property owned by either spouse. If the period of domicile in the community property state before the divorce was short, the amount of community property accumulated by the spouses is likely to be small compared to the amount of common law solely owned property. If the courts equated the common law solely owned property with separate civil law property, then inequitable results were likely. *See Latterner v. Latterner*, 8 P.2d 870 (Cal. Ct. App. 1932); William A. Reppy, Jr. & Cynthia A. Samuel, *Community Property in the United States* 359–69 (2d ed. 1982); McClanahan, *supra* § 13.9, §§ 13:4–13:6.

Where, however, divorce courts in community property jurisdictions have eluded the semantic trap of equating common law "separate" property with civil law separate property (see discussion at section 13.15, *supra*), they have reached fair results by characterizing the property as it would be characterized under the laws of the state in which the spouses were domiciled when the property was acquired and then allocating the property according to the laws of that state. *See Burton v. Burton*, 531 P.2d 204 (Ariz. Ct. App. 1975); *Rau v. Rau*, 432 P.2d 910 (Ariz. Ct. App. 1967); *Berle v. Berle*, 546 P.2d 407 (Idaho 1976); *Gilbert v. Gilbert*, 442 So. 2d 1330 (La. Ct. App. 1984); *Braddock v. Braddock*, 542 P.2d 1060 (Nev. 1975); *Hughes v. Hughes*, 573 P.2d 1194 (N.M. 1978); *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982).

Divorce inequities like those described above are not likely to arise in Wisconsin. Section 767.61 is a broad-gauge statute providing for an equitable division of all property of the spouses upon termination of the marriage. It calls on the court to "divide the property of the parties" and directs that "title to the property of the parties be transferred as necessary, in accordance with the division of property set forth in the judgment." Wis. Stat. § 767.61(1), (5)(a). The only significant exceptions are for property acquired by gift or inheritance or with funds acquired by gift or inheritance, but even that exception does not apply if refusing to divide the property would create a hardship for the other party or the children of the marriage. The breadth and scope of section 767.61 make it reasonable to expect that the courts will throw both marital property and property other than marital property (including common law solely owned property acquired in another state) into the pot for equitable division. Only inherited or gifted property will ordinarily be excluded from the asset division. *See supra*, § 11.13–.15.

4. Assertion of Creditors' Claims [§ 13.17]

Interesting choice-of-laws problems involving the enforcement of a creditor's claim often follow a change of domicile. Courts have tended to apply the law of the place where the debt was incurred both to the categorization of the debt and to the determination of which assets were available for its satisfaction if the spouses resided in that jurisdiction when the debt arose. In Wisconsin, this appears to be mandated by statute. Section 766.55(3) states that chapter 766 does not alter the relationship between the spouses and their creditors with respect to obligations in existence on the determination date. The determination date for spouses moving into Wisconsin after the effective date of the Act is the date they both are domiciled in Wisconsin. Wis. Stat. § 766.01(5)(b). If the obligation were incurred in the state of former domicile, its laws will presumably continue to apply.

Pacific Gamble Robinson Co. v. Lapp, 622 P.2d 850 (Wash. 1980), illustrates the choice-of-laws problems involving creditors' claims. *Lapp* involved a creditor's action in Washington to recover on a promissory note executed in Colorado by the husband alone when the spouses were domiciled in Colorado. Applying the grouping-of-contacts analysis of Restatement section 188 to the transaction, including the expectations of the parties, the court ruled that Colorado's interest was more significant than Washington's and it therefore applied Colorado law. The law of Colorado, a common law state, subjected all the spouses' property to the debt except for the wife's Colorado "separate property," that is, her solely owned property including her earnings. Accordingly, the court concluded that Colorado law also defined the boundaries of what was recoverable in Washington—in effect, the husband's wages and earnings. This was true despite the fact that under Washington community property law only the husband's civil law separate property (and not his wages) would have been reachable to satisfy a debt for the benefit of his separate property, and only the wages and earnings of *both* spouses (plus all other community property) would have been reachable for a debt benefiting the community.

The dissent in *Lapp* said that Washington law should determine the source and classification of funds used to satisfy the obligation, while Colorado law should determine the validity of the obligation in the first instance. Under this analysis, the debt would have been classified as a separate debt of the husband, with the community property (i.e., the wages) of both spouses relieved from its satisfaction. 622 P.2d at 857–

61 (Horowitz, J., dissenting). Presumably the husband had no civil law separate property for the creditor to reach.

Aided by the statutory directive of section 766.55(3) that chapter 766 does not alter the relationship between spouses and their creditors for predetermination date obligations, it is likely that if the Wisconsin Supreme Court were confronted with the facts of the *Lapp* case, it would determine that the former state of domicile had the most significant contacts with the transaction and would apply its laws. This view was adopted in *In re Sweitzer*, 111 B.R. 792 (Bankr. W.D. Wis. 1990) (citing 3 Keith A. Christiansen et al., *Marital Property Law in Wisconsin* § 13.10c, at 13-23, 13-24 (State Bar of Wisconsin CLE Books 2d ed. 1986 & Supp. 1988)). The husband incurred a debt while the spouses were Ohio residents. The creditor reduced the debt to judgment against the husband while the spouses were still Ohio residents. Shortly thereafter the spouses moved their domicile to Wisconsin; subsequently, the wife alone filed a petition for bankruptcy. Later, the creditor sought to garnish the husband's wages (including the wife's marital property interest therein) to satisfy its judgment. The bankruptcy court declined to issue an injunction barring the creditor from garnishing the husband's wages, holding that Ohio law applied to determine which assets were available for recovery. Based on its analysis of section 766.55(3), the court held that all the husband's income was available to the creditor just as it would have been had the spouses remained in Ohio and regardless of any marital property rights that might have otherwise arisen under Wisconsin's marital property statutes. Because the husband's earnings would not be treated as community property under Ohio law, the wife's discharge in bankruptcy did not protect his earnings even though it ordinarily would protect community property acquired after the discharge. *See* 11 U.S.C. § 524(a)(3); *see also supra* § 6.108.

The discussion up to this point has involved the situation in which the spouses resided in the jurisdiction where the debt was incurred. The result is likely to be different, however, when spouses reside in one state and incur a debt in another. Under these circumstances, the courts have tended to emphasize the importance of the state of residence in reaching a choice-of-laws decision. For example, in *Potlatch No. 1 Federal Credit Union v. Kennedy*, 459 P.2d 32 (Wash. 1969), the husband, a resident of Washington, co-signed a note for a loan an Idaho lender made to his brother. Under the significant-relationship and grouping-of-contacts analyses, the court applied Washington law and held that the obligation did not benefit the community and, further, that the community property of the co-signer was not available to satisfy such an obligation. A similar result was reached in *Colorado National Bank v. Merlino*, 668 P.2d 1304 (Wash. Ct. App. 1983), in which the husband and wife resided in Washington, and the husband alone contracted to purchase real estate in Colorado. By Washington statute, no community obligation arose without the signatures of both spouses on the real estate purchase contract. Thus, under Washington law, the husband's obligation was characterized as his separate debt, which was enforceable only against his separate property. The community property assets of the spouses (including their earnings) were not subject to satisfaction of the debt.

A similar result on a reverse fact situation was involved in *Lorenz-Auxier Financial Group, Inc. v. Bidewell*, 772 P.2d 41 (Ariz. Ct. App. 1989). The spouses were domiciled in Oregon, a non–community property state, and the husband entered into equipment leases in Arizona, a community property state. The equipment leases contained a choice-of-laws provision indicating that Arizona law was to govern interpretation of the agreements. Subsequently, the husband defaulted on the leases. The equipment lessor then commenced an action against both the husband and the wife (who had not signed the equipment leases), contending that because the lease agreement contained an Arizona choice-of-laws provision, Arizona's community property debt-satisfaction rules should be applied. Under Arizona law, debt incurred by one spouse while acting for the benefit of the marital community is a community obligation regardless of whether the other spouse approves it. Debts incurred during marriage are presumed to be community obligations. If these rules had been applied to the defendant spouses, any of the wife's assets that would have been community property under Arizona law (but not under Oregon law) would have been reachable by the equipment lessor. The Arizona Court of Appeals concluded, however, that the law of Oregon, a non–community property state, applied to the transaction, because the spouses at all relevant times resided in that state. Under Oregon law, only the husband's separate property could be reached to satisfy a debt that he alone incurred. Accordingly, the court concluded that under Oregon law, the wife's property was not susceptible to judgment on the debt. A key element in the court's holding is the fact that the wife had never signed the equipment leases and thus was not bound by the choice-of-laws provision in the lease agreements.

Arizona also refused to allow recovery against a California couple's community property in a situation in which the husband alone entered into a personal guaranty of a lease of Arizona real estate to a business entity in which he was involved. Arizona was the place of the execution, negotiation, and performance of the guaranty and the site of the leasehold interest. Arizona has a statutory rule (Ariz. Rev. Stat. § 25-214) requiring both spouses to join in a guaranty of a third party's obligation to bind their community property, whereas California does not have such a rule. The obligee on the guaranty brought suit in Arizona seeking to recover from all the couple's community property through application of California law. Applying Restatement sections 6 and 194, the Arizona Court of Appeals concluded that Arizona had the most significant relationship to the transaction, and ruled that it would not mechanistically follow its holding in *Bidewell* that the law of the marital domicile (here California) controls. The key to understanding this case is that the California wife did not join in the leasehold guaranty, and the court was reluctant to undermine the statutory protections afforded by Arizona law that require both spouses to join in a guaranty of a third party's obligation. Thus, the more protective policies of Arizona were applied. Said differently, having determined that Arizona had the most significant relationship, the husband's unilateral guaranty was simply insufficient under Arizona law to bind the California couple's community property. *Phoenix Arbor Plaza, Ltd. v. Dauderman*, 785 P.2d 1215 (Ariz. Ct. App. 1989).

For an analysis of the application of the significant-relationship test in multijurisdictional creditors' rights cases, see Scott Fehrman, *Conflict of Laws: The Availability of Community Property to Satisfy a Judgment*, Community Prop. J., Oct. 1988, at 28. The author advocates applying the significant-relationship test sequentially, first to determine the validity and effect of the contract and then to determine the property available for contractual damage recovery. When a contract is made or performed in one state and enforcement is sought in a second state where the spouses are domiciled, the laws of the two different states may have a significant relationship to different elements of the transaction.

The author concludes that if the contracting spouse alone has the capacity to enter into a contract binding on the community under the law of the significant-relationship state (where the contract was made and performed) but not under the law of the domiciliary state, the law of the domiciliary state should determine the availability of property for recovery to protect the noncontracting spouse. *Id*. at 36. Conversely, if the contracting spouse alone lacks capacity to enter into a contract binding on the community in the significant-relationship state, but has such capacity in the domiciliary state, the law of the significant-relationship state should determine the rights of recovery. *Id*. Under this analysis, *Kennedy*, *Merlino*, *Bidewell* and *Dauderman* were correctly decided, but *Lapp* was not.

Equally complex questions arise in determining when a transmutation in the form of ownership of assets resulting from a change in domicile cuts off the rights of creditors. One decision analyzing the effects of the form of ownership of property on the rights of creditors is *Bricks Unlimited, Inc. v. Agee*, 672 F.2d 1255 (5th Cir. 1982). In that case, the husband had incurred a community debt while the spouses resided in Louisiana. The spouses then moved to Mississippi, a common law state, and bought a house there as joint tenants. The source of funds used to purchase the real estate was not indicated. The Louisiana creditor sued and obtained a judgment for the debt. The spouses sold their jointly owned residence in Mississippi, accepting a note payable to both of them as part of the purchase price. Next, they moved back to Louisiana and jointly assigned the note to a Louisiana bank as collateral for another loan.

The judgment creditor attempted to garnish the maker of the purchase money note. The court determined that the Louisiana bank was a holder in due course and had a priority right to satisfaction out of the proceeds of the purchase money note. As to the balance of the note, the court held that the Louisiana judgment creditor could not reach the wife's one-half of the net proceeds. That interest, attributable to a common law joint ownership in real estate, was the wife's separate property. Under Louisiana law, a spouse's separate property cannot be reached to satisfy a community debt incurred by the other spouse. Apparently, the creditor in this case introduced no evidence to prove that the Mississippi residence was acquired with community property. If this key fact had been proved, it would have squarely raised the legal question of whether spouses may intentionally transmute community property into some other form of ownership to avoid the reach of creditors.

Under the Act, the result in *Agee* might be different. Assume that the defendant spouses moved out of and then back into Wisconsin and acquired their intermediate residence in Illinois. Assume further that the Illinois residence was acquired in joint tenancy with a down payment consisting of Wisconsin marital property. Under these circumstances, a

Wisconsin court might find that, despite Restatement section 234, the court would not permit the entire proceeds of sale of the Illinois real estate to be recharacterized as common law joint tenancy property. Without recharacterization, most of the proceeds—including the wife's share—would remain marital property and would be available to satisfy a family-purpose debt incurred during the earlier period of residence in Wisconsin. Alternatively, a Wisconsin court might rule that investing marital property in an Illinois joint tenancy effectively transmuted the marital property, thus limiting the creditor's recovery to the one-half of the joint tenancy owned by the spouse who incurred the obligation.

On the other hand, if the Illinois real estate were acquired with the individual property of one or both spouses, or with predetermination date Wisconsin solely owned or joint tenancy property, a Wisconsin court would probably reach the same conclusion as the *Agee* court.

In an apparent effort to address the problems inherent in *Agee*-type situations, the 1985 Trailer Bill adopted a statutory section intended for the ears of courts in other jurisdictions that care to listen. Section 766.55(7) states that property available under chapter 766 to satisfy an obligation of a spouse is available regardless of whether the property is located in this state. The 1985 Trailer Bill Note to section 766.55(7) acknowledges that recognition of the provision may be subject to the laws of other jurisdictions but states that it may aid creditors in attempting to satisfy obligations covered by chapter 766 in other jurisdictions. Wis. Stat. Ann. § 766.55 Legis. Council Notes—1985 Act 37, §§ 90 to 98 (West 2009). Clearly, physically removing marital property movables acquired while the spouses were domiciled in Wisconsin to a common law state (and perhaps titling them in the name of the nonincurring spouse alone) should not, under the principles of Restatement sections 258 and 259, transmute the movables and defeat the recovery rights of creditors. In these situations, section 766.55(7) suggests the result that the courts of the new domiciliary jurisdiction should reach under well-established choice-of-laws principles.

More difficult is the situation in which a creditor seeks to reach the future earnings of a spouse domiciled in a common law jurisdiction to satisfy a family-purpose obligation incurred by the other spouse while the spouses were domiciled in Wisconsin. *See supra* ch. 5. The analysis in *Lapp* supports the view that the nonincurring wage-earning spouse's establishment of a new domicile will not defeat the right of the other spouse's creditor to reach 100% of the wage earner's earnings in satisfaction of the obligation, despite the fact that the income is now common law solely owned property. On the other hand, it is equally possible that a court in the new state of domicile might deny recovery because (1) the wage earner is not personally liable for the debt, (2) a family-purpose obligation can be satisfied only from all marital property (or from all other property of the *incurring* spouse), and (3) the wages of the nonincurring spouse are no longer marital property. Section 766.55(7) may at least be considered by the courts of the new domiciliary jurisdiction in reaching a decision on the appropriate substantive law to apply in determining what property is available to satisfy the debt.

1987 Wisconsin Act 393 [hereinafter 1988 Trailer Bill] further amended section 766.55(7) to clarify that the provision on nonimpairment of creditors' rights applies not only when marital property assets are removed to another jurisdiction but also when the marital property laws cease to apply because one or both spouses are no longer domiciled in Wisconsin. The apparent intent of this provision was to buttress the rights of a creditor in pursuing the future earnings of a nonincurring spouse who becomes domiciled in another state when the underlying debt is a family-purpose obligation incurred by the other spouse while both spouses were domiciled in Wisconsin. As noted above, it is not clear that the courts in other jurisdictions will be willing to give long-arm effect to Wisconsin's statutory rules regarding the satisfaction of obligations.

The legislature amplified on the subject of nonimpairment of creditors' rights by enacting section 766.03(6) as part of 1991 Wisconsin Act 301 [hereinafter 1992 Trailer Bill]. Unlike section 766.55(7), which applies to obligations incurred by a spouse while both spouses are domiciled in Wisconsin, section 766.03(6) expressly applies to situations in which an obligation is incurred or arises at a time when one or both spouses are domiciled in another state and the Act therefore does not apply. Section 766.03(6) provides that chapter 766 does not affect the property available to satisfy an obligation incurred by a spouse if the obligation arises at a time when one or both spouses are not domiciled in Wisconsin or arises from an act or omission occurring when one or both spouses are not domiciled in Wisconsin. The Legislative Council Notes to this provision state, in part, the following:

> The substance of this provision is implicit under ch. 766. It is made explicit because its absence, in light of the detailed provisions under s. 766.55 on what property is available to satisfy obligations, has raised questions.

Wis. Stat. Ann. § 766.03 Legis. Council Notes—1991 Act 301, § 11 (West 2009).

It seems obvious that chapter 766 does not affect the property available to satisfy an obligation incurred or arising at a time when the Act does not apply because one or both spouses are domiciled elsewhere. The Legislative Council Notes to section 766.03(6) view that subsection as consistent with other provisions in section 766.55 that leave creditors where they otherwise would have been in the absence of the Act. *See* Wis. Stat. Ann. § 766.03 Legis. Council Notes—1991 Act 301, § 11 (West 2009). That is, it prevents creditors from using the debt-satisfaction provisions of the Act to obtain a windfall, and it similarly prevents obligated spouses from using the Act to the detriment of creditors. The judicial result in *In re Sweitzer*, 111 B.R. 792 (Bankr. W.D. Wis. 1990), appears to be consistent with this statute.

B. Wisconsin Marital Property Taken to a Common Law State Upon Change of Domicile to the Common Law State [§ 13.18]

1. In General [§ 13.19]

The transfer of movable community property (including marital property) to a common law jurisdiction as a result of a change of domicile can produce equally perplexing problems. The issue is well stated in the *Washington Community Property Deskbook* § 8.50 (Wash. State Bar Ass'n 2d ed. 1989):

> Community property brought into common law states has not fared well with respect to its preservation of identity. In a number, perhaps the majority, of cases, mere lack of familiarity by common law lawyers with the community property concept has been responsible for the proper questions not even being asked, and rights not being protected.

For a detailed discussion of the leading cases, see also McClanahan, *supra* § 13.9, § 13:12, at 591–602; Reppy & Samuel, *supra* § 13.16, at 369–75.

Although the basic choice-of-laws principles in Restatement sections 234, 258, and 259 (discussed in sections 13.9 and .10, *supra*) apply equally to situations in which community property is brought to a common law state, surprisingly few decisions have applied these principles. Some confusion stems from the fact that courts in common law jurisdictions are fond of stating that the concept of community property is unknown to their substantive law, even though the spouses' rights in the property are not terminated. *See In re Estate of Warburg*, 237 N.Y.S.2d 557 (Sur. Ct. 1963) (applying German law); *Schneider v. Toledo Trust Co. (In re Estate of Kessler)*, 203 N.E.2d 221 (Ohio 1964). Consequently, courts in common law jurisdictions have used a variety of fictions, such as constructive trusts and resulting trusts, to protect the community property interest of a nontitled spouse. *See Quintana v. Ordono*, 195 So. 2d 577 (Fla. Dist. Ct. App. 1967); *Depas v. Mayo*, 11 Mo. 314 (1848); *Edwards v. Edwards*, 233 P. 477 (Okla. 1924). These cases imply that community property undergoes an immediate conversion to a common law form of ownership. Reppy & Samuel, *supra* § 13.16, at 368; *see also Estabrook v. Wise*, 348 So. 2d 355, 357 (Fla. Dist. Ct. App. 1977) ("Florida is not a community property state, and thus is not required to recognize an encumbrance predicated upon a foreign state's community property law.").

Wisconsin wrestled briefly with these problems in *Fuss v. Fuss*, 24 Wis. 256 (1869). The Wisconsin Supreme Court refused to apply the equitable maxim that the character of property acquired in the original marital domicile will be preserved when it is used to purchase property in a subsequent marital domicile. The court also refused to enforce an agreement executed in the original marital domicile that provided, much like will-substitute agreements discussed at sections 7.99–.105, *supra*, that all property owned by either party would belong to the survivor upon the first death. It is unlikely that the *Fuss* decision would be followed today.

Only a few decisions from common law jurisdictions have taken a less anti–community property view and have recognized the legal attributes of community property brought into their jurisdictions. *Dunbar v. Bejarano*, 358 P.2d 866 (Colo. 1961) (recognizing surviving spouse's community property rights in pension benefit for purposes of avoiding inheritance tax); *Wallack v. Wallack*, 88 S.E.2d 154 (Ga. 1955) (recognizing attributes of Texas community property). *But see Schneider*, 203 N.E.2d at 226 (Ohio 1964) (holding that change of domicile from community property state to common law state did not affect wife's rights in community property previously acquired and brought to new domicile, but exclusive management rights of husband rendered entire value of community property held in his name taxable for state inheritance-tax purposes); *Commonwealth v. Terjen*, 90 S.E.2d 801 (Va. 1956) (holding that full value of home, titled in wife's name and purchased in common law state with money brought from community property state, constituted transfer of exclusive property rights from husband and was fully subject to gift tax).

Several federal income tax cases have held that after spouses move to a common law jurisdiction, ordinary income or capital gain from community property will continue to be treated as owned equally by each spouse for purposes of filing separate federal income tax returns. *Johnson v. Commissioner*, 88 F.2d 952 (8th Cir. 1937); *Phillips v. Commissioner*, 9 B.T.A. 153 (1927); *see also Hammonds v. Commissioner*, 106 F.2d 420 (10th Cir. 1939) (holding that Texas oil interests acquired as compensation for personal services by a spouse domiciled in Oklahoma, a common law state that recognizes the earnings of the wife as separate, were governed by Texas law and characterized as community property).

As with a change of domicile from a common law to a community property state, the events of death, dissolution of the marriage, and assertion of a creditor's claim often provide the occasion for applying choice-of-laws principles. If UMPA is more widely adopted, it will be desirable for the appellate courts in common law jurisdictions to develop greater sensitivity to the appropriate choice-of-laws rules regarding characterization of property and debt.

2. Death of a Spouse [§ 13.20]

A number of decisions from common law jurisdictions have misinterpreted the nature of community property brought into the jurisdiction by the spouses before one of them died. Typically, these decisions have involved inheritance tax determinations. *See, e.g.*, *In re Hunter's Estate*, 236 P.2d 94 (Mont. 1951); *Schneider v. Toledo Trust Co. (In re Estate of Kessler)*, 203 N.E.2d 221 (Ohio 1964); *Commonwealth v. Terjen*, 90 S.E.2d 801 (Va. 1956).

An answer to the perplexing and inconsistent treatment of community property at death by common law jurisdictions has been sought through legislation. The Uniform Disposition of Community Property Rights at Death Act, 8A U.L.A. 213 (2003) [hereinafter Uniform Disposition Act], promulgated by the National Conference of Commissioners on Uniform State Laws in 1971, is designed for adoption by common law jurisdictions and provides for the survival and recognition of basic community property attributes. The Uniform Disposition Act provides that at death, personal property wherever situated, and real property situated in the adopting state, that was acquired as or with community property becomes one-half the property of the decedent and one-half the property of the surviving spouse. The decedent's one-half is not subject to dower, curtesy, or statutory elective rights. Note that the Uniform Disposition Act does not create a new statutory category of property called community property; rather, it provides a mechanism for the succession of property that is derived from or traceable to community property.

To date, the Uniform Disposition Act has been adopted by 14 states: Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Montana, New York, North Carolina, Oregon, Virginia, and Wyoming. The Uniform Disposition Act and comments are reproduced in full at section 13.51, *infra*.

The policy of the Uniform Disposition Act regarding treatment of community property seems clearly correct. Accordingly, the courts of those common law jurisdictions that do not legislatively adopt it should embrace its approach by judicial decision if the appropriate case arises.

3. Divorce [§ 13.21]

The cases involving divorce decrees—*Estabrook v. Wise*, 348 So. 2d 355 (Fla. Dist. Ct. App. 1977); *Wallack v. Wallack*, 88 S.E.2d 154 (Ga. 1955); and *Depas v. Mayo*, 11 Mo. 314 (1848)—were all actions to divide community property located in a common law jurisdiction *following* entry of a divorce decree in the community property jurisdiction. The forthright approach in *Wallack*, which recognizes the survival of community property attributes without resorting to legal fictions, is a good one.

In *Moore v. Ferrie*, 18 Cal. Rptr. 2d 543 (Ct. App. 1993), the court was confronted with the issue of disposing of a community property asset omitted from a divorce judgment in a common law jurisdiction.

The California court acted to divide and allocate community property rights in the husband's pension on the ground that the pension had been omitted from the divorce proceedings in Ohio, a common law jurisdiction. The facts were as follows. The husband had been working for United Airlines since 1965, at which time the couple lived in California. In 1977 the husband moved to Ohio, and the wife joined him there in early 1978. In 1979, the parties separated, and the wife returned to California. In 1980, the husband filed a divorce action in Ohio. Several days later, the wife filed a petition for dissolution in California. After considerable legal skirmishing, including appeals, in both states, the husband eventually obtained a divorce judgment in Ohio. Most of the orders entered by the California court were vacated in deference to the Ohio divorce judgment. However, the California dissolution action itself was never formally dismissed.

When the former wife learned of the husband's retirement in 1991, she filed an order to show cause in the still-pending California dissolution action seeking division of the husband's pension as an omitted asset. The trial court found that it had jurisdiction to divide the community property interest in the pension. The California Court of Appeals agreed, holding that the community property portion of the pension was subject to division in California notwithstanding the earlier Ohio divorce judgment. Under *Henn v. Henn*, 605 P.2d 10 (Cal. 1980), a former spouse may maintain an action to establish his or her community property interest in a pension that was not adjudicated in an earlier final divorce decree. The community property interest in a pension is not altered except by judicial decree or agreement between the parties, and the former spouse is not collaterally estopped from litigating his or her community property interest in the pension by failing to assert this right when his or her entitlement to other community assets was adjudicated.

In *Moore*, the California Court of Appeals rejected the husband's argument that the wife's action constituted a collateral attack on the Ohio judgment, stating that an action to divide an omitted asset does not seek to modify or reopen the previous final judgment. The court pointed out that the wife did not lose her community property interest in the pension when the spouses moved to Ohio because, under Ohio law, community property does not lose its character by virtue of a move to the state. *See Schneider v. Toledo Trust Co. (In re Kessler's Estate)*, 203 N.E.2d 221 (Ohio 1964). Accordingly, if the Ohio court did not adjudicate the parties' interests in the pension, the wife retained her interest in the community property portion following the divorce as a tenant in common. Division of this asset by a California court would not deny the Ohio judgment full faith and credit because that judgment did not purport to deal with the pension.

Allowing the wife to maintain an action to divide the unadjudicated community property pension would give the Ohio judgment no less effect than it would have in Ohio. Although Ohio law at the time did not allow the reopening or modification of a final divorce judgment to dispose of omitted property, it appeared to the court that under Ohio law, if a divorce decree became final without having disposed of certain assets, the parties were simply left with the status quo, and an unadjudicated asset remained the property of the party in whose name it was held. If an Ohio divorce decree failed to dispose of an asset held jointly by the spouses, Ohio presumably would have to allow a subsequent partition action to divide the parties' interests. Under *Schneider*, community property is a form of jointly held property that must be divided in that manner.

Although the court acknowledged that it could find no Ohio precedent addressing the precise question of the appropriate remedy when an Ohio judgment fails to dispose of a community property asset, the court said that it would assume that Ohio law was not out of harmony with California law since, under the rule of *Schneider*, the community property remains community property despite a move to Ohio. The court assumed that Ohio also would accept the corollary principle that unadjudicated community property assets remain jointly owned by the parties as tenants in common after their divorce.

The importance of *Moore* is that, absent disposition of the husband's pension plan by a judgment of the court, the wife's community property ownership interest was not divested. Thus, because the California court had jurisdiction over the parties, it was appropriate for the court to determine and allocate the respective property interests of the former spouses in the pension plan. The case is particularly interesting because it applied an Ohio decision (*Schneider*) to recognize the ongoing attributes of community property removed to a common law jurisdiction and built on that recognition to protect the community property interest of the nonemployee spouse.

No decision of a common law forum seeking to apply choice-of-laws principles in a divorce to community property brought into the jurisdiction has been found. This might be because the vast majority of states now have equitable property division statutes that apply in divorce. In equitable division jurisdictions, the characterization of property under choice-of-laws rules no longer has much significance, regardless of whether the forum jurisdiction is a common law or community property state. Rather, the inquiry is much more likely to focus on whether the property was received as an inheritance or gift or is traceable to property received by inheritance or gift; in such cases, it is probably not subject to division. Only in those jurisdictions lacking equitable-division statutes will choice-of-laws characterization problems be likely to arise at divorce.

4. Assertion of Creditors' Claims [§ 13.22]

The relevant choice-of-laws principles are discussed at section 13.17, *supra*. Applying those principles, a creditor should be able to recover for community (or family-purpose) debts incurred in a community property jurisdiction even if the spouses move to a common law jurisdiction.

C. Investment of Common Law Solely Owned Property in Wisconsin Real Estate by Persons Domiciled in a Common Law State [§ 13.23]

1. In General [§ 13.24]

The classification scheme of the Wisconsin Marital Property Act does not apply to real estate or other immovables acquired in Wisconsin unless both spouses are domiciled here. Section 766.31(8) states that the enactment of chapter 766 does not alter the classification and ownership rights of predetermination date property, except as otherwise provided in chapter 766. The determination date is defined as the last to occur of marriage, 12:01 a.m. on the date that both spouses are domiciled in Wisconsin, or 12:01 a.m. on the effective date of chapter 766 (January 1, 1986). Wis. Stat. § 766.01(5). Because, by definition, spouses domiciled elsewhere have not established a domicile in Wisconsin, no determination date applies to them, and all their property is treated as acquired before the determination date. Real estate and tangibles acquired in Wisconsin thus carry the classification and ownership rights that they would have in the absence of the Act.

This may bring into play the choice-of-laws principles of Restatement sections 234, 258, and 259 (discussed at sections 13.12–.17, supra). *See also* McClanahan, *supra* § 13.9, § 13.8. The decided cases invariably have involved real estate because, under the general rule that movables follow the person, movables located in one state but owned by spouses residing in another are considered to be situated in the state of domicile and to derive their property-law characteristics under its laws. *See, e.g.*, *In re Succession of Dunham*, 408 So. 2d 888 (La. 1981).

2. Death of a Spouse [§ 13.25]

As noted, the Act does not apply to real estate acquired in Wisconsin by spouses unless both are domiciled here. Wis. Stat. §§ 766.01(5), .31(8). Furthermore, upon the death of a nondomiciliary spouse, there will be no augmented deferred marital property election for Wisconsin real estate because, under section 861.02(7)(a), the election applies only if the decedent spouse "is domiciled in this state."

Real estate owned by a decedent domiciled elsewhere is therefore likely to be considered to have the characteristics of the property from the domiciliary jurisdiction that was used to acquire it. *Stephen v. Stephen*, 284 P. 158 (Ariz. 1930) (holding that real estate purchased in Arizona by a married resident of a common law state was solely owned property and not community property); *see also In re Estate of Warner*, 140 P. 583 (Cal. 1914). The Reporter's Note to Restatement section 234 indicates that in disputes between the spouses alone, this will normally be the result. When third parties such as transferees are involved, courts of the situs of the property may be more inclined to apply their local law. *Marshburn v. Stewart*, 240 S.W. 331 (Tex. Civ. App. 1922), *aff'd*, 260 S.W. 565 (Tex. 1924).

However, in *McCarver v. Trumble*, 660 S.W.2d 595 (Tex. App. 1983), the presence of third parties did not result in application of local law. Spouses who were domiciled in Colorado, a common law jurisdiction, acquired an undivided one-half interest in Texas real estate using property supplied by each of them. Third parties owned the remaining one-half interest. The deed recited that the spouses were taking title as joint tenants with right of survivorship and also plainly stated that they were Colorado residents. After the husband died, his sons by a former marriage sold the one-fourth interest purporting to belong to him under Texas community property law to others. In an action to quiet title, the court upheld the surviving wife's contention that she was entitled to the entire one-half interest by right of survivorship, noting that this was not an invalid attempt under Texas law to create a joint tenancy with a right of survivorship using community property but instead a transaction involving the purchase of Texas land by Colorado residents using separate funds as determined under Colorado law. This was sufficient to create a joint tenancy under Texas law. As a result, title to the entire undivided one-half interest vested in the surviving spouse by right of survivorship.

Because Wisconsin has no statutory elective rights available to the surviving spouse of a nondomiciliary decedent (and arguably has no common law rights of dower and curtesy that would apply), a problem might arise if a nonresident attempted to wholly or partially disinherit his or her spouse by acquiring Wisconsin realty with solely owned property from the domiciliary jurisdiction. The 1985 Trailer Bill created section 861.20(1) to deal with this problem. It provides an elective right for the surviving spouse of a nondomiciliary who dies leaving a valid will disposing of real property in Wisconsin that is not marital property or community property. The survivor's election consists of the same right to elect to take a portion of or an interest in property against the decedent's will that would have been available to the surviving spouse if the property were located in the jurisdiction of the decedent's domicile at the time of the decedent's death. This provision is based on a similar California statute, section 120 of the California Probate Code. Section 861.20(1) further specifies that the domiciliary state's procedure for electing against the will applies to the election.

A second section, section 861.20(2), deals with the same basic facts (i.e., a nondomiciliary decedent owning Wisconsin real estate acquired with common law solely owned property) in the context of intestate succession. Again, the statutory solution is to apply the intestate-succession law of the domiciliary jurisdiction as if the property were located in the decedent's domicile at the decedent's death.

3. Divorce [§ 13.26]

No divorce cases have been found that deal specifically with real estate acquired in a community property state by common law domiciliaries. This may be explained by the relatively long-standing existence of "just and equitable" property division statutes in common law jurisdictions, enabling divorce courts to reach any property owned by the spouses. This is in contrast to community property jurisdictions, which often can divide only the community property. Another reason for the absence of such cases may be that the issue is treated as one governed by the divorce law of the forum. *See, e.g.*, *Latterner v. Latterner*, 8 P.2d 870 (Cal. Ct. App. 1932). As one commentator has stated,

> The absence of authority on the question indicates that it is generally understood that the issue [of division of property in a divorce action] is governed by the law of the forum, since an assertion that the law of some other state governed would probably be resisted and lead to an appellate court decision on the point.

Marsh, *supra* § 13.9, at 142. A final reason for the absence of authority may be that the court of the divorce forum exercises personal jurisdiction over the parties and is able to divide property interests and compel transfers of the parties' property regardless of where the property is situated.

Cases dealing with the reverse of this topic—that is, divorce divisions of community property located in common law jurisdictions and owned by residents of a community property state—are treated at section 13.34, *infra*.

D. Investment of Marital Property in Real Estate in a Common Law State by Persons Domiciled in Wisconsin [§ 13.27]

1. In General [§ 13.28]

Once again, the relevant choice-of-laws considerations are set forth in Restatement sections 234, 258, and 259 (discussed at sections 13.9–.10, *supra*). For reasons discussed at section 13.24, *supra*, the cases will ordinarily involve realty.

2. Death of a Spouse [§ 13.29]

a. In General [§ 13.30]

Despite a dearth of cases, it is expected that when only the spouses are involved, the courts of the situs will look to the nature of the property used to acquire the real estate in making the appropriate choice of law. *See supra* § 13.25.

b. Marital Property Rights [§ 13.31]

Under proper conflict-of-laws analysis, courts in common law jurisdictions must recognize a surviving nondomiciliary spouse's vested, one-half Wisconsin marital property interest in real estate located in the common law jurisdiction if the real estate was acquired in whole or in part with marital property. If the common law state where the real estate is located has adopted the Uniform Disposition Act (discussed at section 13.20, *supra*), this result will be dictated by statute. Example 2 in the comment to section 1 of the Uniform Disposition Act indicates that the Act will apply to real estate located in an enacting jurisdiction that is owned by a nondomiciliary but acquired with or traceable to community property. 8A U.L.A. at 195.

Less clear is whether such important rights of succession as the revised and expanded intestate succession rights of a surviving spouse under section 852.01(1)(a), or the surviving spouse's elective share in augmented deferred marital property at death under section 861.02, will be recognized by the common law situs jurisdiction. Sections 236 and 241 of the Restatement indicate that questions of the devolution of interests in land upon the intestate death of the owner and the existence and extent of common law or statutory interests of a surviving spouse in land are determined by the law that would be applied by the courts of the situs. Usually that will be the local law of the situs. Accordingly, courts in common law jurisdictions that follow the Restatement position may ignore Wisconsin's intestate succession law and augmented deferred marital property rule in favor of applying their own statutory rights or elections. *See, e.g.*, *Spence v. Spence*, 195 So. 717 (Ala. 1940); *Ehler v. Ehler*, 243 N.W. 591 (Iowa 1932); *Sinclair v. Sinclair*, 109 A.2d 851 (N.H. 1954).

Possible procedural solutions for the difficulties that might be faced in convincing the courts of another state to recognize Wisconsin marital property interests in real estate located there have been suggested by Professor June M. Weisberger in *Selected Conflict of Laws Issues in Wisconsin's New Marital (Community) Property Act*, 35 Am. J. Comp. L. 295, 302 (1987). Assuming that real estate in the other state is titled solely in the name of either the decedent spouse or the surviving spouse (so that the title does not reflect the actual ownership interests), the Wisconsin probate court having jurisdiction over the decedent's estate might order either the decedent's personal representative (if the real estate is titled in the decedent's name) or the Wisconsin surviving spouse (if the real estate is titled in the surviving spouse's name) to execute and record a conveyance in the situs state to reflect the ownership rights of the parties under Wisconsin law. This would follow logically from the probate court's authority in section 857.01 to determine the classification of property and to render a decree that property be titled in accordance with its classification.

Weisberger also suggests the use of a court proceeding modeled on traditional proceedings to quiet title in which the rights of various parties having an interest in real estate are determined on the basis of personal jurisdiction over them. Under this approach, if the Wisconsin court obtains jurisdiction over all the interested parties, its judgment should be entitled to full faith and credit in the state where the real estate is located.

c. Deferred Marital Property Rights [§ 13.32]

It is instructive to examine some of the issues that the courts of a common law jurisdiction will face in deciding whether to apply the section 861.02 elective share in deferred marital property to real estate located in another state but owned by a Wisconsin married person. Consider the following situation:

- ***Example.*** A spouse using her wages acquires real estate located in Minnesota during marriage but before the effective date of the Act. All these wages would have been marital property for purposes of the deferred marital property reach-back of sections 851.055 and 861.02. Both spouses are domiciled in Wisconsin at all relevant times, including on the date of acquisition of the realty and the date of the acquiring spouse's death. The acquiring spouse's will leaves the Minnesota real estate to third persons. The surviving spouse files a petition to make the augmented deferred marital property election under section 861.08(1), claiming an amount equal to 50% of the augmented deferred marital property estate. Under section 861.02(2)(b), the augmented deferred marital property estate includes real property located in another jurisdiction. Assume that some portion of the Minnesota real estate must be used to satisfy the elective share, and that the devisees of the Minnesota real estate are given appropriate notice of the proceedings. The court enters a judgment requiring the devisees to make a prorated contribution toward the surviving spouse's augmented deferred marital property elective share. The surviving spouse seeks to enforce the judgment against the devisees in Minnesota.

Applying the basic choice-of-laws principles of Restatement section 6 does not lead to a clear-cut answer as to what a Minnesota court would do. A Minnesota court might determine that Wisconsin has the most significant relationship to the parties and enforce the judgment for an augmented deferred marital property elective-share contribution against the third persons. Or, because the real estate is located in Minnesota, the court might apply the Minnesota statutory election against the will instead of the Wisconsin augmented deferred marital property elective share on the ground that it will further certainty, predictability, and uniformity of result.

d. Rights to Income from Real Estate [§ 13.33]

Even more difficult than deciding whether the court would apply Wisconsin's deferred marital property elective share is characterizing the income from the real estate in the above example. Will the income be classified as marital property under the income rule of section 766.31(4) or classified as common law solely owned property? The answer depends on whether the income is deemed to be converted to personal property and "repatriated" to Wisconsin under the doctrine that movables follow the person, *see, e.g.*, *Succession of Packwood*, 9 Rob. 438 (La. 1845), or is viewed merely as an incident of the real estate. With the spouses' strong relationship to Wisconsin, repatriation and classification of the income as marital property would be equitable. The result might be different, however, if the income were directly plowed back into the real estate through payments on a purchase money mortgage with a Minnesota bank or a land contract with a Minnesota vendor. Under those circumstances, persons domiciled in Minnesota would have a stake in the dispute, and applying Wisconsin law might disrupt justified expectations of the parties.

Commissioner v. Skaggs, 122 F.2d 721 (5th Cir. 1941), illustrates the complexity of these questions. In that case, spouses resided in Texas; before marriage, the husband acquired income-producing real estate in California. The question was whether the income from the property should be treated as community property under Texas law (which has an income rule similar to Wisconsin's) or as separate property under California's community property law. Applying the law of the situs (California), the court said that the income was the husband's separate property. Reppy and Samuel, *supra* § 13.16, at 354, offer an excellent analysis of this case, noting the possible results depending on the conflict-of-laws methodology used by the forum state. Their analysis suggests that a forum that, like Wisconsin, has a "better law" factor in its conflicts methodology would have applied Texas law because of its broader view of marital sharing.

3. Divorce [§ 13.34]

A number of decisions recognize that community property invested in real estate in a common law jurisdiction by one spouse will not lose its community property characteristics and therefore is equally divisible in the event of divorce. These decisions customarily have come from the divorce courts of the community property jurisdiction where the parties were domiciled rather than from the courts of the state where the land was situated. The cases have uniformly recognized that while the domiciliary courts were not able to directly affect title to the out-of-state property, they were free to control its disposition by exercising in personam jurisdiction over the spouses. *Noble v. Noble*, 546 P.2d 358 (Ariz. Ct. App. 1976); *Fink v. Fink*, 603 P.2d 881 (Cal. 1979); *Rozan v. Rozan*, 317 P.2d 11 (Cal. 1957); *Tomaier v. Tomaier*, 146 P.2d 905 (Cal. 1944); *Economou v. Economou*, 274 Cal. Rptr. 473 (Ct. App. 1990); *Glaze v. Glaze*, 605 S.W.2d 721 (Tex. Civ. App. 1980); *see also Grappo v. Coventry Fin. Corp.*, 286 Cal. Rptr. 714 (Ct. App. 1991); *Haws v. Haws*, 615 P.2d 978 (Nev. 1980) (in *Grappo* and *Haws*, courts determined rights in Nevada real estate, purchased by one spouse with separate property while both spouses were domiciled in California, under community property laws of California, not Nevada).

The Wisconsin Supreme Court has also recognized that in personam orders to parties under its jurisdiction may affect out-of-state property. *Dalton v. Meister*, 71 Wis. 2d 504, 239 N.W.2d 9 (1976). It seems likely that a court would seek to achieve similar results in divorce property settlements under section 767.61. *See also Belleville State Bank v. Steele*, 117 Wis. 2d 563, 345 N.W.2d 405 (1984) (requiring that judgment of Illinois divorce court ordering party to convey Wisconsin real estate be enforced); *Bailey v. Tully*, 242 Wis. 226, 7 N.W.2d 837 (1943) (enforcing California decree ordering conveyance of Wisconsin real estate from one party to the other).

For additional discussion concerning the means by which a forum divorce court may exercise its equitable powers to protect its domiciliaries at the time of divorce, see Weisberger, *supra* § 13.31, at 297–98.

In *Fall v. Eastin*, 215 U.S. 1 (1909), the U.S. Supreme Court recognized the power of a divorce court in the state of Washington (where the parties were domiciled) to compel the former husband to execute a conveyance of land located in Nebraska as part of the equitable division of the parties' assets. The former husband conveyed the land to a third person in fraud of the wife's interest under the decree. The wife commenced an action in Nebraska against the purchaser to quiet title to the land. The Court declined to give independent substantive effect to the Washington decree as a document of title affecting the real estate in Nebraska under the full faith and credit clause of the U.S. Constitution, stating that the appropriate remedy under the circumstances was a contempt citation against the husband by the Washington court. *See also* Sheldon R. Shapiro, Annotation, *Power of Divorce Court to Deal with Real Property Located in Another State*, 34 A.L.R.3d 962 (1970), and cases cited therein.

4. Remedies During Marriage [§ 13.35]

A question somewhat related to those arising in a divorce action is whether courts in a common law jurisdiction where real estate acquired with Wisconsin marital property is located would grant any of the interspousal remedies of subsections 766.70(3) and (4), particularly those adding the name of the other spouse, altering the management and control rights of the property, or changing its classification.

➢ ***Example.*** Real estate is acquired in Florida with Wisconsin marital property and titled in the name of one spouse. Subsequently, an action is brought in Florida by the nontitled spouse, who resides in Wisconsin, seeking to change the title to his or her name under section 766.70(4). The whereabouts of the titled spouse is unknown.

The essential question relates to the nature of the Florida court's jurisdiction over the matter. Assuming that the location of the real estate confers a legal basis for a spouse claiming an ownership interest to invoke the jurisdiction of the Florida courts, the Florida court could hear the matter. The proceeding may be characterized as quasi in rem. *See* Restatement ch. 3 introductory note to topic 2 (Judicial Jurisdiction Over Things).

The Florida court might then consider remedies relating to the title or reclassification of the real estate. If the spouses are considered domiciled in Wisconsin, and Florida's conflict-of-laws methodology determines that Wisconsin has the dominant interest, Florida might choose to apply Wisconsin's statutory remedies to real estate acquired with marital property. Restatement § 8 cmt. k.

If the matter arose in Wisconsin, and if the court could obtain in personam jurisdiction over the parties, the court could apply remedies by issuing orders to the parties that would affect the Florida real estate acquired with marital property, *see Dalton v. Meister*, 71 Wis. 2d 504, 239 N.W.2d 9 (1976); Restatement § 55, although subsequent proceedings to enforce the judgment in Florida might be required.

5. Assertion of Creditors' Claims [§ 13.36]

The choice-of-laws principles applicable to contract creditors' rights include those discussed in Restatement section 188. *See supra* § 13.6. One bankruptcy court decision is illustrative. In *Janis v. Janis (In re Janis)*, 125 B.R. 274 (Bankr. D. Ariz. 1991), a creditor under a guaranty attempted to enforce a second mortgage against a Hawaii condominium owned by the debtor spouses, both of whom were Arizona residents. The bankruptcy trustee moved to set aside the Hawaii foreclosure judgment and invalidate the creditor's claim against the equity in the condominium. It appeared that only the husband had executed the guaranty obligation, but that the wife had joined in the second mortgage securing it. Arizona law requires that both spouses join in a transaction of guaranty in order for the spouses' community property to be bound. *See* Ariz. Rev. Stat. § 25-214 (current through legislation effective February 9, 2010 of the Sixth Special Session, and legislation effective April 16, 2010 of the Second Regular Session of the Forty-Ninth Legislature (2010)).

After examining the applicable principles of Restatement section188, the Bankruptcy Court concluded that because Arizona had the most significant relationship to the parties, Arizona law would be applied in determining the enforceability of the guaranty. The court held that, under Arizona law, because the wife had not joined in the guaranty, it was effective only as to the husband and would ordinarily be recoverable only from his separate property. The court also concluded that because the debtors at all times were Arizona residents, the Hawaii condominium should be regarded as their community property. After noting that Hawaii at one time had been a community property jurisdiction and still had laws on its books to avoid divestiture of community property rights or interests, the court concluded that Hawaii would treat the condominium as community property under its law.

The U.S. District Court subsequently reversed the decision of the bankruptcy court. *Janis v. Janis (In re Janis)*, 151 B.R. 936 (Bankr. D. Ariz. 1992). The court held that the wife's joining in the second mortgage on the Hawaii condominium to secure her husband's guaranty satisfied the spousal joinder requirement under the Arizona statutes. In addition, her execution of the second mortgage constituted an independent promise of payment, because the mortgage explicitly referred to payment of the guaranty and the husband's underlying obligations, for which it was security. Accordingly, the court held that the second mortgagee could recover from all the remaining proceeds from sale of the condominium, not just from the husband's share.

E. Transfers of Property Between Wisconsin and Other Community Property Jurisdictions [§ 13.37]

Not all transfers of property into or out of Wisconsin pursuant to a change of domicile will involve common law property states. Some will inevitably involve property brought to Wisconsin from a community property state or taken to a community property state from Wisconsin. Because of variations in the characteristics of community property under the laws of the original eight community property states, as well as differences between the community property of those states and Wisconsin's marital property, conflict-of-laws problems may arise.

For example, assume that California civil law separate property (i.e., property acquired before marriage or during marriage by gift or inheritance) is brought to Wisconsin by a spouse who establishes marital domicile here. The spouse then invests in Wisconsin income-producing real estate. The income from separate property under California's community property law remains separate. How is the income treated under the Act? Section 766.31(8) purports to preserve the classification and property rights of the California separate property. A problem arises, however, because of the "except as provided otherwise in this chapter" language of section 766.31(8). The comment to UMPA section 4 indicates that the income treatment in subsection 4(d) (which became section 766.31(4)) is one exception to the basic rule. Thus, the income from the California separate property will be classified as Wisconsin marital property unless the owner spouse acts unilaterally to reclassify the income as individual property under section 766.59. If this is not done, and if the income is used to pay the mortgage or for other capital purposes, the mixed property rule of section 766.63(1) would apply and tracing would be necessary to determine the separate property component. The original California separate property component would not be subject to the augmented deferred marital property election of section 861.02 at death because it would not have been marital property under the Act. *See* Wis. Stat. § 766.31(6), (7).

The following example illustrates another conflict-of-laws problem involving a community property state:

➢ ***Example.*** A married couple establishes domicile in Wisconsin after having resided for a number of years in Arizona. They bring with them a life insurance policy on the life of one spouse that names that spouse's child by a prior marriage as beneficiary. The insured spouse is the record owner of the policy. Premiums from the inception of the policy were paid entirely with inherited civil law separate property while the spouses were domiciled in Arizona. Arizona (along with New Mexico, Texas, and Louisiana) employs an "inception of title" rule for classifying life insurance policies. This rule provides that if the policy was initially acquired with the separate property of one spouse, it remains the separate property of that spouse even if premiums are subsequently paid with community property. The community is deemed to have a lien against the policy and the

> proceeds for the amount of premiums paid with community property. Although the insured spouse intends to continue the practice of paying the premiums out of inherited property after establishing domicile in Wisconsin, several premiums are inadvertently paid with Wisconsin marital property. Subsequently, after residing in Wisconsin for a time, the insured spouse dies.

Because a premium has been paid with Wisconsin marital property, under Wisconsin law the time-based apportionment rule of section 766.61(3)(b) would determine the marital property component of the life insurance proceeds. This conflicts with the Arizona inception-of-title rules as buttressed by the preservation of property rights provisions of section 766.31(8). The court must decide which state's law will apply.

Assume now that the insurance policy in the preceding example is on the life of a child and is owned by the spouse who is the child's parent. Under these facts, section 766.61 will not apply, and it will be necessary to resort to the general rule of Restatement section 259 that the law of the marital domicile when an intangible is acquired continues to govern its characterization after it is removed to another jurisdiction. Section 766.31(8) purports to protect that classification. But, if some premiums on such a policy are paid with Wisconsin marital property after the spouses' determination date, a conflict may arise if the mixed property presumption and tracing rules of section 766.63(1) apply. If the Wisconsin court determines that section 766.63(1) is an exception to the preservation-of-property-rights rule of section 766.31(8), and if the child dies or the policy is surrendered after the move to Wisconsin, does the court apply Arizona law and merely restore to marital property the premiums paid from marital property in a manner consistent with the inception-of-title rule, while awarding the balance of the proceeds to the parent who owns the policy? Or does it determine that Wisconsin law applies, with a further requirement of equitable apportionment of the proceeds? If it determines that apportionment is appropriate, does it use the time-based rule of section 766.61(3)(b), or does it apportion the proceeds based on the ratio of marital property premiums to total premiums? There is, of course, no way of knowing how the Wisconsin courts will deal with these issues. Suffice it to say all the theories are plausible, and each has advantages and disadvantages.

Next, assume that the policy in the above example is owned by the spouse of the insured; this spouse is named as beneficiary. The owner spouse pays the premiums from Arizona inherited separate property while the spouses reside there and continues this practice after establishing domicile in Wisconsin. Inadvertently, however, several premiums are paid with marital property. Upon the death of the insured, the insurance proceeds would be treated entirely as the individual property of the surviving owner spouse under section 766.61(3)(c), even though several premiums were paid with Wisconsin marital property. If the insured decedent's will leaves his or her estate to a child of a prior marriage, the insured's estate might have a lien or right to reimbursement from the beneficiary spouse under Arizona law and section 766.31(8) for one-half of the premiums paid with marital property. A court may be asked to determine which set of rules applies.

Conflicts regarding insurance policies will also occur if the spouses' former domiciliary state determines ownership of the policy or the proceeds under an apportionment rule based on the ratio of premiums paid with community funds to the total amount of premiums paid. California and Washington follow such a rule. If all premiums were paid out of inherited civil law separate property both before and after the spouses changed domicile to Wisconsin, except for several premiums inadvertently paid out of Wisconsin marital property, the conflict-of-laws problem becomes evident. The statutory time-based apportionment rule of section 766.61(3)(b) may produce a far different result than an apportionment based on the ratio of premiums paid with community funds (i.e., marital property) to the total amount of premiums paid. The latter apportionment formula is arguably an element of the property rights preserved by section 766.31(8).

Note that in most of the above examples the election against the augmented deferred marital property estate under section 861.02 would not apply, because premium payments on the policy before the establishment of the spouses' domicile in Wisconsin were made from property that would not have been marital property. It is much more likely that spouses moving to Wisconsin who bring with them insurance policies they own on the life of a spouse (or a child) will have paid premiums with earnings or income that clearly would have been Wisconsin marital property if the Act had applied to the spouses from the inception of their marriage. These policies would constitute deferred marital property as defined by sections 851.055 and 861.02(2)(b). Under these circumstances, the election against the augmented deferred marital property estate under section 861.02 may enable a surviving spouse to reach part or all of the value of the policies.

Retirement benefits generate the same kinds of choice-of-laws problems as life insurance policies, again depending on the rules that states of former domicile (and employment) use to characterize retirement benefits. The situation is further complicated by the overlay of federal law applicable to benefits paid by qualified plans governed by ERISA (Employee Retirement Income Security Act of 1974), 29 U.S.C §§ 1001–1461. *See supra* § 2.214–.217.

The discussion up to this point has involved spouses who move from other community property states to Wisconsin. When the transactional analysis flows in the other direction, that is, the spouses move from Wisconsin to another community property jurisdiction and take Wisconsin marital property with them, there is also potential for difficult choice-of-laws questions. This is because the property law systems of other community property states tend to be far less structured and formal than the regime created by the Wisconsin Marital Property Act. As a result, it is impossible to speculate on the extent to which other community property jurisdictions will recognize particular attributes of Wisconsin marital property, such as the terminable interest of a nonemployee spouse under section 766.62(5) in retirement benefits accrued while the spouses were domiciled in Wisconsin, or the title-based management and control rules of section 766.51 for marital property. The cases and statutes of the various community property jurisdictions dealing with the treatment of "other" property brought into those states from outside, discussed at sections 13.13–.17, *supra*, point out the difficulties encountered in attempting to freely analogize between similar forms of property ownership.

Finally, many of the questions about Wisconsin residents investing marital property in real estate in a common law state, discussed *supra* §§ 13.27–36, may also arise when a Wisconsin resident uses marital property to acquire real estate in another community property jurisdiction. The community property state's intestate-succession laws, provisions for protection of a spouse at death, and creditors' rights and remedies may differ, perhaps significantly, from the Wisconsin scheme. Appropriate choice-of-laws principles will have to be applied when disputes arise.

F. Effect of Choice of Laws on Marriage Agreements [§ 13.38]

1. General Principles Regarding Construction and Enforceability of Marriage Agreements [§ 13.39]

Relatively little authority exists on which law governs the validity and construction of a marriage agreement (assuming the agreement does not contain a choice-of-laws provision) when the agreement is entered into while the spouses are domiciled in one state but enforcement is sought after they change domicile to another. Wisconsin applies a grouping-of-contacts analysis when the issue arises in its courts. *Knippel v. Marshall & Ilsley Bank (In re Estate of Knippel)*, 7 Wis. 2d 335, 96 N.W.2d 514 (1959); *see supra* § 13.6. This approach has also been followed in Ohio. *Osborn v. Osborn*, 226 N.E.2d 814 (Ohio C.P 1966), *aff'd*, 248 N.E.2d 191 (Ohio 1969). Other states have simply applied the law of the jurisdiction where the agreement was made, *Robinson v. Shivley*, 351 S.W.2d 449 (Ark. 1961); *Fernandez v. Fernandez*, 15 Cal. Rptr. 374 (Ct. App. 1961); *Hill v. Hill*, 262 A.2d 661 (Del. Ch.), *aff'd*, 269 A.2d 212 (Del. 1970); *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super Ct. App. Div. 1978); *Davis v. Davis*, 152 S.E.2d 306 (N.C. 1967), or the law of the state where the agreement was performed, *Sun Life Assurance Co. v. Hoy*, 174 F. Supp. 859 (E.D. Ill. 1959) (applying Illinois law to determine that oral premarital agreement had been fully performed and thus would be enforced despite statute of frauds).

A generally accepted conflict-of-laws principle permits parties to a contract to choose the local law that will govern the construction and enforceability of the agreement. Restatement § 187. Ordinarily, courts will recognize this choice unless the chosen state has no substantial relationship to the parties or the transaction or if applying the law of the chosen state would offend some fundamental public policy of either the forum state or another state that has a materially greater interest in the matter's outcome than does the chosen state. *Id.*

An interesting and detailed discussion of these principles is found in *Estate of Richman v. Commissioner*, 68 T.C.M. (CCH) 527 (U.S. Tax Ct. 1994) involving a Texas couple's purchase of mutual-fund shares from a Massachusetts business trust using Texas community property funds. The couple opened the account as a joint tenancy with rights of survivorship, and the mutual-fund shares were held in that form. The trust agreement and account application comprising the contract contained a choice-of-law provision reciting that the rights of all parties, and the validity and construction of all provisions, were subject to and construed according to the laws of Massachusetts. Following the husband's death, the Commissioner contended that the mutual-fund shares in fact were Texas community property, and that the decedent's one-half interest (which passed to his children) did not qualify for the federal estate-tax marital deduction under I.R.C. § 2056. The Tax Court concluded that the choice-of-laws provision in the application and trust agreement mandated the characterization of the mutual-fund shares as joint tenancy property, and that this characterization did not offend any fundamental public policy of the state of Texas. Thus, the mutual-fund shares passed by survivorship to the surviving spouse and qualified for the marital deduction.

Wisconsin courts have followed the Restatement position but not in the specific context of marriage agreements. *See State Farm Life Ins. Co. v. Pyare Square Corp.*, 112 Wis. 2d 65, 331 N.W.2d 656 (Ct. App. 1983); *First Wisconsin Nat'l Bank v. Nicolaou*, 85 Wis. 2d 393, 398 n.1, 270 N.W.2d 582 (Ct. App. 1978). However, section 766.58(3)(g) specifically recognizes that parties may choose the law governing construction of marital property agreements. Note that the statute does not mention the choice of the law that will govern validity or enforceability; it is not known whether the provision of section 766.58(3)(h) that permits spouses to agree concerning "any other matter affecting either or both spouses' property" will be construed to cover these aspects.

A marriage agreement that states a choice of law generally will be governed by the law chosen, despite a change of marital domicile. The selected law will be enforced in a subsequent domicile if the agreement expressly provides for use of the law, so long as enforcement would not violate the public policy of the subsequent domicile. *See Weisz v. Weisz*, 97 Cal. Rptr. 18 (Ct. App. 1971); *Norris v. Norris*, 419 A.2d 982 (D.C. 1980); *Hirsch v. Hirsch*, 309 So. 2d 47 (Fla. Dist. Ct. App. 1975); *Wyatt v. Fulrath*, 211 N.E.2d 637 (N.Y. 1965) (criticizing strongly, in dissent, treatment of New York depository agreements containing choice-of-laws clauses like express marriage agreement between spouses, when spouses were Spanish citizens and domiciliaries who never came to New York); *Behr v. Behr*, 266 S.E.2d 393 (N.C. Ct. App. 1980); *Rogers v. Rogers*, 373 A.2d 507 (Vt. 1977); *McGill v. Hill*, 644 P.2d 680 (Wash. Ct. App. 1982). *But see Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982) (interpreting agreement under Georgia law, when both parties so stipulated, despite fact that agreement stated that it was to be construed according to Michigan law).

An issue related to inclusion of a choice-of-laws provision in a marriage agreement is the effect that the agreement will have on subsequently acquired property following a change of domicile to another jurisdiction. As stated by one commentator,

> The general rule, that the law of the second jurisdiction governs marital-property interests, in subsequent acquisitions of the spouses after a change of domicile, is of course subject to modification by an express antenuptial agreement between the spouses. If the spouses agree by such a contract, which complies with the necessary formalities, that their marital property interests shall continue to be governed by the law of their first domicile even after removal to another jurisdiction, there is no reason why such an agreement should not be given effect as between the parties.

Marsh, *supra* § 13.9, at 218–19 (footnote added). (Marsh uses the term *marital-property interests* to denote a broad array of spousal property rights under both the common law and community property systems. This is not a reference to the specific property classification of that name in UMPA or the Act.)

The more difficult question, of course, is posed when the marriage agreement does not contain a choice-of-laws provision and does not mention what effect, if any, a change of marital domicile is to have on the agreement. Some cases have held that the agreement will not be enforced with respect to property acquired in the subsequent domicile unless the contract expressly provides for the contingency of change of domicile. *Fuss v. Fuss*, 24 Wis. 256 (1869); *Long v. Hess*, 40 N.E. 335 (Ill. 1895); *Hoefer v. Probasco*, 196 P. 138 (Okla. 1921); *Clark v. Baker*, 135 P. 1025 (Wash. 1913). According to Marsh, the better view is represented by those courts in a jurisdiction of subsequent domicile that have rejected such a mechanical rule and, despite the absence of an express provision, have enforced the agreement with respect to after-acquired property if that appeared to be the spouses' intent. *Sanger v. Sanger*, 296 P. 355 (Kan. 1931); *Kleb v. Kleb*, 62 A. 396 (N.J. Ch. 1905), *aff'd*, 65 A. 1118 (N.J. 1907); *Lemye v. Sirker*, 235 N.Y.S. 273 (App. Div. 1929); *Spence v. Cole*, 205 P. 172 (Okla. 1922).

2. Specific Considerations Regarding Enforceability of Wisconsin Marital Property Agreements [§ 13.40]

a. Formal Requirements [§ 13.41]

Almost all states have a statute similar to section 853.05, which provides that even if a will is not executed in compliance with the formal requirements of the state where it is offered for probate, it will nonetheless be treated as validly executed if it is in writing and was executed in accordance with the law (either at the time of execution or at the time of death) of the place where the will was executed, of the testator's domicile at the time of execution, or of the testator's domicile at the time of death. However, similar statutes are not found for marriage agreements.

The formal requirements for a valid marital property agreement in Wisconsin are very simple: there must be a document, and it must be signed by both spouses. Wis. Stat. § 766.58(1). There is no need for consideration. *Id*. Other states, whether common law or community property, may require greater formalities, including witnesses, acknowledgment, and recording. *See* Alexander Lindey & Louis I. Parley, *Lindey and Parley on Separation Agreements and Antenuptial Contracts* §§ 90.01–.20, 11.64 (2d ed. 1999); de Funiak & Vaughn, *supra* § 13.11, at § 136.

De Funiak and Vaughn make a compelling case for enforcing agreements executed in another state regardless of differences in the formal requirements:

> Where the spouses at the time of the marriage, or even after the marriage, enter into an express contract governing their rights and interests in property to be acquired there is no reason why such an express agreement should not govern and be recognized in other states than that in which it is made, provided that it was valid where made and provided that its recognition and enforcement are not against the public policy of the forum.

De Funiak & Vaughn, *supra* § 13.11, at § 90; *see also Hill v. Hill*, 262 A.2d 661 (Del. Ch.), *aff'd*, 269 A.2d 212 (Del. 1970). From a choice-of-laws standpoint, then, if spouses validly execute a marital property agreement while domiciled in Wisconsin and later move to another state, the move alone should not affect the enforceability of the agreement in the new state of domicile.

b. Unique Features of Will-substitute Agreements [§ 13.42]

Conflict-of-laws questions are likely to arise regarding the multistate ramifications of will-substitute marital property agreements entered into by spouses while domiciled in Wisconsin. (See section 766.58(3)(f) and sections 7.99–.105, *supra*, for a discussion of such agreements.)

One interesting question arises when spouses domiciled in Wisconsin enter into such an agreement and subsequently change their domicile to another state, where one spouse dies. The issue is whether the agreement will be recognized as valid and given effect.

The statute authorizing will-substitute agreements is in derogation of Wisconsin's statute of wills, section 853.03, which requires certain formalities in a valid will. Virtually all other states have similar statutes of wills; relatively few have provisions in derogation of the statute of wills as broad as Wisconsin's. Washington's statutes on community property agreements, Wash. Rev. Code § 26.16.120 (current with amendments received through Jan. 15, 2010), and nontestamentary arrangements, Wash. Rev. Code § 11.02.091 (current with 2010 legislation effective through April 22, 2010), come close, but the statute on community property agreements applies only to transfers of community property at death (and not to other classifications of property). For this reason, community property agreements in Washington typically classify all or most of the property of spouses (including future acquisitions) as community property to give the agreement maximum effect. A number of other states have adopted the Uniform Probate Code, including the nontestamentary transfer provisions of section 6-101. Wisconsin has added similar statutory provisions covering a variety of nonprobate transfers, *see* Wis. Stat. §§ 705.10–.31. These are modeled after Uniform Probate Code section 6-101 (Uniform Nonprobate Transfers at Death Act) and sections 6-301 through 6-311 (Uniform TOD Security Registration Act). The Wisconsin statute dealing with nonprobate transfers at death, Wis. Stat. § 705.10, specifically includes nonprobate transfers on death by provisions in a marital property agreement.

If the married couple has moved to a jurisdiction that lacks statutory provisions validating a broad array of nontestamentary dispositions at death, the efficacy of the agreement to transfer the decedent's property located in the new domicile is likely to come into question when the first spouse dies. The spouses themselves may not have executed wills in the new domicile because they believed that their will-substitute agreement would continue to be valid. The result in such a case is very likely to depend on the nature of any statute in the state of domicile that permits transfers at death in derogation of the statute of wills. The result will also depend on the domiciliary courts' views concerning the public-policy implications of permitting transfers at death by contract—even when the contract specifies that Wisconsin law is to apply to the issues of construction and validity, and Wisconsin law clearly permits such arrangements.

Perhaps a more common situation will be that in which a Wisconsin couple enters into a will-substitute agreement that attempts to affect out-of-state real property. For reasons discussed previously, the state where the land is located may not recognize the validity of nontestamentary transfers of this sort under its own local law. If this is the case, and if the decedent spouse dies without a valid will, a court in the situs jurisdiction might then proceed to apply its own law, with the result that the land would pass by the situs state's law of intestate succession. On the other hand, if the decedent dies domiciled in Wisconsin and the surviving spouse and other interested parties also reside in Wisconsin, a case could be made that the state of the situs of the land should apply Wisconsin law and give effect to the nontestamentary transfer. *See supra* §§ 13.9, .31.

It is possible, however, that persons other than the recipient or recipients of the real estate under the terms of the will-substitute agreement would be entitled to an interest in the real estate under the intestate succession law of the state of the situs. In this situation, the courts of the situs may be reluctant to give effect to a Wisconsin will-substitute agreement unless the persons who would otherwise receive an interest in the land consent to the transfer or disclaim or renounce their interests.

The courts of the situs may also be reluctant to give effect to a Wisconsin will-substitute agreement if the rights of other third parties (such as creditors) in the situs jurisdiction would be adversely affected. The answer to this problem might be for the court in the situs jurisdiction to also recognize and apply the creditor protection provisions of section

859.18, since these are specifically intended to discourage the avoidance of creditors' rights through the use of will-substitute agreements. *See supra* § 7.12. This would permit application of Wisconsin law to accomplish the purposes of the agreement and would at the same time protect creditors' interests.

Professor Weisberger suggests that when spouses domiciled in Wisconsin have entered into a will-substitute agreement that by its terms applies to out-of-state real estate and one spouse dies, the transferee under the will-substitute agreement should be able to confirm his or her interest in the real estate in a Wisconsin proceeding under section 863.27, 865.201, or 867.046 and then record or enforce the order or judgment in the situs state. *See* Weisberger, *supra* § 13.31, at 304. However, section 867.046 (providing for summary confirmation of interests in property passing by will-substitute agreement) and section 865.201 (providing for confirmation of such interests in the context of informal administration) by their terms do not appear to apply to property located outside Wisconsin, although the procedures for confirmation of such interests in the context of formal probate, *see* Wis. Stat. § 863.27, may not be so limited. Furthermore, a question exists regarding whether the courts of the state where the real estate is located will give effect to such a court order or judgment as against the rights of a creditor or an intestate taker under its own laws, unless it is shown that the Wisconsin court has obtained jurisdiction over them. *See supra* §§ 13.9–.10.

c. Giving Effect to Classification of Out-of-state Real Estate by Marital Property Agreement [§ 13.43]

The following may be a fairly common conflict-of-laws situation. Both spouses are domiciled in Wisconsin, and one spouse inherits real estate in another state. Later, the spouses enter into a Wisconsin marital property agreement classifying all their assets (including inherited assets) as marital property pursuant to section 766.31(10). The agreement is not limited in its application to assets situated in Wisconsin. No effort is made to change the title to the inherited out-of-state real estate after execution of the marital property agreement.

The question is whether the courts of the situs state will honor the classification of the real estate as co-owned marital property if the non-inheriting spouse dies first. Even if the situs state is one that has adopted the Uniform Disposition Act, *see supra* § 13.20, it is not clear whether the language of section 1 of the Uniform Disposition Act, 8A U.L.A. at 216–17, is broad enough to cover the situation, because it seemingly applies to real estate *acquired with* community property—that is, "any real property situated in this state which was *acquired with the rents, issues or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property* under the laws of another jurisdiction." (Emphasis added.) If the Uniform Disposition Act does not apply (or has not been enacted in the situs state), a policy question is raised as to whether the courts of the situs jurisdiction will recognize the property classification created by the marital property agreement under section 766.31(10). The procedural solutions suggested by Professor Weisberger and discussed in detail in section 13.31, *supra*, seemingly would apply here as well. If the Wisconsin probate court having jurisdiction over the deceased spouse's estate has jurisdiction over all the interested parties, it may compel the deceased spouse's personal representative and the surviving spouse to execute and record a conveyance in the situs state to reflect the ownership rights of the parties under Wisconsin law.

Perhaps a simpler solution would be for spouses entering into a comprehensive marital property agreement to execute and record a conveyance of out-of-state real estate that effectively recognizes their co-ownership under local law. This at least would avoid title and conveyancing problems under the law of the situs state after the death of the first spouse. More problematic, however, is whether the Internal Revenue Service would recognize the classification of the out-of-state real estate as marital property on the strength of the Wisconsin marital property agreement, particularly if the real estate is located in a non–community property jurisdiction.

G. Choice of Laws and Dual Domiciles [§ 13.44]

1. Definition of a Marital Domicile [§ 13.45]

a. Before May 3, 1988 [§ 13.46]

If the conflict-of-laws rules governing characterization of property interests are complicated when both spouses are domiciled in one jurisdiction, the difficulty is compounded in a dual-domicile marriage. The Act specifically states that, except as provided otherwise in chapter 766, the enactment of chapter 766 does not alter the classification and ownership rights of property acquired before the determination date. Wis. Stat. § 766.31(8). Before May 3, 1988, the determination date was defined as the last to occur of marriage, 12:01 a.m. on the date of establishment of a marital domicile in Wisconsin, or 12:01 a.m. on the effective date of chapter 766 (January 1, 1986). Wis. Stat. § 766.01(5) (1985–86). Unless a marital domicile were established in Wisconsin, there would be no determination date for the spouses, and the classification and ownership rights of their property would not be altered by the Act.

Before passage of the 1988 Trailer Bill, it was unclear what precisely was meant by the statutory phrase "a marital domicile in this state." The Act did not define the term. The comment to UMPA section 1(5), on which section 766.01(5) is based, provided a clue. In relevant part it states the following:

> The Act will apply to those *couples* now domiciled in an adopting state as well as those who move to one in the future. It will also apply to couples who marry in an adopting state after the Act is in effect. The definition of "determination date" creates a flexible formula to establish for individual *couples* in these three separate configurations the specific date as of which the Act is in effect with respect to their property….

(Emphasis added). Implicit in the words "those couples now domiciled" or "those [couples] who move" is that both spouses either are domiciled, or establish domicile, in the state adopting the Act.

The linkage of the adjective "marital" with "domicile" in section 766.01(5) (1985–86) (and elsewhere in the Act) before May 3, 1988 also cannot be ignored. The word "marital" implies being of the marriage, mutual choice, and a single location. The statute did not refer to "establishment of domicile by a spouse" in Wisconsin or use any other configuration of words to intimate that the action of one spouse alone could trigger a determination date. Further, the Act was silent on the question whether one state or another would be the "deemed domicile" of choice when spouses reside in different states.

There was another view of the statutory language, however. This view held that if *either* spouse established a domicile in Wisconsin, then there must be a further inquiry as to whether that spouse intended to establish a marital domicile in this state. This view contended that the words "a marital domicile" may be synonymous with "the domicile of a spouse" if that spouse so intends. Proponents of this view argued that "*a* marital domicile" is not the same as "*the* marital domicile." Thus, when spouses resided in two states, Wisconsin and state A, they may have intended to have a single marital domicile in Wisconsin, a single marital domicile in state A, or separate marital domiciles in the states in which each resided. The result rested purely on their intent. Under this analysis, when one spouse established residence in Wisconsin, further inquiry would be necessary to determine whether Wisconsin was intended to be the marital domicile of one or both spouses. If the requisite intent were established, then a determination date would be triggered for purposes of the Act. The difficulty, of course, is that if only one spouse intended to have a marital domicile in Wisconsin, applying the Act to the property or obligations of that spouse alone might produce strange results, although there is no public policy that appears to prohibit the Wisconsin domiciliary spouse from making that choice. Presumably the Act could not apply to the spouse who resides in state A and intends to have his or her domicile there.

At least three possible determination date scenarios could result, depending on the interpretation of the words "establishment of a marital domicile in this state."

1. There is no determination date and the Act does not apply unless both spouses have or establish their domicile in Wisconsin. This interpretation of the statutory language seems to be the correct one, given the repeated use of the noun "couples" in the comment to UMPA section 1(5) and the use of the adjective "marital" to modify "domicile" in the statute itself.

2. There is a determination date and the Act applies to a spouse if that spouse has a domicile in Wisconsin. This alternative requires

interpreting the phrase "a marital domicile" as analogous to "the domicile of a spouse" if that spouse so intends. For reasons cited previously, this interpretation is not as persuasive as alternative 1 above. Adoption of this interpretation would subject the property of a spouse domiciled in Wisconsin to the Act, while the property of the nondomiciliary spouse would be subject to the property laws of the state where he or she resides. There would appear to be no obvious constitutional impediment to this view, however.

3. There is a determination date and the Act applies to both spouses even if only one spouse has a domicile in Wisconsin. In the case of a dual-domicile marriage, this interpretation would, in effect, make the Act a "long-arm" statute regarding the property of the nondomiciliary spouse and might not pass constitutional muster.

If alternative 1 is the appropriate rule for determining when the determination date occurs and the Act begins to apply, even more challenging problems exist for determining when it ceases to apply. No statute dealt with this subject; however, three additional scenarios can be envisaged:

4. The Act ceases to apply to both spouses as soon as one spouse is no longer domiciled in Wisconsin.

5. The Act ceases to apply to the property of one of the spouses when he or she establishes a domicile in a state other than Wisconsin, but it continues to apply to the property of the spouse who remains domiciled in Wisconsin.

6. The Act ceases to apply to the property of both spouses only when both spouses establish a domicile in a state other than Wisconsin.

If it is correct to conclude that the joint presence and intention of both spouses, that is, a mutual marital domicile as discussed in alternative 1, were required for a determination date to occur and the Act to apply, then it follows that when one or both spouses no longer have their domicile in Wisconsin, the Act would cease to apply to both. This interpretation is outlined in alternative 4. It appears constitutionally permissible for a court to adopt alternative 5 and determine that the Act applied to the property of a spouse who remains domiciled in Wisconsin after the other spouse established domicile in another jurisdiction, but such an interpretation is at odds with the determination date statute, which seemingly required both spouses to be domiciled in the state. Alternative 6, like alternative 3, may have constitutional infirmities to the extent it attempts to extend the property laws of the state of Wisconsin to income or assets acquired by a spouse domiciled in another state.

The language of the statute itself and the comment to UMPA section 1(5) support alternative 1 as the correct interpretation of the pre–May 3, 1988 version of section 766.01(5) (1985–86) for determining when the Act begins to apply, and logic dictates that alternative 4 is the proper parallel rule for determining when the Act ceases to apply. Nevertheless, these rules might produce unintended results at the death of a Wisconsin domiciliary spouse in a dual-domicile marriage before May 3, 1988. The then-existing versions of deferred marital property election in section 861.02 (1985–86) and the election against the augmented marital property estate in section 861.03 (1985–86), involving probate and nonprobate property respectively, applied only "at the death of a spouse whose marital domicile is in this state." As in section 766.01(5) (1985–86), the term *marital domicile* was not defined, although logically it should have the same meaning.

Assume that a married couple was domiciled in Iowa. After December 31, 1985, the husband moves to Wisconsin and commences employment and establishes domicile there. Meanwhile, the wife continues to live and work in Iowa. Assume further that this arrangement continues without the spouses obtaining a legal separation or divorce. The husband dies before May 3, 1988, leaving intangibles and real estate in Wisconsin. Clearly the husband is domiciled in Wisconsin for probate purposes. Because the husband has no "marital domicile" in Wisconsin under the rationale of alternative 1, neither the deferred marital property election statutes nor any other spousal election would be available to the wife with respect to the husband's estate if he chose to disinherit her. (The Wisconsin probate court could order spousal or family allowances for the wife and minor children under sections 861.31–.35, however.)

The same problem could occur under alternative 4. Assume, for example, that both spouses were domiciled in Wisconsin. After December 31, 1985, the husband moves and establishes domicile in Iowa and is employed there, while the wife remains domiciled in Wisconsin. Under alternative 4, the Act would not apply to these spouses. If the wife died before May 3, 1988, neither spouse would have a "marital domicile" in Wisconsin. If the wife chose to disinherit her husband, the deferred marital property elections of the versions of sections 861.02 and 861.03 then in effect would be unavailable, and the husband could not reach property in the hands of the decedent's personal representative or transferees that would have been marital property had both spouses continued their domicile in Wisconsin.

If the court adopted the view described in alternative 5, then the deceased Wisconsin spouse in the above example might be "a spouse whose marital domicile is in the state," and the deferred marital property election and the election against the augmented marital property estate might apply. However, the Wisconsin elective rights in all likelihood would not apply to the estate of the nondomiciliary spouse if he or she died first. Presumably, the Legislature did not contemplate these significant inconsistencies and problems with the definition of marital domicile during the formulation of the 1985 Trailer Bill.

b. After May 2, 1988 [§ 13.47]

The basic rule set forth in section 766.03 is that the Act first applies to spouses on their determination date, defined in section 766.01(5)(b) as the date after January 1, 1986, on which both spouses are domiciled in Wisconsin. Thereafter, the Act continues to apply to the spouses "during marriage," defined in section 766.01(8) as the period during which both spouses are domiciled in Wisconsin, beginning with the determination date and ending either at dissolution of the marriage or at the death of a spouse. The Act will cease to apply when one of the spouses is no longer domiciled in Wisconsin. However, the fact that one of the spouses changes domicile by itself does not affect any property right, interest, or remedy acquired under the Act by either spouse or by a third party. Wis. Stat. § 766.03(3).

Because the law was uncertain before the adoption of these provisions, section 766.03(5) contains a saving provision to the effect that any property right, interest, or remedy that a spouse or third party acquired on or after January 1, 1986, and before May 3, 1988 (the effective date of the new provisions), as well as the property available to satisfy an obligation incurred during that period, is not adversely affected by the provisions.

In addition, subsections 766.61(3)(a)2. and (c)2. provide time-apportionment formulas for determining the marital property and individual property components in certain life insurance policies when one spouse or both spouses become domiciled in another state. *See supra* §§ 2.168–.170.

A similar change in the formula for determining the marital property component in the deferred employment benefits of a spouse was adopted when section 766.62(1)(b) was amended by the 1988 Trailer Bill.

The 1988 Trailer Bill and 1998 Probate Code revision bill (1997 Wisconsin Act 188) also amended section 861.02 to make clear that a surviving spouse, regardless of domicile, may elect deferred marital property treatment of property owned by a spouse who dies domiciled in Wisconsin, including real property located in another jurisdiction.

2. General Rules Relating to Establishment of Domicile [§ 13.48]

The general rules of law relating to the establishment of a domicile of choice have long been recognized in Wisconsin and elsewhere. Every person has a domicile at all times, and no person may have more than one domicile at a time, at least for the same purpose. Restatement § 11; *see also Eaton v. Eaton (In re Will of Eaton)*, 186 Wis. 124, 133, 202 N.W. 309 (1925). A domicile of choice requires the concurrence of physical presence in a place and an intention to make that place home. Restatement §§ 15, 16, 18; *see also Lauterjung v. Ford (In re Estate of Ford)*, 14 Wis. 2d 324, 327, 111 N.W.2d 77 (1961); *Rosick v. Morey (In re Estate of Morey)*, 272 Wis. 79, 82–83, 74 N.W.2d 823 (1956); *Will of Eaton*, 186 Wis. at 133. An established domicile of choice continues until it is superseded by the spouses establishing a new domicile. Restatement § 19. Early Wisconsin cases such as *Lauterjung* and *Eaton* required total abandonment of the prior domicile before acquisition of a new one, but this requirement has been dropped in more recent decisions. *Oak Park Trust & Savings Bank v. Tressing (In re Estate of Tressing)*, 86 Wis. 2d 502, 510, 273 N.W.2d 271 (1979); *Daniels v. Draves (In re Estate of Daniels)*, 53 Wis. 2d 611, 619, 193 N.W.2d 847 (1972).

The Wisconsin Supreme Court has held that when spouses live together but own two homes in different states and move back and forth between them, the domicile of choice of the spouses will be determined by intention, and physical acts will be evidence of which residence the parties consider their permanent home. *Tressing*, 86 Wis. 2d at 510;

Daniels, 53 Wis. 2d at 619. *Daniels*, however, made clear that this rule is limited to situations in which the spouses live together, and that the rule does not address situations in which spouses live apart by mutual consent in domiciles in different states for at least part of the time. *Daniels*, 53 Wis. 2d at 614. The general rule in the latter situation is that spouses living apart can acquire separate domiciles of choice. *See* Restatement § 21 cmt. d; *Green v. Commissioner of Corps. & Taxation*, 305 N.E.2d 92 (Mass. 1973).

The principles discussed above no doubt will be useful in determining whether a marital domicile has been established for purposes of the Act. Except in a minority of cases, it is unlikely that most married couples will formally express any intent concerning their marital domicile, with, for example, a written document or marriage agreement.

3. Dual Domicile Considerations [§ 13.49]

When spouses reside in different states, the same property interests may be characterized differently under the laws of the two states. This is most likely to pose problems at death or divorce; however, it might also create complications for Wisconsin income tax purposes if one spouse is not domiciled in Wisconsin for the entire tax year. *See* Wis. Stat. § 71.10(6)(d) (discussed at § 9.36, *supra*).

In the few cases to consider the issue, the courts have held that income and assets acquired with earnings are characterized according to the law of the jurisdiction where earned or acquired, even though the domicile of the spouses is elsewhere. *Mounsey v. Stahl*, 306 P.2d 258 (N.M. 1956), involved the characterization of a mineral interest located in New Mexico as community property or separate property. The spouses had their marital domicile in New York, and the husband conducted an oil and gas business with offices in New York and Texas. Absent a showing that the mineral interest in question was acquired with the husband's separate earnings generated in New York and not his community property earnings generated in Texas, the mineral interest was presumed under New Mexico law to be community property. *See also Trapp v. United States*, 177 F.2d 1 (10th Cir. 1949); *Hammonds v. Commissioner*, 106 F.2d 420 (10th Cir. 1939).

A second case, *Lane-Burslem v. Commissioner*, 659 F.2d 209 (D.C. Cir. 1981), involved spouses who claimed marital domicile in Louisiana but resided and worked in England. The wife previously had been a Louisiana resident and intended to return there with her husband, a British citizen. The question was whether the wife could attribute one-half her earnings to her nonresident, alien husband as community income and thereby escape income tax on that portion. The court held that under the provisions of the Louisiana Civil Code then in effect, a nonresident spouse's community interest in the domiciliary spouse's property would be limited solely to property acquired in Louisiana. Applying a significant-relationship test, the court determined that the United Kingdom had the most significant relationship to the income; under English law, the income was the wife's separate property, not community property. And, in *Commissioner v. Cavanagh*, 125 F.2d 366 (9th Cir. 1942), in which the husband was domiciled in California and the wife in Canada, the court said that the husband was subject to income tax on only one-half his income because "the wife's interest in her husband's income [is] determined by the law of domicile where earned and not by the law of matrimonial domicile." *Id*. at 368.

However, in *Payne v. Commissioner*, 141 F.2d 398 (5th Cir. 1944), the court held that separate marital domiciles would not be recognized even if the spouses were separated. The wife resided and earned income in Texas, and the husband resided in Ohio. In determining that all the wife's Texas earnings were taxable to her, the court applied Texas conflict-of-laws rules that resolved the issue on the basis of marital domicile. Under the common law rule, marital domicile is the husband's place of residence, and thus the wife's earnings were characterized as separate property under Ohio law, rather than as community property under Texas law.

The above cases that look to the jurisdiction where income is earned appear to be consistent with the position taken in Restatement section 258, comment c, which states the following:

> When the spouses have separate domicils at the time of the acquisition of the movable, the local law of the state where the spouse who acquired the movable was domiciled at the time will be applied, in the absence of an effective choice of laws by the parties, to determine the extent of the other spouse's marital interest therein.

On the other hand, the Court of Appeals of Arizona in *Martin v. Martin*, 752 P.2d 1026 (Ariz. Ct. App. 1986), *modified in part*, 752 P.2d 1038 (Ariz. 1988), cited reasons of judicial economy and uniformity of result in applying its quasi-community property law to the assets of both parties, even though one spouse resided in California at the time of the divorce. A conflict-of-laws issue arose because the California spouse had significant postseparation earnings there. Such earnings are treated as the separate property of the earning spouse under California law, whereas they are treated as community property under Arizona law. In applying Arizona law to both parties, the court characterized the rule of Restatement section 258 as "anachronistic" and "unworkable in modern mobile America," 752 P.2d at 1031 (citation omitted), because a trial court may find itself forced to apply various rules of state property law to different marital assets depending on where each spouse was domiciled when the particular asset was acquired. *See also Ismail v. Ismail*, 702 S.W.2d 216, 222 (Tex. App. 1985).

For further analysis of the complex issues involved when spouses have separate domiciles, see *Lintner*, *Marital Property Rights and Conflict of Laws When Spouses Reside in Different States*, 11 Comm. Prop. J. 283 (1984). In examining the various conflict-of-laws theories applicable to these problems, Lintner comments on the choice-influencing considerations approach followed in Wisconsin:

> As applied to the rights of one spouse in the marital property of the other domiciled in a different state, the most relevant considerations would be predictability of results, simplification of the judicial task, and application of the "better rule of law". As noted above, choosing one marital property system and applying it to all of the couple's property would result in greater predictability and a simplification of the complex job of dividing up the couple's property. Application of the "better rule of law" implies a subjective decision that could obstruct the goal of assuring predictable results. The consideration could be construed, however, to mean reaching the most equitable result.

Id. at 298.

The following example illustrates some of the potential property-related pitfalls of a dual-domicile marriage in which spouses are essentially estranged but not divorced.

➢ ***Example.*** The spouses maintain separate domiciles, the wife living in Wisconsin and the husband in Michigan. The husband owns real estate in Michigan, along with personal property investments titled in his name. All the personal property of the spouses was acquired from earnings after their marriage except for the Michigan real estate, which was inherited. The husband dies. His will disinherits the wife.

What are the rights of the parties in this situation? The wife could file an election to take against the will under sections 700.2201–.2206 of the Michigan Statutes (current through P.A. 2010, No. 57, of the 2010 Regular Session, 95th Legislature) and thereby be entitled to a fractional share of the estate of the husband, including the Michigan real estate. The Michigan personal representative, by way of set-off, might seek to apply half the property titled in the wife's name against this statutory share on the ground that it represents the husband's share of Wisconsin marital property. Alternatively, the wife might ask the probate court in Michigan to determine that part of the husband's estate was marital property and to award her half. Again, half the assets in her name probably would be available to the personal representative as a set-off against any assets of the husband awarded to her. The Michigan courts would be most unlikely to entertain this action with respect to the Michigan real estate, because the real estate would not be treated as marital property even under Wisconsin law; they might also dismiss the action as to personal property accumulated by the husband while he was residing in Michigan.

Similar problems could occur if spouses decide to divorce after a lengthy separation during which they have accumulated property in two jurisdictions. If the other state has an equitable property-division statute similar to Wisconsin's, the fact that property is located in different jurisdictions and has different characteristics under the laws of each should not prove to be a major problem. It is likely that the difficulties that may occur at death will be avoided in a divorce because of the exclusion of inheritances and gifts from the divorce property division.

In the area of creditors' rights, the result may depend on where the suit is brought. Among the possible conflict-of-laws issues are the characterization of the spouses' mutual obligations of support, the existence of a doctrine of necessaries, the characterization of the debt that was incurred, and the characterization of earnings and property acquired by the spouse domiciled in Wisconsin and by the spouse domiciled elsewhere for purposes of debt satisfaction. In these cases, it is likely that the grouping-of-contacts analytical framework of Restatement section 188 (discussed at section 13.6, *supra*) will be used to reach a decision. Nonetheless, the decision-making process will involve difficult issues. *See supra* § 13.17.

H. Special Choice-of-laws Problems Involving Tort Causes of Action and Recoveries [§ 13.50]

In tort cases, Wisconsin follows the choice-influencing considerations approach of *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967) and concurrently applies the grouping-of-contacts approach of Restatement section 188 in contract cases. *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978); *see supra* §§ 13.4–.6. The multijurisdictional implications of personal injury cases pose some of the most difficult choice-of-laws questions. The residences of the plaintiff and defendant, the place where the injury occurred, the place where the conduct occurred, and the place where an insurance contract was written and delivered may all be in different states. In resolving which law to apply to various aspects of such a complex transaction, the courts in Wisconsin can be expected to use the approach outlined at sections 13.4–.6, *supra*.

A cause of action itself, however, is a species of property. In *Jaeger v. Jaeger*, 262 Wis. 14, 53 N.W.2d 740 (1952), the Wisconsin Supreme Court ruled that a wife's cause of action that accrued while the spouses were temporarily in Arizona was not classified as Arizona community property. The spouses were domiciled in Wisconsin and had an accident while traveling through Arizona. The wife sued her husband in Wisconsin for damages as the result of injuries sustained. In an apparent effort to bar the wife's suit against the husband, the defense was raised that the cause of action was community property. This theory assumed that damages become the community property of both spouses under Arizona law; that the husband has rights with respect to such property and must be a party to the suit; and that the husband's negligence is imputed to the wife, so that she cannot recover for injuries caused by that negligence. The court held that the law of the matrimonial domicile (Wisconsin) governed the characterization of the spouses' respective rights in the cause of action and that under Wisconsin law the cause of action was the wife's sole property.

Section 766.31(7)(f) deals with recoveries for personal injury and not causes of action as such. It creates a bifurcated treatment for such recoveries. The recovery is the individual property of the injured spouse, except for the portion attributable to expenses paid from marital property and amounts attributable to loss of income during marriage, which are marital property. Under *Jaeger*, the Wisconsin courts will no doubt apply the statutory rules to recoveries received by spouses domiciled in Wisconsin from causes of action arising after the determination date in another state.

A more difficult question is how to determine the property-law classification of a cause of action that accrues to a spouse in another state after marriage but *before* the determination date, that is, before the spouses establish domicile in Wisconsin. Assume that the law of the other jurisdiction confers a vested property right in a cause of action solely in the injured party, including the right to recover lost income now and in the future. Because earnings are characterized as the sole property of the injured spouse under the laws of the other state, the classification of that part of the recovery as marital property under section 766.31(7)(f) conflicts with section 766.31(8), which purports to preserve the classification and ownership of predetermination date property. The former nonresident may cite *Jaeger v. Jaeger*, 262 Wis. 14, 53 N.W.2d 740 (1952), for the proposition that the law of the former marital domicile determines the classification of the cause of action. Once accrued, the cause of action and any recovery based on it are characterized as the solely owned property of the injured party under the laws of the former marital domicile. Section 766.31(8) recognizes that characterization. The attempted ex post facto classification of part of the *recovery* on the cause of action as marital property by section 766.31(7)(f) is thus problematic. The issue seems equally unclear with respect to causes of action that accrue before marriage to an injured party domiciled elsewhere who subsequently marries and moves to Wisconsin or who moves to Wisconsin and marries.

However, if an injured spouse dies after the spouses establish a marital domicile in Wisconsin, the augmented deferred marital property election of section 861.02 would apply to that portion of the recovery that would have been marital property if the recovery had occurred after the determination date. This follows because the portion of the recovery attributable to loss of income during marriage would have been marital property if the Act had applied to the spouses from the inception of their marriage.

IV. Uniform Disposition of Community Property Rights at Death Act [§ 13.51]

UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTIETH YEAR
AT VAIL, COLORADO

AUGUST 21–28, 1971

WITH
PREFATORY NOTE AND COMMENTS

APPROVED BY THE AMERICAN BAR ASSOCIATION AT ITS MEETING AT NEW ORLEANS, LOUISIANA, FEBRUARY 7, 1972

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UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT

PREFATORY NOTE

Frequently spouses, who have been domiciled in a jurisdiction which has a type of community property regime, move to a jurisdiction which has no such system of marital rights. As a matter of policy, and probably as a matter of constitutional law, the move should not be deemed (in and of itself) to deprive the spouses of any preexisting property rights. A common law state may, of course, prescribe the *dispositive* rights of its domiciliaries both as to personal property and real property located in the state. California's development of its "quasi-community property" laws illustrates the distinction.

The common law states, as contrasted to California, have not developed a statutory pattern for disposition of estates consisting of *both separate* property of spouses and property which was community property (or derived from community property) in which both spouses have an interest. In these states there have been relatively few reported cases (although the number has been increasing in recent years); the decisions to date show no consistent pattern and the increasing importance of the questions posed suggests the desirability of uniform legislation to minimize potential litigation and to facilitate the planning of estates.

This Act has a very limited scope. If enacted by a common law state, it will only define the dispositive rights, at death, of a married person as to his interests at death in property "subject to the Act" and is limited to real property, located in the enacting state, and personal property of a person domiciled in the enacting state. The purpose of the Act is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their "community" rights. It thus follows the typical pattern of community property which permits the deceased spouse to dispose of "his half" of the community property, while confirming the title of the surviving spouse in "her half."

It is intended to have no effect on the rights of creditors who became such before the death of a spouse; neither does it affect the rights of spouses or other persons prior to the death of a spouse. While problems may arise prior to the death of a spouse they are believed to be of relatively less importance than the delineation of dispositive rights (and the correlative effect on planning of estates). The prescription of uniform treatment in other contexts poses somewhat greater difficulties; thus this Act is designed solely to cover dispositive rights at death, as an initial step.

The key operative section of the Act is Section 3 which sets forth the dispositive rights in that property defined in Section 1, which is subject to the Act. Section 2 follows Section 1's definition of covered property and is designed to provide aid, through a limited number of rebuttable presumptions, in determining whether property is subject to the Act.

No negative implications were intended to be raised by lack of inclusion of other presumptions in Section 2; areas not covered were simply left to the normal process of ascertainment of rights in property.

The first three sections form the heart of the Act; the succeeding sections might almost be described as precatory and have been added to clarify situations which would probably follow from the first three sections but which might raise questions. Thus, Section 8 makes it clear that nothing in the Act prevents the spouses from severing any interest in community property or creating any other form of ownership of property during their joint lives; and, such action on their part will effectively remove any property from classification as property subject to this Act. Similarly, Section 9 makes it clear that the Act confers no rights upon a spouse where, by virtue of the property interests existing during the joint lives of the spouses, that spouse had no right to dispose of such property at death. By way of illustration, in at least one community property jurisdiction, the wife has no right to dispose of any part of the community property if she predeceases her husband. If the law of that jurisdiction is construed so as to treat this as a rule of property, then the move to the common law state should not alter the "property interest" of the spouses by conferring a right on the wife which she did not previously possess. On the other hand, if the provision is treated as simply establishing a pattern of dispositive rights on death of a wife who predeceases her husband, rather than a property right, the common law state of new domicile could prescribe an alternative pattern of dispositive rights. The Act does not resolve this question; rather it simply makes clear that it does not affect existing "property rights," leaving to the courts the interpretation of the effect of the community property state's law.

UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT

SECTION 1. [*Application*.] This Act applies to the disposition at death of the following property acquired by a married person:

(1) all personal property, wherever situated:

(i) which was acquired as or became, and remained, community property under the laws of another jurisdiction; or,

(ii) all or the proportionate part of that property acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, that community property; or

(iii) traceable to that community property;

(2) all or the proportionate part of any real property situated in this state which was acquired with the rents, issues or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property.

COMMENT

This section defines property subject to the Act.

Subsection (1): Personal Property

Subsection (1) is designed to cover all personal property which was acquired while the spouses were domiciled in a community property state, to the extent that it would have been treated as community property by that state at the time of acquisition and that no further action terminated the community character of the property. It also includes any property which was not originally community property but became such by agreement and, further, brings within the Act any personal property which can be traced back to a community source. Again, the Act only applies if there was no severance of the community interests [Section 8]. [While Section 3 applies to the dispositive rights of persons domiciled in the enacting state, the Act, as a practical matter, may be effective as to property located outside the state only to the extent that the state of the situs of the property is willing to recognize the policy of the domiciliary state.]

- ***Example 1.*** H and W, while domiciled in California, purchased 100 shares each of A Co., B Co. and C Co. stock with community property (earnings of H). H and W were transferred to a common law state which had not enacted this Act; while domiciled there H sold the 100 shares of A stock and with the proceeds purchased 100 shares of D stock. Subsequently H and W became domiciled in Michigan which had enacted this Act; H sold the B stock and 50 shares of D Co. stock and purchased 150 shares of E stock. H died domiciled in Michigan with 100 shares of C Co., 50 shares of D Co. and 150 shares of E Co. stock; all of the stock had always been registered in H's name. All of the shares, traceable to community property or the proceeds therefrom, constitute property subject to this Act.

Subsection (2): Real Property

Subsection (2) deals with real property and is confined to real property located within the enacting state (since presumably the law of the situs of the property will govern dispositive rights). The policy and operation of this subsection are intended to be the same as those set forth in subsection (1).

- ***Example 2.*** H and W, while domiciled in California, purchased a residence in California. They retained the residence in California when they were transferred to Wisconsin. After becoming domiciled in Wisconsin they used community funds, drawn from a bank account in California, to purchase a Wisconsin cottage. H and W subsequently became domiciled in Michigan; they then purchased a condominium in Michigan for $20,000 using $15,000 of community property funds drawn from their bank account in California and $5,000 earned by H after the move to Michigan. H died domiciled in Michigan; title to all of the real property was in H's name. Assuming Michigan had enacted this Act, three-fourths of the Michigan condominium would be property subject to this Act; the Michigan statute would not, however, apply to either the Wisconsin or California real estate. If Wisconsin had enacted this Act, the Wisconsin statute would apply to the Wisconsin cottage.

Subsections (1) and (2): Apportionment

In both subsections (1) and (2) an apportionment is required by the phrase "all or the proportionate part" where personal property, or real property situated in the enacting state, has been acquired partly with property described as subject to the Act and partly with other (separate) property. To put it succinctly, the phrase represents a condensation of an area covered by many pages in a prior draft and is simply a statement of policy; it leaves to the courts the difficult task of working out the precise interest which will be treated as the "proportionate part" of the property subject to the dispositive formula of Section 3. Simply by way of illustration, assume that a single man (domiciled in a community property state) purchased a life insurance policy with a face amount of $100,000 and an annual premium of $1,000. Assume further that he paid three premiums and then entered into marriage. Further assume that the next seven premiums were paid with his earnings while domiciled in the community property state and that he and his wife then moved to a common law state where the next ten premiums were paid from his earnings in that common law state; he then died after the payment of the twenty premiums. Under one interpretation of the law of Texas the contract would remain the separate property of the insured; the community would have a claim for community funds advanced to pay premiums and, ignoring interest, it would appear that $7,000 of the proceeds would be treated as community property and the remaining $93,000 would be treated as the separate property of the deceased spouse. On the other hand, a state like California would probably treat the proceeds as being 65% separate and 35% community (basing the allocation of proceeds upon the percentage of separate and community funds contributed). Further variations could be mentioned. The illustration is one of the simpler problems. Much more difficult problems are encountered where benefits under a qualified pension and profit-sharing plan are involved and the employee has been domiciled in both community property and common law jurisdictions during the period in which benefits have accrued. Attempts at defining the various types of situations which could arise and the varying approaches which could be taken, depending upon the state, suggest that the matter simply be left to court decision as to what portion would, under applicable choice of law rules, be treated as community property. The principle suggested is that at least a portion should be treated as community, if the appropriate law so treated it. Ordinarily, such questions should not arise if the problem is foreseen and effective planning takes place prior to death of a spouse.

SECTION 2. [*Rebuttable Presumptions*.] In determining whether this Act applies to specific property the following rebuttable presumptions apply:

(1) property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as or to have become, and remained, property to which this Act applies; and

(2) real property situated in this State and personal property wherever situated acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship, is presumed not to be property to which this Act applies.

COMMENT

The purposes of the rebuttable presumptions are simply to assist a court in applying the definitions in Section 1, through a process of tracing the property to a community property origin.

Subsection (1)

Subsection (1) of Section 2 deals with property acquired by the spouses while domiciled in a community property state. It thus provides that if one of the spouses acquired property while so domiciled, such property is “presumed” (a rebuttable presumption) to have been and remained community. It may be shown, of course, that such property was the separate property of the spouse and the law of the state of domicile may furnish the rule. For example the law of community domicile may provide the rule that property acquired in the name of the wife shall be deemed to be her separate property or that a particular subsequent act effectively severed the community property interests.

> ➢ ***Example 1.*** H, married to W and domiciled in California, acquired stock; later H and W became domiciled in Michigan. Such property, if retained, is presumed to be property subject to this Act. By operation of Section 1 the proceeds of sale or exchange of such stock, and property acquired with the proceeds or income of such stock, would be deemed subject to the Act. If, however, upon the death of H, H's personal representative rebutted the presumption by evidence that the stock was acquired by H with his separate property (or by inheritance) neither the stock nor property acquired with that property or the income therefrom (unless the income itself would be subject to the Act because, under the applicable law, income from separate property is deemed to be community property) would be subject to this Act. Similarly the presumption may be rebutted by showing that such property, though originally community property, was effectively severed by an act of the spouses. It should be emphasized that the presumption is simply one of procedural convenience and neither changes the nature of the property interests nor prevents an interested person from showing the separate nature of the property.

Subsection (2)

Subsection (2) sets up a rebuttable presumption that where a domiciliary of a *common law* state acquired property in such form as to indicate that title was in joint tenancy, tenancy by the entireties, or some other form of joint ownership with right of survivorship, it will be presumed that the property is not subject to the Act. This presumption was deemed appropriate as expressing the normal expectations of the spouses and to facilitate ascertainment of title to real property located in the enacting state, as well as personal property wherever located.

> ➢ ***Example 2.*** John and Mary Jones, formerly domiciled in California, became domiciled in Illinois and purchased a residence, taking title in the names of "John and Mary Jones as joint tenants, and not as tenants in common, with right of survivorship." Regardless of the source of the funds, the Illinois residence would be presumed to be held in joint tenancy and not subject to this Act.

SECTION 3. [*Disposition upon Death.*] Upon death of a married person, one-half of the property to which this Act applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this State.

One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this State. With respect to property to which this Act applies, the one-half of the property which is the property of the decedent is not subject to the surviving spouse's right to elect against the will [and no estate of dower or curtesy exists in the property of the decedent].

COMMENT

This section deals with the dispositive rights, at death, of (1) a married person domiciled in the enacting state as to personal property and (2) of any married person, including a nondomiciliary of the enacting state, as to real property located in the enacting state; it also sets forth rules for intestate succession to property subject to this Act.

Testate Disposition

The dispositive pattern is the usual one encountered in the community property states; the deceased spouse may dispose of his one-half of the community property, subject to the provisions of Section 9.

- ***Example.*** H and W were formerly domiciled in California and are now domiciled in Michigan. All of their property was community property prior to the move from California to Michigan. At H's death he held title to a home in Michigan which had been purchased with the proceeds of the sale of a home in California which had been community property. Stock acquired as community property in California was held in his name in safety deposit boxes located in Illinois and Michigan. H and W had acquired a cottage in California as community property, held in H's name, and it was so held at the time of his death. H and W acquired a Michigan resort condominium, taking title as tenants by the entireties. H acquired bonds issued by his employer with earnings in Michigan and held title in his own name.

The Michigan residence and the stock would be deemed property subject to this Act and H would have the right under Section 3 to dispose of half of that property by his will. The remaining property would not be deemed subject to this Act.

Intestate Succession

If the property subject to this Act passes by intestate succession, the law of the enacting state applies to the decedent's one-half, again subject to Section 9. If under the law of the enacting state, a surviving spouse is entitled to one-third of the decedent's property by intestate succession, the result of the Act is to give to her two-thirds of the property subject to the Act. For example, if the spouses had recently moved to a common law state and owned $300,000 of property (all being personal property held in the husband's name and acquired as community property), the wife would be entitled to one-half of the property ($150,000) and would receive a 1/3 share of the husband's half ($50,000) for a total of $200,000. It is clearly within the power of the enacting state to prescribe any pattern of intestate succession deemed appropriate, and views may differ. In some community property states, the surviving spouse receives all of the decedent's community property upon intestate succession; in another, she would receive none. Similarly, the common law state may alter the pattern to fit its own policy determination.

Dower, Curtesy, Elective Share

Dower and curtesy do not exist in community property and have been abolished in many common law states; policy considerations suggest that no such interest should exist in property subject to this Act, since the surviving spouse already has a one-half interest in such property. Similar reasons suggest a denial of any right in the surviving spouse to elect a statutory share in the one-half of the property over which the decedent had a power of disposition.

SECTION 4. [*Perfection of Title of Surviving Spouse*.] If the title to any property to which this Act applies was held by the decedent at the time of death, title of the surviving spouse maybe perfected by an order of the [court] or by execution of an instrument by the personal representative or the heirs or devisees of the decedent with the approval of the [court]. Neither the personal representative nor the court in which the decedent's estate is being administered has a duty to discover or attempt to discover whether property held by the decedent is property to which this Act applies, unless a written demand is made by the surviving spouse or the spouse's successor in interest.

COMMENT

This section simply provides for perfection of title interests of the surviving spouse (e.g. where title was in the name of the deceased spouse) by orders of the court of appropriate jurisdiction (e.g. the probate court) in the enacting state. This section is designed to eliminate any liability of the personal representative for a breach of his fiduciary duty by failing to search for or to discover whether property held by the decedent is property defined in Section 1, unless a written demand is made by the surviving spouse or the spouse's successor in interest. In several states the Court administering a decedent's estate has a duty or undertakes to advise parties in interest of their legal and equitable rights, and this section is similarly designed to eliminate such Court's liability for failing to discover the community rights and to advise the interested party of his rights. Nothing contained in this section is to be construed to interfere with the Court's jurisdiction in a proper proceeding to perfect the title of the surviving spouse in and to property to which this Act applies.

SECTION 5. [*Perfection of Title of Personal Representative, Heir or Devisee*.] If the title to any property to which this Act applies is held by the surviving spouse at the time of the decedent's death, the personal representative or an heir or devisee of the decedent may institute an action to perfect title to the property. The personal representative has no fiduciary duty to discover or attempt to discover whether any property held by the surviving spouse is property to which this Act applies, unless a written demand is made by an heir, devisee, or creditor of the decedent.

COMMENT

This section is a corollary to Section 4. Since title is apparently in the surviving spouse, the section simply provides for an action by the personal representative, heirs, or devisees and is again designed to eliminate any liability of the personal representative for a breach of his fiduciary duty by failing to discover or to attempt to discover whether property held by the surviving spouse is property subject to this Act, absent a written demand by an heir, devisee or creditor of the decedent.

SECTION 6. [*Purchaser for Value or Lender*.](a) If a surviving spouse has apparent title to property to which this Act applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the personal representative or an heir or devisee of the decedent.

(b) If a personal representative or an heir or devisee of the decedent has apparent title to property to which this Act applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the surviving spouse.

(c) A purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.

(d) The proceeds of a sale or creation of a security interest shall be treated in the same manner as the property transferred to the purchaser for value or a lender.

COMMENT

This section is designed to protect purchasers and lenders taking a security interest, who acquire such interest for value, after the death of the decedent, from a person who appears to have title to property to which this Act applies. The only requirement is that the purchaser or lender have acquired his interest for value; there is no requirement of good faith absence of notice. The purpose of the section is to permit reliance upon apparent title and facilitate both ascertainment of title and disposition of assets where adequate consideration is paid. Since, during the joint lives of the spouses, the spouse with apparent title would have been able to convey title (at least as to community property) though being held accountable to the other spouse for an appropriate allocation of the proceeds or any breach of fiduciary obligation, the Act simply extends this treatment to disposition of the assets after the death of a spouse.

SECTION 7. [*Creditor's Rights*.] This Act does not affect rights of creditors with respect to property to which this Act applies.

SECTION 8. [*Acts of Married Persons*.] This Act does not prevent married persons from severing or altering their interests in property to which this Act applies.

COMMENT

The rights, and procedures, with respect to severance of community property vary markedly among the community property states. The Act simply makes clear that nothing in the Act itself in any way limits the rights of the spouses to sever community property or to create a form of ownership not subject to this Act.

SECTION 9. [*Limitations on Testamentary Disposition*.] This Act does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.

SECTION 10. [*Uniformity of Application and Construction*.] This Act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

SECTION 11. [*Short Title*.] This Act may be cited as the Uniform Disposition of Community Property Rights at Death Act.

SECTION 12. [*Repeal and Effective Date*.] The following acts and laws are repealed as of the effective date of this Act:

(1)

(2)

SECTION 13. [*Time of Taking Effect*.] This Act shall take effect….

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14

Ethical Considerations

As a result of circumstances beyond the publisher's control, the revision of chapter 14 has been delayed. What follows is the chapter and supplement as it appeared in the previous edition. The State Bar of Wisconsin will provide, at no additional charge, the revised chapter to all book owners when it becomes available. If you have any questions, please contact the State Bar at 800-728-7788.

14

Ethical Considerations

I. [§ 14.1] Scope of Chapter

This chapter addresses the factors that a lawyer should consider when deciding whether the joint representation of spouses is appropriate and ethical in various situations, including estate planning, drafting marital property agreements, advising spouses in credit transactions, probate, and divorce. The chapter also includes sample letters advising spouses of possible conflicts of interest when a lawyer represents both of them jointly.

This chapter approaches its topic by first laying out the basic policy issues underlying the ethical rules applicable in the marital property context and suggesting various factors relevant to the application of those rules (see sections 14.2–.5, *infra*). Next, the chapter examines the ethics rules of primary importance in marital property law (see sections 14.6–.14, *infra*) and then switches focus to the aspects of marital property law of primary importance in an analysis of the ethics of joint representation (see sections 14.15–.23, *infra*). Next the chapter reviews common examples of the interaction of ethics law with marital property law (see sections 14.24–.34, *infra*). Finally, the chapter provides some sample engagement letters (see sections 14.35–.36, *infra*).

II. [§ 14.2] General Approach to Representing One or Both Spouses

A. [§ 14.3] General Considerations

Advising spouses who live under a community property regime such as the one established by the Wisconsin Marital Property Act[1] requires a lawyer to be alert to more and often different ethical concerns than does advising spouses who live under a common law regime. The primary source of the additional ethical concerns is the nature of community property (or Wisconsin marital property) itself. *See infra* § 14.15.

The ethical problems raised by the Wisconsin Marital Property Act primarily involve the following: (1) each spouse's right and need to have independent legal advice, and the lawyer's corresponding duty of undivided loyalty without conflicts of interest; (2) a spouse's interest in consulting freely and confidentially with his or her lawyer, and the lawyer's corresponding duty to preserve client confidences; and (3) a lawyer's need to promote client and public confidence in the integrity of the legal system and to avoid the appearance of impropriety. *See infra* § 14.14.

Any consideration of the professional ethics involved in serving clients relative to marital property must be based first on an understanding of the relevant provisions of the Rules of Professional Conduct for Attorneys and

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[1] 1983 Wis. Act 186 [hereinafter the Act or the Wisconsin Marital Property Act], *reprinted infra* the Appendix. The bulk of the Wisconsin Marital Property Act is codified as amended at chapter 766 of the Wisconsin Statutes, *reprinted infra* the Appendix. Textual references to the Wisconsin Statutes are hereinafter indicated as 'chapter xxx' or 'section xxx.xx,' without the designation "of the Wisconsin Statutes." Unless otherwise indicated, all references to the Wisconsin Statutes are to the 2001–02 Wisconsin Statutes, as affected by acts through 2003 Wisconsin Act 38.

their application. Wisconsin has adopted,[2] with some modifications, the American Bar Association Model Rules of Professional Conduct,[3] effective January 1, 1988. The Rules of Professional Conduct for Attorneys adopted in Wisconsin constitute chapter 20 of the Wisconsin Supreme Court Rules.[4]

Whether one lawyer may represent both spouses (or, more generally, more than one person) in estate planning, estate and trust administration, and related matters has received the attention of interested professional groups, among them the Special Study Committee on Professional Responsibility of the ABA Section of Real Property, Probate and Trust Law and the American College of Trust and Estate Counsel.[5] Members of these groups, among others, have asserted that the applicable ethical rules should permit a lawyer, when not acting as an advocate, to act in a joint representation capacity in advising spouses in estate planning and similar circumstances. Further, some members have asserted that the ABA Model Rules of Professional Conduct (especially the conflict-of-interest rules) do not adequately address clients' needs and interests in these situations.[6]

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[2] Wis. Sup. Ct. Order, June 10, 1987, 139 Wis. 2d xiii (1987) [hereinafter "Rules of Professional Conduct for Attorneys"].

[3] Model Rules of Professional Conduct (1983) [hereinafter ABA model rules or model rules].

[4] Rules of Professional Conduct for Attorneys, SCR ch. 20 (1988) [references to individual rules are hereinafter indicated as SCR 20:x.x].

[5] Am. Bar Ass'n, *Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, *reprinted in* 28 Real Prop. Prob. & Tr. J. 765 (Winter 1994) [hereinafter *Representing Husband and Wife*]; *ACTEC Commentaries*, *infra*, note 10; *see also Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 Real Prop. Prob. & Tr. J. 1 (1987) [hereinafter Developments] (regarding American Bar Association); Jackson M. Bruce, Jr., *Ethics in Estate Planning and Estate Administration*, 15 Prob. Notes 118 (1989) (published by the American College of Probate Counsel, now American College of Trust and Estate Counsel).

[6] *See infra* § 14.4 (quoting introduction to third edition of the ACTEC Commentaries, *supra* note 10). For further discussion regarding the application of the ABA Model Rules of Professional Conduct in the estate planning context, see John R. Price, *Ethics in Action, Not Ethics Inaction: The ACTEC Commentaries on the Model Rules of Professional Conduct*, 29 *The Annual Phillip E. Heckerling Institute on Estate Planning* ch. 7 (1995); Jeffrey N. Pennell, *Ethics, Professionalism and Malpractice Issues in Estate Planning and Administration*, C126

B. [§ 14.4] Independent, Joint and Separate Representation

It will be useful to distinguish three potential modes of representing spouses with respect to their property interests. As used in this chapter:

- *Independent representation* refers to the representation of husband and wife independently, by different lawyers.
- *Joint representation* (sometimes called *dual representation*) refers to the common representation of husband and wife as joint (as opposed to separate) clients.
- *Separate representation* refers to the common representation of husband and wife as separate clients of the same attorney. As discussed below, separate representation is problematic and unusual.

1. *Independent Representation.* The "easy solution" to a number of the ethical concerns involving marital property is simply to avoid them by requiring that each spouse obtain independent legal advice. This solution requires at least one additional attorney and sometimes two additional attorneys, if the attorney who originally represented one or both of the spouses can no longer ethically serve them. Independent representation also eliminates most, if not all, of the ethical issues unique to marital property law. However, the easy solution may be unwise, as well as inefficient, for a number of reasons: higher costs, increased complications and delays, and possibly more disputes. In fact, the New York Court of Appeals has stated that, in appropriate cases, the parties have an "absolute

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ALI-ABA 67 (June 18, 1995); Randall W. Roth, *Current Ethical Problems in Estate Planning*, C992 ALI-ABA 439 (Feb. 23, 1995); Bruce S. Ross, *How to Do Right by Not Doing Wrong: Legal Malpractice and Ethical Considerations in Estate Planning and Administration*, 28 *The Annual Phillip E. Heckerling Institute on Estate Planning* ch. 8 (1994); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 Fordham L. Rev. 1253 (1994); Louis A. Mezzullo, *Ethics for Estate Planners*, C960 ALI-ABA 65 (Oct. 26, 1994); Robert L. Manley, *The Impact of Ethical Rules on Estate Planning*, C966 ALI-ABA 371 (July 22, 1994); Hazard, *supra* note 13; Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1993); Jeffrey N. Pennell, *Professional Responsibility: Reforms Are Needed to Accommodate Estate Planning and Family Counselling*, 25 *The Annual Phillip E. Heckerling Institute on Estate Planning* ch. 18 (1991), (especially paragraph 1803); Gerald P. Johnston, *Avoiding Malpractice Liability in the Estate Planning Context*, U. S. Cal. 1991 Inst. on Fed. Tax., ch. 17 (1991) (especially section 1705).

right" to be represented by the same attorney. *Levine v. Levine*, 436 N.E.2d 476, 479 (N.Y. 1982).

2. *Joint Representation.* The principles of legal ethics recognize the efficacy of joint representation in proper cases. As one commentator has written, "There are, however, not infrequently cases in which it is highly desirable and to the advantage of everyone concerned that the same lawyer should, at the desire of both parties, represent them both."[7]

When independent representation is unnecessarily recommended or insisted on by an attorney, the public may be justified in concluding that the lawyers are making matters more complicated than necessary and "feathering their own nests." Such a perception hardly promotes public confidence in the integrity of the legal system and the efficiency of the legal profession.[8]

In addition, the independent representation solution may be contrary to the bar's arguable duty to make legal services available to the public at a reasonable cost.[9] An attorney's ethical responsibilities to his or her client include the duty to provide services and representation competently, efficiently, and economically.

The trend in the law governing lawyers seems to support the position of this chapter that efficiency and economy remain proper considerations in rendering legal services and are relevant to ethical considerations, if in the client's (or clients') best interest(s). Supreme Court Rule 20:2.2 recognizes the propriety of a lawyer serving as an "intermediary" when the lawyer believes that the matter can be resolved on terms compatible with the clients' best interests and that each client can make adequately informed

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[7] Henry S. Drinker, *Legal Ethics* 120 (1953).

[8] *See* former SCR 20.48(2) (EC 9 2) (lawyer's duty to promote "public confidence in the integrity and efficiency of the legal system and the legal profession"). See *infra* 18, *infra* § 14.14 for a discussion of the continued relevance of the ABA Code.

[9] Former SCR 20.06 (canon 2) (which provided that a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available) and former SCR 20.12 (DR 2 106) spoke in terms of reasonable compensation. The clear import is that efficiency in rendering services and obtaining results has been an appropriate ethical consideration. *See* Keith Kaap, *Ethics and Professional Responsibility: A Handbook for Wisconsin Lawyers* 2-105 (State Bar of Wisconsin CLE Books 1986 & Supp.) (out of print). *See infra* note 18.

decisions, and when each client provides informed consent to the common representation. *See infra* § 14.11.

The efficacy of multiple representation in the context of trusts and estates practice is one of the main themes of the *ACTEC Commentaries on the Model Rules of Professional Conduct*, originally approved by the Board of Regents of the American College of Trust and Estate Counsel in October 1993 and now in their third edition.[10]

On the subject of multiple representation, the ACTEC Commentary on Model Rule 1.7 (Conflict of Interest: General Rule) emphasizes that in many instances, it may be appropriate for a lawyer to represent more than one member of the same family in connection with each person's estate plan. The commentary notes that in some instances the clients may actually be better served by such a representation, resulting in more economical and better coordinated estate plans.

3. *Separate Representation.* The ACTEC Commentary on Model Rule 1.7 also addresses the possibility of separate representation (a lawyer simultaneously representing both husband and wife as separate, as opposed to joint, clients), acknowledging that this mode of representation has received criticism. The Commentary provides the following example:

> Example 1.7-1. Lawyer (*L*) was asked to represent Husband (*H*) and Wife (*W*) in connection with estate planning matters. *L* had previously not represented

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[10] Am. Coll. of Trust & Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct* (3d ed. 1999) [hereinafter ACTEC Commentaries]. The Commentaries are available in print from ACTEC and also online at ACTEC's Web site, www.actec.org. As of the date of publication the precise link is http://www.actec.org/pubInfoArk/comm/toc.html. The Commentaries represent an effort by ACTEC to provide "particularized guidance" to lawyers, courts, and ethics committees regarding trusts and estates lawyers' professional responsibility. The Commentaries are intended to provide assistance in interpreting the model rules and eventually developing amendments to them. The Commentaries do not, however, constitute an official interpretation of the model rules. The introduction to the third edition summarizes the purpose of the Commentaries as follows: "Neither the Model Rules of Professional Conduct (MRPC) nor the Comments to them provide sufficiently explicit guidance regarding the professional responsibilities of lawyers engaged in a trusts and estates practice. Recognizing the need to fill this gap, ACTEC has developed the following Commentaries on selected rules to provide some particularized guidance to ACTEC Fellows and others regarding their professional responsibilities."

either *H* or *W*. At the outset *L* should discuss with *H* and *W* the terms upon which *L* would represent them. Many lawyers believe that it is only appropriate to represent a husband and wife as joint clients, between whom the lawyer could not maintain the confidentiality of any information relevant to the representation. However, some experienced estate planners believe that it is appropriate to represent a husband and wife as separate clients, each of whom is entitled to presume the confidentiality of information disclosed to the lawyer in connection with the representation. If permitted by the jurisdiction in which the lawyer practices, the lawyer may properly represent a husband and wife as separate clients. Whether the lawyer represents the husband and wife jointly or separately, the lawyer should do so only with their consent after disclosure of the implications of doing so. The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc.[11]

The separate representation of both spouses as clients is explored in greater detail in *Representing Husband and Wife*, a report of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar Association. *See supra* note 5. The report discusses ethical considerations under the ABA model rules involved in selecting the mode of representing spouses, the duties and obligations that arise under various scenarios depending on the mode of representation selected, and the duties and obligations applicable in the absence of an agreement with the spouses regarding the mode of representation.[12]

Some commentators are critical of the practice of separately representing spouses. For example, Professor Geoffrey C. Hazard, Jr., describes the

[11] *ACTEC Commentaries*, *supra* note 10. For a summary of the purpose and some of the major contributions of the *ACTEC Commentaries*, see Bruce S. Ross, *'Particularized Guidance' for the Estate and Trust Lawyer*, 133 Tr. & Est. 10 (July 1994). The *ACTEC Commentaries* are discussed in greater depth in John R. Price, *Ethics in Action, Not Ethics Inaction: The ACTEC Commentaries on the Model Rules of Professional Conduct*, 29 *The Annual Phillip E. Heckerling Institute on Estate Planning* ch. 7 (1995).

[12] For a discussion of the report, see Malcolm A. Moore & Anne K. Hilker, *Representing Both Spouses: The New Section Recommendations*, 7 Prob. & Prop. 26 (July/Aug. 1993); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 Fordham L. Rev. 1253 (1994); *Report of Working Group on Spousal Conflicts*, 62 Fordham L. Rev. 1027 (1994) (from the December 3–5, 1993, Fordham University School of Law Conference on Ethical Issues in Representing Older Clients).

concept of separate representation as "a legal and ethical oxymoron," and "incorrect as a matter of law and therefore a legally dangerous mode of practice."[13]

C. [§ 14.5] Suggested Factors for Determining Independent or Joint Representation

The rules governing professional conduct often do not give clear-cut answers. There may be a dearth of guidance, and only a few ethics opinions may be found on the subjects involved.[14] The State Bar of Wisconsin Standing Committee on Professional Ethics Formal Opinion E-89-10 (1989) lists the factors to consider in determining whether joint representation as an intermediary is appropriate under SCR 20:2.2. *See infra* note 21. While helpful, that opinion addressed a proposed business representation.

The bias of this chapter is toward efficiency and economy, consistent with proper ethical standards, with the clients' interests being the paramount consideration. The factors listed below are relevant in applying the Rules of Professional Conduct for Attorneys to the ethical concerns raised by the marital property system in Wisconsin.

Determining the proper response to the ethical concerns connected with marital property involves weighing a client's interest in receiving sound, independent professional advice and judgment on the one hand, and the client's interest in efficient, economical legal advice and assistance on the other. *See Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1309–11 (1981). An analysis of the model rules, case authority, ethics opinions, and other supporting authority indicates that an attorney should consider the following factors in an attempt to strike a balance between these two interests.

1. *Ethical judgment*—whether a clear answer to the ethical question involved is evident, or whether there are well-supported differences of ethical opinion. If a clear answer is evident or if the matter is governed by a rule of professional conduct, the answer or rule governs. On the

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[13] Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 Prob. Law. 1, 5–6, 11–15 (Summer 1994).

[14] *See* Kaap, *supra* note 9, at 1–4; *see also* Keith Kaap, *In the Eye of the Sphinx: A Perspective on Ethics Research*, 57 Wis. Bar Bull. 14 (June 1984).

other hand, if reasonable, cogent arguments exist on both sides of the proposition, the following factors become significant.

2. *Informed consent*—whether, without compromising the spouses' respective interests, an informed consent by the spouses could resolve the ethical problem. If the spouses' informed consent will resolve the matter, joint representation may be acceptable.

3. *Monetary significance*—the matter's relative significance in monetary terms. This factor considers the relationship between the monetary amount involved and the total present and prospective wealth of one or both spouses. If the amount involved is small in comparison to the spouses' total present and prospective wealth, joint representation may be more acceptable. By contrast, if the amount involved is large in comparison to the total present and prospective wealth, independent representation may be advisable.

4. *Nonmonetary significance*—the matter's significance in terms of its importance in the spouses' relationship, as perceived by the spouses. As under factor 3, if the matter is of minor significance, it may be appropriate for one attorney to represent both spouses; by contrast, if the spouses attach high significance to the matter, the lawyer should exercise more caution, and independent representation may be advisable.

5. *Cost of independent representation*—the increased costs of independent representation (over joint representation), in comparison to the monetary or other significance of the matter. As the monetary or other significance of the matter increases, the weight given to this factor should be reduced. However, if the costs of separate representation are large in comparison to the monetary or other significance of the matter, joint representation is more justifiable. It should be recognized, however, that if conflicts later develop and continuation of joint representation is not possible or advisable, independent representation from the beginning might have been less costly.

6. *Complicating circumstances*—whether complicating circumstances exist, such as children by a prior marriage, disparity in spousal wealth or education, dependent relationship between the spouses, or one or both spouses' lack of knowledge or experience in business, financial, or other matters relevant to the matter involved. Such complicating circumstances suggest that independent representation is advisable.

Conversely, if, for example, the situation involves a first marriage or the absence of children by a prior marriage, little or no disparity in spousal wealth or education, the independence of each spouse in his or her relationship with the other, equal spousal knowledge and experience regarding the matter, or simple and easily understood issues, joint representation may be acceptable.

7. *Irrevocability*—whether the matter involves an irrevocable action or decision or one that can be revoked or changed only by joint spousal action, or whether it involves an action or decision that can be revoked or changed unilaterally by one spouse. If the matter involves an irrevocable decision or one that can be changed only by joint action, that favors independent representation. On the other hand, if the matter involves a decision or action that can be changed or revoked by either spouse acting alone, that favors joint representation.

8. *Prior representation*—the extent of prior representation of one or both spouses by the attorney or his or her law firm. If the attorney previously represented one spouse, independent representation may be preferable. However, if the prior contact was with the spouses jointly, especially if it was longstanding, continuing joint representation may be appropriate.

9. *Judgment of overall fairness*—whether the contemplated action appears to be fair to each spouse rather than one-sided, based on the attorney's good faith, independent judgment. If the contemplated action would have a relatively neutral effect on the parties' interests, joint representation may be acceptable. By contrast, if the contemplated action seems to involve unfairness or overreaching, the attorney should insist on independent representation.

Some commentators have suggested that a lawyer asked to undertake multiple representation of clients should consider interviewing the prospective clients separately to better determine whether the interests of the prospective clients conflict to such a degree that joint representation is inappropriate. *See, e.g.*, John R. Price, *Price on Contemporary Estate Planning* § 1.14, (Supp. 1999) at 11; Hazard, *supra* note 13, at 23.

Further, consistent with SCR 20:2.2, the attorney should strive to accommodate differing interests, promote harmony, and avoid unnecessary discord. This is particularly true in the context of serving spouses. When appropriate and consistent with the ethical considerations outlined in this chapter, joint representation of spouses should further these ends.[15]

Although the above list includes most of the significant factors involved in reaching a decision on the ethical problems in serving the interests of spouses, other factors may be relevant in a specific case. Moreover, no list can dictate the respective weight to be given to the factors. As with all considerations in resolving ethical questions, the lawyer must apply his or her judgment to the facts of the particular situation.

The factors to consider in determining whether there is a conflict of interest in the estate planning context were addressed in *In the Matter Estate of Koch*, 849 P.2d 977 (Kan. Ct. App. 1993). In *Koch*, two of the testatrix's sons who were disinherited by the operation of an anti-litigation clause in the testatrix's will contested the will's validity. The will provided for an equal distribution of the residue among the testatrix's four sons but also provided that the share of any son in litigation at the time of the testatrix's death as a plaintiff against the testatrix or any of her other sons would be cancelled unless the litigation was dismissed within six weeks following her death. At the time the will was prepared, the two sons who later contested the will were involved as contestants in litigation against the testatrix and her other two sons, who were represented in the litigation by the lawyer who drew up the will. Following the testatrix's death, the contestants refused to dismiss the litigation and sought to have the will set aside on the basis of undue influence.

In attempting to prove undue influence, the contestant sons asserted that the lawyer who drew the will had a conflict of interest because he also represented the other sons in the intrafamily litigation. They argued that the conflict materially limited the lawyer's ability to represent the testatrix and created suspicious circumstances that, when combined with the fiduciary relationship between the lawyer and the testatrix, created a presumption of undue influence. *Id.* at 992.

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[15] *See* John B. Haydon, *Can One Lawyer Ethically Represent Both Spouses in Estate Planning Under Wisconsin's Marital Property Act?*, Wis. J. Family Law, Sept. 1985, at 12. But see James J. Podell, *The Impact of Wisconsin's Marital Property Act on Marital Agreements: A Divorce Lawyer's Perspective*, Wis. J. Family Law, Sept. 1985, at 10; David L. Walther, *Separate Representation in the Preparation of Marital Agreements*, Wis. J. Family Law, Sept. 1985, at 8. *See generally* State Bar of Wis., *Lawyers' Marital Property Forum*, Aug. 1985 (newsletter that contains Haydon, Podell, and Walther articles).

In rejecting the contestants' argument that the attorney had a conflict of interest, the court identified and discussed the relevant factors under Kansas Court Rule Annotated 261, which, like Wisconsin SCR 20:1.7, is based on ABA model rule 1.7. The factors identified by the court included the duration and intimacy of the lawyer's relationship with the client(s) involved; the function being performed by the lawyer; the likelihood that an actual conflict will arise; and the likely prejudice to clients if it does arise. *Id.* at 996–97. The court also noted the long-term consideration by the testatrix of her family situation and the fact that her testamentary plan made sense. *Id.* at 998.

In reaching its conclusion that there was no conflict of interest, the court stated:

> If we choose to adopt a highly theoretical analysis, it is possible to make an elusive argument and "find" a conflict. If, however, we take a down-to-earth, real world, functional approach in which we insure that confidentiality is preserved and that the client's wishes are served, we are hard pressed to find any ethical violation. . . .

Id. at 995. The court further observed:

> The scrivener's representation of clients who may become beneficiaries of a will does not by itself result in a conflict of interest in the preparation of the will. Legal services must be available to the public in an economical, practical way, and looking for conflicts where none exist is not of benefit to the public or the bar.

Id. at 998.

The case suggests that the factors listed in this section may in some situations be more significant than an overly analytical reading of the text of the Rules of Professional Conduct for Attorneys. *Cf.* section 14.10, *infra*.

III. [§ 14.6] Ethical Principles Applicable in the Marital Property Context

A. [§ 14.7] Identification of Relevant Sections of Rules of Professional Conduct for Attorneys and Related Authority

Our analysis involves primarily SCR 20:1.7 (Conflict of Interest: general rule), SCR 20:1.9 (Conflict of Interest: former client), and 20:1.6 (Confidentiality of Information). (The nonsequential discussion of these rules in this chapter is intentional, because SCR 20:1.7 involving conflicts of interest, is primary in this consideration.) The ABA model rules, upon which the Rules of Professional Conduct for Attorneys are based, were promulgated with comments adopted with some modifications by the Wisconsin Supreme Court.[16]

Further interpretive assistance may be had in ethics rules of the other community property states,[17] and the prior Wisconsin rules based on the older American Bar Association Model Code of Professional Responsibility.[18]

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[16] The Wisconsin Supreme Court Order adopting the Rules of Professional Conduct for Attorneys states that the comments to the ABA model rules [hereinafter ABA comments] and the comments of Wisconsin's Code of Professional Responsibility Review Committee [hereinafter committee comments] are not adopted but are printed for information purposes. *See* Wis. Sup. Ct. Order, June 10, 1987, 139 Wis. 2d xiii, xv (1987).

[17] The ethics rules in effect in eight of the nine community property states, including Wisconsin, are now based primarily on the ABA model rules. *See ABA/BNA Lawyer's Manual on Professional Conduct* § 01:3 (1983, as supplemented) [hereinafter ABA/BNA Manual]. California is the exception. California attorneys are governed by the California Rules of Professional Conduct, which, although similar to the ABA code, do not contain specifically comparable provisions. *People v. Ballard*, 164 Cal. Rptr. 81 (Ct. App. 1980). In general, the California rules appear to be more practical and specific than the ABA code or ABA model rules, but do not appear to contain provisions uniquely applicable to community property or provisions contrary to the considerations outlined in this chapter. The variations among the ethics rules in the community property states are so extensive that more detailed observations are beyond the scope of this chapter.

[18] Model Code of Professional Responsibility (1984) [hereinafter ABA code]. References to the ABA code's ethical considerations will be indicated as EC-*x*, its disciplinary rules, DR-*x*, and its canons, canon *x* (current rules). References to the

The American Bar Association Commission on the Evaluation of the Rules of Professional Conduct (commonly referred to as the Ethics 2000 Commission) was established in 1997 to comprehensively review and evaluate the ABA Model Rules of Professional Conduct. The changes adopted were influenced by the American Law Institute's *Restatement (Third) of the Law Governing Lawyers*, published in 2000. The Commission recommended significant changes to a number of key rules, such as Rule 1.4 (Communication), Rule 1.6 (Confidentiality of Information), Rule 1.7 (Conflict of Interest: general rule), and Rule 1.8 (Conflict of Interest: prohibited transactions), as well as the adoption of some new rules. The ABA House of Delegates adopted a substantial portion of the Ethics 2000 Commission's recommendations as official ABA policy in February 2002. In addition, the ABA House of Delegates adopted significant changes to Rule 1.6 (Confidentiality of Information).

The Wisconsin Supreme Court Ethics 2000 Committee is currently considering the ABA model rule changes. As of the date of publication the committee appears to be prepared to issue a report adopting the ABA changes almost verbatim. The Wisconsin Supreme Court will consider the committee's report before the changes become effective in Wisconsin, if at all. The details of the ABA changes are discussed in the following sections.

B. [§ 14.8] Conflict of Interest

1. [§ 14.9] Various Sources of Guidance

Wisconsin Supreme Court Rule 20:1.7 is the starting point of any analysis of conflicts of interest. It provides as follows:

SCR 20:1.7 Conflict of interest: general rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents in writing after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

ABA code as previously adopted by Wisconsin will be indicated as former SCR 20.*x* (rules repealed and replaced effective Jan. 1, 1988).

> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

SCR 20:1.7 provides the general rule that a lawyer may not represent (absent consent, if appropriate) a client if that representation (1) will be directly adverse to another client's interests, or (2) may be materially limited by the lawyer's responsibility to another client or a third party, or by the lawyer's own interests.[19] In representing two clients at the same time (joint representation—see section 14.4, *supra*) it will be common for one of the above ethics rules to apply.

A lawyer may nonetheless proceed if two conditions are met: (1) the lawyer reasonably believes that the joint representation will not adversely affect either client, and (2) each client consents to the joint representation in writing after consultation.[20] Note that the Wisconsin rule, SCR 20:1.7, requires *written* consent of each client after consultation. It does not require the consultation be in writing, although that may be advisable.

The premise of SCR 20:1.7 is that each client is entitled to the undivided, undiluted loyalty of his or her attorney, as well as to professional

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[19] The following discussion from the *Annotated Code of Professional Responsibility*, despite Wisconsin's adoption of the model rules, remains helpful:

> Former canon 6 set forth a concrete definition of "conflicting interests": a conflict was deemed to exist in a situation in which the lawyer had a duty to one client to contend for what his duty to another client required him to oppose. [Then current] DR 5-105 does not contain a comparably clear definition of a proscribed conflict . . . It gives, instead, a two-part test: (1) Is the attorney's independent professional judgment on behalf of a client impaired? or (2) Is the attorney representing "*differing interests*," defined as any interest (conflicting, inconsistent, diverse, or other) which adversely affects either the judgment or the loyalty of the lawyer.

American Bar Found., *Annotated Code of Professional Responsibility* 230–31 (1979) [hereinafter Annotated Code] (emphasis in original).

[20] For a discussion of what the consultation must include, see section 14.11, *infra*.

judgment solely for the client's benefit, free of compromising influences and loyalties. *See* SCR 20:1.7 ABA cmt.

In addition, under some circumstances Wisconsin Supreme Court Rule 20:2.2 (Intermediary) may apply.

> SCR 20:2.2 Intermediary
>
> (a) A lawyer may act as intermediary between clients if:
>
> (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved and the effect on the attorney-client privileges and obtains each client's consent in writing to the common representation;
>
> (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
>
> (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
>
> (b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
>
> (c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

The State Bar of Wisconsin Standing Committee on Professional Ethics provided a useful analysis of the interaction of SCR 20:1.7 and SCR 20:2.2 when it addressed in an opinion the issue of independent representation of both the majority and minority investors in connection with the formation of a business.[21]

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[21] In State Bar of Wisconsin Standing Committee on Professional Ethics, Formal Opinion E-89-10 (1989) (Conflicts: Representing Majority and Minority Investors in New Business Formation), the committee determined that, generally, one lawyer (or law firm) may represent both the majority and minority investors in connection with the formation of a business (for example, a partnership or corporation), if the standards and procedures of SCR 20:1.7 (conflict of interest) and SCR 20:2.2 (intermediary) are satisfied. The committee recognized the propriety of such dual representation under appropriate circumstances, but strict compliance with both SCR 20:2.2 (including consideration of the relevant factors in determining whether the dual representation is appropriate) and SCR 20:1.7(b)

In addition, Wisconsin Supreme Court Rule 20:1.9 defines conflicts of interest with respect to former clients. *See infra*, section 14.12.

These rules also apply to the lawyer's partners or the associates of his or her firm, so that if the lawyer may not serve under SCR 20:1.7 or SCR 20:1.9, neither may the lawyer's partners or his or her associates or firm. *See* SCR 20:1.10.

Because the rules were developed primarily for a litigation or other adversarial context, rather than for a family, spousal, or similar context, it is often very difficult to apply these rules to specific situations involving representation of one or both spouses (or other family members) in a non-litigation context (in which the rule may be more easily understood and its application may be clear).

The ABA comments and the comments of the Code of Professional Responsibility Review Committee following each rule provide some guidance, although these comments were not formally adopted by the Wisconsin Supreme Court.[22] The comments following SCR 20:1.7 suggest that the critical questions involve the likelihood that a conflict of interest will occur, and if it does, whether it will materially interfere with the lawyer's independent professional judgment. Unfortunately, with respect to estate planning and probate the comments simply provide as follows:

> A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

SCR 20:17 comment.

(obtaining the clients' informed consent) is required. The committee also concluded that written consent to the representation is required under SCR 20:1.7(b) after appropriate explanation. *See infra* § 14.11. The committee further concluded that, if withdrawal from dual representation is required, SCR 20:2.2(c) requires that the lawyer not continue to represent either client. The committee stated that SCR 20:2.2(c) is an exception to the general rule of SCR 20:1.9(a), which permits dual representation if the former client consents.

[22] *See* Wis. Sup. Ct. Order, June 10, 1987, 139 Wis. 2d xiii, xv (1987).

To provide assistance to trusts and estates lawyers, courts, and other persons in interpreting the ABA model rules, including rule 1.7 on conflicts of interest, the American College of Trust and Estate Counsel has adopted the *ACTEC Commentaries*, discussed at section 14.4, *supra*. Though the Commentaries do not constitute an official interpretation of the model rules, they seek to identify ways in which common ethical issues under the rules might be dealt with by trusts and estates lawyers.

In addition, the Special Study Committee on Professional Responsibility of the ABA Section of Real Property, Probate and Trust Law has offered views on various professional responsibility issues that may arise in the simultaneous representation of spouses, in its report *Representing Husband and Wife*, discussed at section 14.4, *supra*. The report takes the position that joint representation of husband and wife does not necessarily implicate rule 1.7. Rather, the report concludes that rule 1.7 applies only once the lawyer discerns that there is a substantial potential for a material limitation upon the lawyer's representation of either spouse. *Representing Husband and Wife*, *supra* note 5, at 779–80. Like the *ACTEC Commentaries*, the special committee report does not constitute official commentary on the model rules, and it has been criticized for some of its views.

An excellent source for guidance in ethical matters is the *ABA/BNA Lawyer's Manual on Professional Conduct*. Under the heading "Practice Guide, Multiple Representation," the following general statements are made:

> [T]he rules and law are clear that a lawyer may [represent multiple parties in the same transaction] only under very limited circumstances, namely, where the lawyer reasonably believes the multiple representation will not adversely affect any one of the clients, and all of the clients consent after full disclosure of the implications of the multiple representation.
>
> These limitations thus make it very unlikely, and perhaps impossible, for a lawyer to ever represent opposing parties in litigation or multiple parties to the same transaction whose interests or positions are fundamentally antagonistic. But they do make it permissible for a lawyer to represent multiple parties whose interests are generally aligned, such as clients with similar lobbying interests or parties to the formation of a corporation. However, should it become evident during the multiple representation that the lawyer cannot adequately represent the interests of each party, or should any party revoke consent, the lawyer must then withdraw and may not thereafter represent one party against another on the same matter.

ABA/BNA Manual, *supra* note 17, at 51:301.

Another source of general guidance is the American Law Institute's *Restatement (Third) of the Law Governing Lawyers*.[23] Section 121, entitled "Conflicts of Interest—In General" roughly corresponds with SCR 20:1.7(b), dealing with conflicts other than those involving concurrent representation of adverse clients. Section 130, entitled "Multiple Representation in Non-Litigated Matter," roughly corresponds with SCR 20:1.7(a), dealing with conflicts between directly adverse clients and with SCR 20:2.2, dealing with intermediary representations. The Restatement may be particularly useful in analyzing conflicts under the newly revised ABA model rules, which may well become applicable to Wisconsin lawyers in the very near future. The ABA's revised rules were developed in close coordination with the Restatement.

The ABA's recently adopted changes to the Model Rule of Professional Responsibility include a substantially revised rule 1.7. The Wisconsin Supreme Court Ethics 2000 Committee is likely to favorably report on the new rule.

> Rule 1.7: Conflict Of Interest: Current clients
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Note that the revised rule provides that a lawyer shall not represent a client if the representation of that client may be "materially limited" by the

[23] ALI, *Restatement (Third) of the Law Governing Lawyers* (2000) [hereinafter Restatement].

lawyer's other responsibilities only if there is a "substantial risk" of such material limitation. Rule 2.2 (Intermediary) is eliminated in the new rules and the requirements of that rule are largely subsumed in the concept of "concurrent conflict of interest" found in the revised rule 1.7.

2. [§ 14.10] Suggested Analytical Framework for Conflicts of Interest

It may be helpful to attempt to parse the requirements of SCR sections 20:1.7 and 20:2.2. The first step is to analyze whether a conflict exists at all. If it does, the next step is to determine what standards apply in addressing the conflict.

1. *No Conflict.* Some authority exists to suggest that under certain circumstances, a joint representation of spouses presents no conflict of interest. The importance of such a determination is that it obviates, in such cases the need to obtain the client's written consent after consultation or to comply with the other requirements of SCR sections 20:1.7 and 20:2.2. However, the lawyer must continue to monitor whether the determination that no conflict of interest is present remains supportable throughout the representation.

The illustrations under Restatement section 130, entitled "Multiple Representation in Non-Litigated Matter," specifically contemplate joint representation of spouses in estate planning and take the position that, in some situations, the joint representation does not involve a conflict and therefore does not require client consent. The illustrations go on to suggest, however, that other such situations may present a conflict and therefore require informed consent to proceed with joint representation of the spouses.[24]

Montana Ethics Opinion 960731 (1996) takes the position that, absent an existing conflict or evidence that the lawyer's independent judgment will likely be adversely influenced by jointly representing spouses with their estate planning, the lawyer need not communicate to the couple the potential for conflicts of interest under rule 1.7 of the model rules, nor obtain a written conflict waiver. Nonetheless, the opinion goes on to

[24] Restatement, § 130, Illustrations 1 and 2.

observe, "we believe that for the lawyer's purpose it is wise practice to obtain a written waiver."[25]

In Florida Ethics Opinion 95-4 the Board of Governors of the Florida bar concluded that, when jointly representing a husband and wife in estate planning (see *infra* section 14.13 for a more detailed fact pattern), the lawyer was not ethically required to discuss the lawyer's obligations with regard to separate confidences with the husband and wife. The Board observed that while such a discussion is not ethically required, in some situations it might help prevent the type of occurrence that was the subject of the opinion.

Even if an attorney concludes that SCR 20:1.7 does not apply to a particular joint representation and chooses not to make the disclosures and obtain the consents required thereunder, the lawyer should monitor the client relationship to determine whether circumstances develop that implicate the rule.

2. *Representation Materially Limited.* Many joint representations will fall within the ambit of SCR 20:1.7(b). In many joint representations the representation of one of the spouses may be materially limited by the lawyer's responsibilities to the other spouse when counseling them with respect to their respective rights in marital property.

There are two variations of this conflict situation. One is when the lawyer proposes to represent both spouses (for example in estate planning) and also represents or proposes to represent one of the spouses in a separate matter, which representation will be materially limited by the lawyer's responsibilities to the other spouse. In such a case, SCR 20:1.7(b) would apply, but not SCR 20:2.2, because the latter rule only applies to representations of clients in the same matter. If, however, the lawyer represents both spouses in a matter and the representation will be materially limited by the lawyer's responsibilities in that matter to either spouse, then both SCR 20:1.7(b) and SCR 20:2.2 should apply.

The comments to the revised ABA model rule 1.7 provide some insight:

> Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out

[25] The opinion can be viewed online at http://www.montanabar.org (follow the links to the 1996 ethics opinions). As of the date of publication the direct link is http://www.montanabar.org/ethics/ethics/ethicsopinions/960731.html

> an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

ABA Model Rule section 1.7 cmt. 8.

One of the ways a representation may be materially limited is by the lawyer's own interests. A number of specific lawyer-interest situations are covered by SCR 20:1.8 (Conflict of Interest: prohibited transactions). SCR 20:1.8 provides specific consent requirements for some of these instances. For example, it must be recognized that the person who pays the fees has the power to exert pressure that affects the lawyer's independent judgment. *See* SCR 20:1.8(f), :5.4(c). The rules prohibit a lawyer from accepting compensation for representation from a person other than a client unless there is no interference with the lawyer's independent professional judgment or the lawyer-client relationship, the client consents after consultation, and information relating to the representation is protected as required by SCR 20:1.6. SCR 20:1.8(f).

3. *Representation Directly Adverse.* Under some circumstances the interests of the jointly represented spouses may be directly adverse. There are two variations of this conflict situation. One is when the lawyer proposes to represent both spouses (for example in estate planning) and also represents or proposes to represent one of the spouses in a separate matter in which the other spouse has a directly adverse interest. In such a case, SCR 20:1.7(a) is implicated, but not SCR 20:2.2, because the latter rule only applies to representations of clients in the same matter. In cases in which the lawyer represents both spouses in the matter in which their interests are directly adverse, then both SCR 20:1.7(a) and SCR 20:2.2 are implicated.

The comments to the revised ABA model rule 1.7 provide some insight:

> [A]bsent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are

> wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.

ABA Model Rule section 1.7 cmt. 6.

4. *Intermediation.* If the jointly represented spouses are directly adverse (or the representation of one of the spouses may be materially limited by the lawyer's responsibilities to the other spouse) *and* the lawyer is representing them *both* in the matter, then the requirements of SCR 20:2.2 must also be met.

The ACTEC Commentary on Model Rule 2.2 briefly addresses the applicability of the intermediary rule in an estate planning context:

> If it appears appropriate to the lawyer, the lawyer may act as an intermediary between clients with respect to trusts and estates matters. For example, intermediation may be appropriate with respect to estate or trust administration matters, or representation in connection with a family business enterprise, which may involve clients with actual or potentially conflicting interests, but more important common goals… Note, however, that most common representations do not involve intermediation under MRPC 2.2. The representation of multiple clients in estate planning and administration matters including the representation of multiple fiduciaries is not ordinarily provided pursuant to MRPC 2.2.

Note that under the revised ABA model rules, rule 2.2 has been eliminated and the issues it deals with are incorporated in model rule 1.7 (dealing with joint representation) and new model rule 2.4 (dealing with the lawyer as a mediator). This rule change is currently under consideration in Wisconsin and may affect Wisconsin lawyers in the near future. See the discussion at section 14.9, *supra*.

5. *Reasonable Belief and Consent.* If a conflict exists, either because the spouses that are to be jointly represented are directly adverse (SCR 20:1.7(a)) or because the lawyer's representation of one spouse is materially limited by responsibilities to the other spouse, then two requirements are imposed upon the lawyer before the joint representation may proceed.

First, the lawyer must meet a "reasonable belief" requirement. In the case of the directly adverse conflict (SCR 20:1.7(a)) the lawyer must reasonably believe that the representation will not adversely affect the relationship with the "other" client. If the representation of one of the spouses may be materially limited by the lawyer's responsibilities to the other spouse (SCR 20:1.7(b)), the lawyer must reasonably believe that the representation will not adversely affect the representation of the spouse being represented in the particular matter.

Second, the lawyer must obtain written consent from the affected clients after consultation. *See infra* section 14.11.

6. *Enhanced Requirements for Intermediation.* If the intermediation rules apply, then in addition to complying with the "reasonable belief" and "written consent after consultation" requirements of SCR 20:1.7, the lawyer must meet the enhanced requirements of SCR 20:2.2. The enhanced requirements expand on the "reasonable belief" and "written consent after consultation" requirements of SCR 20:1.7. The enhanced "reasonable belief" requirements are:

> [T]he lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
>
> [T]he lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

SCR 20:2.2(a)(2) and (3). The enhanced consent/consultation requirements are:

> [T]he lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved and the effect on the attorney-client privileges and obtains each client's consent in writing to the common representation.
>
> While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

SCR 20:2.2(a)(1) and (b).

Note again that under the revised ABA model rules, rule 2.2 has been removed and the issues it deals with are incorporated in model rule 1.7 and new model rule 2.4. This rule change may soon be considered by the Wisconsin Supreme Court.

7. *Independent Representation Required.* If SCR 20:1.7 (and possibly SCR 20:2.2) is implicated and (1) the representation does not meet the "reasonable belief" requirements, (2) consultation cannot occur, or (3) written consent is not given, then the lawyer may not accept the joint representation and must insist that the clients obtain independent representation.

The above analytical framework may seem somewhat at odds with the spirit of the factors laid out in section 14.5, *supra* (*see In re Estate of Koch*, *supra* section 14.5). In fact, these approaches are readily synthesized by treating the factors laid out in section 14.5, *supra*, as the basis upon which the lawyer may determine whether the subjective standards set out in SCR 20:1.7 are satisfied; i.e. whether a representation may be "materially limited" and whether the lawyer may "reasonably believe" the clients' interests will not be adversely affected by going forward with the representation.

3. [§ 14.11] Consent to Joint Representation

A proposed joint representation could be beneficial to one spouse and directly adverse to the other's interests, or the representation could be materially limited by the attorney's responsibilities to others, including responsibilities to one of the spouses. After considering and applying SCR 20:1.7 and the factors outlined in section 14.5, *supra*, the lawyer may nonetheless be able to represent both spouses (joint representation), if the lawyer reasonably believes that representation of neither spouse will be adversely affected. *See supra* section 14.10.[26]

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[26] The new ABA model rule 1.7 (currently under consideration in Wisconsin—*see supra* section 14.9) changes the terminology from "consent after consultation" to "informed consent." The ABA definition of informed consent appears to be more stringent than the current Wisconsin standard: "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." ABA model rule 1.0(e). The new comments elaborate that:

In addition, such a joint representation requires each client's consent in writing after consultation. The lawyer must advise each spouse of the conflict or potential conflict and its implications and the advantages and risks of common representation; the lawyer also must give each spouse the chance to evaluate his or her need for independent representation free of potential conflict. The lawyer may proceed to jointly represent the spouses only if each spouse then provides written consent.

An attorney cannot accept the spouses' consent to joint representation until appropriate and adequate consultation has been provided to each spouse, whether by that attorney or another attorney. Consultation concerning joint representation must include an explanation of the implications, advantages, and risks of joint representation. SCR 20:1.7(a)(2), (b)(2).

The ABA comment contains a "test" for whether a consent to a conflict of interest is possible, which can be characterized as the "disinterested lawyer" test:

> A client may consent to representation notwithstanding a conflict. However, . . . when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. . . . Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

"[i]nformed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client… . The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." ABA Model Rule § 1.7 cmt. 18.

SCR 20:1.7 ABA cmt. (Consultation and Consent).[27]

Although the above comment concerning revocation of consent may be correct as a general statement, it is not universally applicable, especially in a nonlitigation context. *See infra* § 14.12.[28]

The ACTEC Commentary on Model Rule 1.7 (Conflict of Interest: General Rule), discussed at section 14.4, *supra*, notes that some conflicts are so serious that the informed consent of the parties is insufficient. When the interests of clients actually conflict to such a degree that the lawyer cannot adequately represent their individual interests, the lawyer should not undertake joint representation. The Commentary cites as one example of such a situation the representation of both parties to a prenuptial agreement. Presumably the example refers to a prenuptial agreement that addresses divorce or otherwise involves the significant waiver of spousal rights. *ACTEC Commentaries*, *supra* note 10.

Section 130 of the Restatement recognizes that a lawyer may represent multiple clients notwithstanding an otherwise prohibited conflict if the

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[27] The comments to the recently revised ABA model rules address whether a conflict can by consented to:

> Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus… representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

ABA Model Rule § 1.7 cmt. 15.

[28] The new comments to the revised ABA model rules add the following guidance:

> A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

ABA Model Rule § 1.7 cmt. 21.

affected clients give informed consent in accordance with the requirements of section 122 of the Restatement. The illustrations under section 130, however, make quite clear the view that the simultaneous representation of a husband and wife in estate planning does not per se present a conflict of interest situation. *See supra* § 14.10.[29]

4. [§ 14.12] Representing One Spouse Following Joint Representation

A related issue is whether, when independent representation is required, an attorney who previously represented the spouses jointly may represent one of them in the same or a related matter. The test seems to be whether, in accepting the subsequent representation, the attorney, in furthering the interests of the new client, may be required to do anything that will injure the former client in any matter in which he or she formerly represented the client, or whether the attorney may be called upon to use any knowledge or information acquired in the course of that representation against the former client. Drinker, *supra* note 7, at 105.

The ABA comments to model rule 1.9 (SCR 20:1.9) indicate that information acquired by a lawyer in the course of representing a client generally may not subsequently be used by the lawyer to the client's

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[29] The new comments to the revised ABA model rules provide:

> "[A] lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them."

ABA Model Rule § 1.7 cmt. 28.

disadvantage. However, the fact that the lawyer once served the client does not preclude the lawyer from using "generally known" information about the client when later representing another client. SCR 20:1.9, ABA cmt. Further, disqualification from subsequent representation can be waived, but only if the circumstances of the intended representation are disclosed. *Id.*

In general, in an adversarial context or when a dispute arises concerning the subject matter of prior representation, the attorney who previously represented the spouses jointly may not represent one of them unless the spouse who is no longer represented by the attorney consents. The guidelines for consent in this situation are the same ones used in consenting to joint representation. *See supra* § 14.11. The consent should be in writing, and if there is also independent counsel, the consent should recite that it is given after consultation with that spouse's independent counsel.[30]

In State Bar of Wisconsin Standing Committee on Professional Ethics, Formal Opinion E-89-4 (1989) (Prior Joint Representation of Spouses and Subsequent Representation of One Spouse in Divorce Action), the committee concluded that under SCR 20:1.9(a), unless the former client spouse consents to representation adverse to him or her after consultation,

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[30] The new comments to the revised ABA model rules provide as follows:

> "Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of [section 1.7(b)]. The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under [section 1.7(b)]."

ABA Model Rule § 1.7 cmt. 22.

the law firm that had previously represented both spouses in general legal matters (including assistance in purchasing assets subject to property division) could not represent one of the spouses in a subsequent divorce action. This conclusion was drawn because the prior representation was connected with matters substantially related to the divorce, in which one spouse's interest would be materially adverse to the other spouse's interest. The committee stated that a substantial relationship between the matters exists "if the factual contexts of the two representations are similar or related." *Id.*

The Restatement takes a similar approach:

> **§ 132. Representation Adverse to Interest of Former Client**
> Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in § 122, a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse. The current matter is substantially related to the earlier matter if:
>
> (1) the current matter involves the work the lawyer performed for the former client; or
>
> (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

Restatement, *supra* note 23, at § 132.

In Delaware Board Case No. 102 (1998), the Preliminary Review Committee of the Board of Professional Responsibility privately admonished a lawyer for preparing a new will for a wife that excluded her husband as a beneficiary after the lawyer had jointly represented the husband and wife in several legal matters. The wife requested the change in her will after the husband filed for divorce.

C. [§ 14.13] Client Confidences

Wisconsin Supreme Court Rule 20:1.6(a) provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . ." The policy behind this rule is that a client needs to be free to discuss any matter with his or her lawyer, and that a lawyer should be equally free to obtain information from the client. SCR 20:1.6 ABA cmt. Confidences must be preserved even after termination of the attorney-client relationship. SCR 20:1.6 ABA cmt. (Former Client). However, a lawyer may reveal information when necessary to perform the attorney's services, when required by law, or when the client consents after full disclosure. SCR 20:1.6(a). In addition, a lawyer shall disclose information to prevent or rectify a client's criminal or fraudulent acts that the lawyer reasonably believes are likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another. SCR 20:1.6(c).

Particularly relevant to relationships between spouses is the rule that a lawyer may not use information gained in the course of representation to the client's disadvantage. SCR 20:1.8(b), .9(b). For example, an attorney who represented one of the spouses before or during their marriage later may be asked to represent them both in connection with the subject matter of the first representation. The attorney should alert the first spouse to this rule and its implications and give the first spouse the opportunity to grant or deny consent to the joint representation. Conversely, the same considerations apply when the attorney may have represented both spouses during their marriage and then is asked to represent one of them in connection with the same subject matter. *See supra* § 14.12.

These rules apply not only to information protected by the attorney-client privilege but also to information gained in the professional relationship that the client has requested be kept confidential, as well as to any information that if disclosed is likely to be embarrassing or detrimental to the client. Indeed, the expansive language of SCR 20:1.6 implies that the information protected in the attorney-client relationship is *any* information relating to the representation.

The common representation of a husband and wife, either jointly or as separate clients, *see supra* § 14.4, raises the question of the lawyer's disclosure of confidential communications imparted to the lawyer by only one spouse. The majority view is that, absent an agreement to the contrary, common representation of spouses is "joint," and that communications to the lawyer by either spouse, though confidential as to third parties, are not confidential as between the spouses. *See* Ross, *supra* note 11, at 16–17. The lawyer is thus placed in a difficult situation upon receiving a confidential communication from one spouse that that spouse does not wish to have shared with the other spouse.

The ACTEC Commentary on Model Rule 1.6 (Confidentiality of Information) offers alternatives for the lawyer who receives a confidence from one common client who opposes its disclosure to another common client. The Commentary asserts that, in such cases, the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. *See ACTEC Commentaries*, *supra* note 10.

The ACTEC Commentary on Model Rule 1.6 concurs with the view espoused in the report by the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law that it is advisable to obtain in advance an agreement with husband and wife (preferably in writing) regarding the "ground rules" of the representation.[31]

The Supreme Court of New Jersey faced the issue of disclosure of confidential information between spouses in a joint representation in *A. v. B.*, 726 A.2d 924 (N.J. 1999). After preparing a coordinated estate plan for a husband and wife, a law firm inadvertently took on the representation of a different woman who had filed a paternity suit against the husband. When the firm discovered the conflict, it notified the husband of its intention to tell his wife, the firm's joint client, about the paternity suit. At that point the husband sought to enjoin the firm from disclosing the information, and was successful in the lower court. Ultimately, however, the supreme court ruled that the firm was entitled to disclose the existence (but not the identity) of the husband's nonmarital child. The court reasoned that the husband had in effect committed a fraud on his wife by failing to disclose the existence of the child in the context of the joint estate planning process, which the firm was entitled to rectify under New Jersey RPC 1.6(c). Like Wisconsin, New Jersey adopted model rule 1.6 with modifications that supported the disclosure to the wife.

Florida Ethics Opinion 95-4 takes a contrary approach to disclosure. The summary of the opinion states:

> In a joint representation between husband and wife in estate planning, an attorney . . . may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of

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[31] *ACTEC Commentaries*, *supra* note 10. *See generally Representing Husband and Wife*, *supra* note 5; *see also* Teresa S. Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma From a Unilateral Confidence*, 28 Real Prop. Prob. & Tr. J. 683 (1994); Jeffrey N. Pennell, *Professional Responsibility: Reforms Are Needed to Accommodate Estate Planning and Family Counselling*, 25 *The Annual Phillip E. Heckerling Institute on Estate Planning* § 1805.1 (1991). See also the references cited at section 14.5, *supra*.

both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.[32]

As suggested in the sample letters appearing in sections 14.35–.36, *infra*, the issue of sharing confidential communications can be addressed at the outset of the attorney-client engagement as part of the written consent to the joint representation arrangement.

For further discussion regarding the permissive disclosure of confidential client information to prevent, rectify or mitigate substantial financial loss, see Restatement *supra* note 23, § 67.

With limited exceptions, the lawyer's duty of confidentiality arising from the common law attorney-client privilege survives the client's death. *See Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (handwritten notes of attorney made nine days before Deputy White House Counsel Vincent W. Foster, Jr. committed suicide were not discoverable by Independent Counsel in Whitewater investigation of Clinton administration).

D. [§ 14.14] Avoidance of Appearance of Professional Impropriety

The principles of ABA code canon 9 are incorporated into most of the current Rules of Professional Conduct for Attorneys and the preamble, although they are not specifically designated as a separate rule. Canon 9 provides that "[a] lawyer should avoid even the appearance of professional impropriety." This canon is based on the concept that a lawyer should promote public confidence in the legal system and the profession. Hence, for example, as stated in the preamble to the current Rules of Professional Conduct for Attorneys, a lawyer's conduct should "conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." The preamble also states that it is a lawyer's duty to uphold the legal process: "As a public citizen, a lawyer

[32] Fla. Eth. Op. 95-4 (May 30, 1997). As of the date of publication the direct link is http://www.flabar.org/tfb/tfbetopin.nsf/SearchView/Ethics,+OPINION+95-4?opendocument. For a discussion of the history and import of Advisory Opinion 95-4, see Hollis F. Russell & Peter A. Bicks, *Joint Representation of Spouses in Estate Planning: The Saga of Advisory Opinion 95-4*, Fla. Bar J. (March 1998).

should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession." The formulation under the ABA code is that a lawyer should try to reflect credit on the profession and should try to inspire the confidence, respect, and trust of his or her clients. In serving these ends, the code says, the attorney should "strive to avoid not only professional impropriety but also the appearance of impropriety." Former SCR 20.48(6) (EC 9 6).

Although the Rules of Professional Conduct for Attorneys do not include a specific section incorporating the old "appearance of professional impropriety" canon, the Wisconsin Court of Appeals has held that its standard was retained in the Rules. In *Burkes v. Hales*, 165 Wis. 2d 585, 478 N.W.2d 37 (Ct. App. 1991), the court stated as follows:

> In [*Berg v. Marine Trust Co.*, 141 Wis. 2d 878, 416 N.W.2d 643 (Ct. App. 1987)], we recognized that lawyers have the duty "to 'preserve the confidences and secrets of a client' and to 'avoid . . . even the appearance of professional impropriety.'" *Id.*, 141 Wis. 2d at 886, 416 N.W.2d at 647, quoting *Westinghouse Elec. v. Gulf Oil*, 588 F.2d at 224. We noted that such a rule embodies the substance of Canons 4 and 9 of the A.B.A. Code of Professional Responsibility which appeared in our own code as SCR 20.21 and 20.48 (1986). *Id.* Wisconsin adopted the A.B.A.'s Model Rules of Professional Responsibility in 1987. These rules, which replaced those in effect when *Berg* was decided, omit the appearance of impropriety language. According to the comments accompanying the new rules, the language was deleted for two reasons:
>
>> First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since impropriety is undefined, the term "appearance of impropriety" is question begging.
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>> Nevertheless, at least one other jurisdiction adopting the new rules believes it is still appropriate to consider the "appearance of impropriety" when weighing ethical matters because "its meaning pervades the Rules and embodies their spirit." *First American Carriers, Inc., v. Kroger Co.*, 787 S.W.2d 669, 672 (Ark. 1990).
>>
>> We see no error in the trial court's decision [in holding the lawyer disqualified]. First, there is no indication that the court placed undue or even substantial reliance on appearances of impropriety in arriving at its decision. Second, while we recognize that the mere appearance of impropriety, without more, will no longer disqualify an attorney, we agree with our colleagues on the Arkansas court that the spirit of that standard survives as a useable and useful guide for making ethical decisions. . . . Despite deletion of the "appearance" language from the code of ethical

> conduct, we continue to believe that considerations of "the lay sense of justice" are implicit in the new rules. *Berg*, 141 Wis. 2d at 890–91, 416 N.W.2d at 649, citing *Marketti v. Fitzsimmons*, 373 F. Supp. 637, 639 (W.D. Wis. 1974).

Id. at 599–600.[33]

In sum, lawyers faced with the decision to serve as counsel for both spouses have the duty to be alert to the ethical ramifications and considerations involved. They also have the responsibility to resolve any ethical problems in a manner consistent with the principles of the Rules of Professional Conduct for Attorneys and the interests of each spouse.

Although the model rules contain no precise counterpart of canon 9, this deletion has not eliminated the concept that a lawyer should avoid even the appearance of impropriety. Indeed, the import of canon 9 is reflected throughout the entire model rules and is alluded to in the preamble. *See* Rules of Professional Conduct for Attorneys.

E. [§ 14.15] Aspects of Marital Property Law With Ethical Significance For Joint Representation of Spouses

1. [§ 14.16] Elements of Marital Property

a. [§ 14.17] In General

The following elements of Wisconsin marital property create situations in which joint representation raises ethical problems. These situations under marital property also illustrate instances in which lawyers must be alert to ethical concerns. In these situations, the lawyer must consider whether separate representation, joint representation based on informed consent, or other action is ethically required.

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[33] The court of appeals also cited David Ivers, *Prohibition Against Appearance of Impropriety Retained Under Model Rules of Professional Conduct*, 13 U. Ark. Little Rock L.J. 271, 282 (1991). *See* 165 Wis. 2d 598 n.9.

b. [§ 14.18] Ownership and Classification

Under common law, because ownership is usually based on title, the spouses generally understand (or easily can determine) who owns specific assets, and a lawyer can give relatively straightforward advice. By contrast, under the marital property system, ownership is not based on title but on asset classification; hence, the spouses may not understand (and cannot easily determine) who "owns" specific assets. *See supra* Chapter 2. Further, advice on the classification of assets requires factual and legal analysis, and each spouse has a right to independent professional judgment on his or her behalf regarding asset source, tracing, and classification questions. *See supra* Chapter 3. Whether joint representation is possible in various circumstances (especially in a second marriage with issue by a prior marriage) and whether an informed waiver of conflict of interest and a written consent to joint representation solve ethical concerns are matters to be considered. Another ethical concern may arise because of information received during a prior professional representation that the attorney is required to maintain in confidence.

c. [§ 14.19] Marriage Agreements

Under common law regimes, marriage agreements, other than premarital agreements, are uncommon. By contrast, under the Wisconsin marital property system, marriage agreements are more common and involve matters unique to that system (including classification of property, management rights, and credit). *See supra* Chapter 7. Marriage agreements may significantly affect property rights at death or divorce, and they are particularly common in connection with estate planning for clients with more substantial estates.

Determining the extent to which two independent attorneys are required in making these agreements and whether one may be the prior attorney for one or both spouses involves consideration of conflicts of interest and previously acquired confidential information. In addition, joint representation may affect the validity of the agreement itself under section 766.58(8). Section 766.58(8) states that if legal counsel is retained, the fact that both parties are represented by one attorney, or one party is represented by counsel and one is not, by itself is not sufficient to make a marital property agreement unconscionable or to affect its enforceability. Counsel should be wary of relying on this section for comfort in undertaking a joint representation, especially if the agreement includes provisions that purport to affect property rights at divorce. *See infra* § 14.34.

d. [§ 14.20] Management and Control

Under Wisconsin marital property law, some rights of management and control exist independently of title, and the exercise of those rights can give rise to conflicts of interest between spouses. The lawyer advising spouses must be alert to these potential conflicts. *See supra* Chapter 4. When asked by a spouse for advice concerning the exercise of such rights, the lawyer must recognize that the advice may directly affect the interests of the other spouse, whom he or she also may represent, and may involve the duty of good faith under section 766.15 as well. These concerns generally do not exist under common law systems, because title is the determining factor in questions of management and control.

e. [§ 14.21] Estate Planning

The process of advising spouses on their estate plans gives rise to significant ethical considerations. The analysis must begin with the general rule that each spouse is entitled to independent advice concerning the ownership of assets, the control over assets at death, the options available to the spouse, and the effect of proposed or existing provisions of the estate plan documents not only on the spouse's nonmarital property but also on his or her interests in marital property. Similar considerations relate to consents to beneficiary designations or gifts, tax consequences of various actions (which may be adverse to one or the other spouse), and reclassifications of assets. *See supra* Chapter 10. Although the same ethical considerations exist under common law systems, those systems involve relatively straightforward spousal elective rights and ownership of property, in comparison to the many complex issues raised by a community property system. Hence, under a common law system, if a plan is developed by joint involvement or understanding, ethical considerations generally permit joint representation, with a relatively simple explanation of each document and its effect.

In planning estates involving Wisconsin marital property, if joint representation is used, the spouses' joint participation in the total process is necessary, including participation at the stages of analysis and decision making. The lawyer must be alert to the marital property interests of each spouse and the possibly varying intentions of each spouse. *See* 1 R. Wilkins, *Drafting Wills and Trust Agreements (A Systems Approach)* 82 (1983); *see also* Bruce, *supra* note 5.

2. [§ 14.22] Conclusion

One approach to the preceding concerns is to conclude that each spouse must have separate counsel in matters involving his or her property. This approach rests on the general proposition that it is an attorney's responsibility to assert (or to advise independently, with undivided loyalty, of the possibility of asserting) those positions that are in the client's interest or for the client's economic or other benefit. Under this approach, assertions on behalf of one spouse concerning marital property could be contrary to the other spouse's interest. *See supra* section 14.4.

Some may argue that the spouses' situation in connection with marital property is analogous to the classic conflicts of interest between buyer and seller, injured party and alleged tortfeasor, or plaintiff and defendant in a lawsuit. However, spouses' circumstances need not be so characterized, and when appropriate and under the procedures outlined in this chapter, it may be ethical for one lawyer to advise and represent both spouses regarding their respective rights in marital property.

Whether it is ethical for one lawyer to advise both spouses in a specific situation depends on the lawyer's determination, based on the Rules of Professional Conduct for Attorneys (discussed at § 14.7, *supra*) and related guidance (including the factors listed in § 14.5, *supra*), of whether joint representation is practical, is in the interests of the clients, and is consistent with the lawyer's ethical duties, including the lawyer's duty to make professional services available on a cost efficient basis and the lawyer's role in accommodating differing interests. The answer also depends on the lawyer's ability to analyze the spouses' circumstances and explain to the spouses, in neutral terms, the legal and practical considerations involved in the matter. If the spouses then give informed, written consent to the joint representation, the lawyer may proceed (note, however, that not every joint representation of spouses necessarily involves a conflict that must be waived via a written consent; *see supra* § 14.10, citing the Restatement).

The lawyer must, however, be alert to changes in the relationships between the spouses and be willing to continually weigh the factors involved. If the factors or other significant circumstances change, the attorney must reevaluate the basis for the joint representation. If this evaluation reveals that continuation of joint representation is not in the interest of each spouse, the attorney should bring that to the spouses' attention and withdraw if necessary. Conversely, if separate representation initially was required, and the factors or other circumstances change, the matter should be reevaluated and consideration given to whether joint representation thereafter may be appropriate or permissible.

F. [§ 14.23] Ethical Responsibilities When Representing Only One Spouse

When an attorney represents only one spouse, that spouse is the attorney's client, and his or her loyalty is to that spouse. Nonetheless, the attorney must be alert to and consider the duties and responsibilities his or her client has to the other spouse and the nature of their marital and nonmarital property. These factors are affected significantly by Wisconsin marital property law. The ethical duty of competency under SCR 20:1.1 requires the attorney to become knowledgeable and proficient in these matters. Marital property is a form of co-ownership between spouses, a duty of good faith exists between spouses, management and control of marital property by one spouse extends to property owned by the other spouse, and credit transactions by one spouse can affect the marital property interest of the other spouse. *See supra* Chapter 5 (credit transactions). But despite the partnership theory underlying Wisconsin's marital property system, the spouses remain two independent persons, each having independent legal capacity to act and enter into financial and other transactions. *See* Wis. Stat. §§ 765.001(2), 766.97. The Wisconsin marital property law does not impose any independent responsibilities on the attorney regarding the spouse whom the attorney does not represent, beyond those general responsibilities already imposed by the law governing lawyers, such as not participating in fraud.

As in other matters involving more than one party, especially parties having good faith obligations toward each other, the attorney who represents one spouse must be alert to the possibility that the other spouse may assume that the attorney also represents him or her.[34] To avoid this,

[34] A critical ethical question for attorneys representing a spouse or spouses, and one not answered by the Rules of Professional Conduct for Attorneys, is "who is the client?" *See* Developments, *supra* note 5.

the attorney should make the extent of his or her representation clear to both spouses and (especially when the other spouse needs counsel or may rely on the attorney's advice to the client-spouse) encourage the other spouse to seek independent counsel. *See generally* SCR 20:4.3 (dealing with unrepresented person). Alternatively, assuming that the client-spouse concurs, the attorney may consider joint representation in accord with the considerations outlined in this chapter.

A few examples that illustrate the ethical responsibilities involved in representing only one spouse may be helpful. In each case, it is assumed that the attorney represents only one of the spouses, the attorney has not previously represented the other spouse, and there is no reasonable basis for the other spouse to conclude that the attorney represents him or her.

- ***Example 1.*** The client wife asks the attorney to assist in the sale of securities that are registered in her name alone, or in her name *or* her spouse's name (the alternative form). The attorney knows that the funds used to purchase the securities were derived from the spouses' income or earnings during marriage while Wisconsin residents, after the spouses' determination date, and that the securities are therefore marital property. Although each spouse has a marital property interest in the securities, the attorney has no duty to inform the other spouse before or after the transaction. Depending on the circumstances and the extent of the duty of good faith under section 766.15, the attorney may need to advise the client that she should or must do so. Under the management and control rules, the client spouse has the right to sell the securities. *See supra* Chapter 4.

- ***Example 2.*** The client husband requests advice and assistance in obtaining a purchase money mortgage loan to purchase investment real estate and in establishing a substantial line of credit. Among other things, the husband wants advice and assistance in preparing a financial statement that will list all marital property and each spouse's income. The equity in the real estate is to come from savings derived from the spouses' income and held in a marital account in a financial institution. For the same reasons as under example 1, the attorney has no duty to inform the other spouse before or after the transaction, even though the nonclient spouse's property interests may be subject to liability on the debt. Depending on the circumstances and the extent of the duty of good faith under section 766.15, the attorney may need to advise the client that that he should or must do so.

- ***Example 3.*** The client wife holds a high-yielding, insured, cash management fund account that is marital property. She asks for advice on investing all the account in a highly speculative venture with no prospect of income for a number of years. The attorney counsels the wife concerning the duty of good faith. For purposes of this example, it is assumed that the new investment would violate her duty of good faith to her husband but would not rise to the level of fraud. The attorney recommends that the wife obtain her husband's consent before proceeding in order to avoid a claim for breach of the good faith duty under section 766.70. The wife refuses to follow this advice. The duty of good faith under section 766.15 is a duty owed by each spouse to the other and does not create for the attorney an independent ethical responsibility to the nonclient husband. The attorney may continue to represent the wife and assist with the change in investment if she requests. The attorney has fulfilled his or her obligation by advising his or her client, and in fact, it would breach his or her duty of confidentiality to the client to reveal the transaction to the client's husband.[35]

- ***Example 4.*** The client husband wishes to make gifts of $10,000 of marital property cash to each of his brother and his brother's wife, who have a financial emergency. For purposes of this example, it is assumed that the gifts would exceed the threshold amount in section 766.53 regarding gifts of marital property to third persons. The attorney advises the client to obtain his wife's consent to avoid the wife having a remedy against the husband and donees under section 766.70. The client husband refuses to follow this advice. Sections 766.53 and 766.70 create rights between the spouses and between the nonconsenting spouse and the donee, but do not create for the attorney an independent ethical responsibility to the nonclient.

The conclusions in these four examples apply despite a possible argument that, based on the nature of the spouses' marital property interests, the attorney is responsible to the nonclient spouse. For example, upon motion by the wife in a divorce action, the California intermediate appellate court disqualified the attorney for the family corporation from representing the husband. *Woods v. Superior Court*, 197 Cal. Rptr. 185 (Ct. App. 1983). Although the court did not mention it, the stock of the

[35] The answer would be different if the transaction constituted fraud that the lawyer reasonably believed was likely to result in substantial injury to the financial interest or property of the husband. SCR 20:1.6(c)(1).

family corporation was owned by the spouses as community property. Letter From Attorney Arthur C. Kralowec to author (Sept. 10, 1985) (on file with author). The disqualification was based, in part, on the fact that a critical issue between the parties involved the valuation and related aspects of the corporation. It appears, however, that the court was strongly influenced by other unique facts, including the following: the wife had moved to join the corporation as a party; the attorney had previously represented the wife in preparing her will; the wife had consulted the attorney concerning the value of the business and the family home; the wife alleged that she had consulted with and had obtained the attorney's advice concerning the spouses' marital discord; and the court's finding that it was likely that the attorney would be called as a witness. Regardless of the nature of the ownership of the stock, absent the wife's consent, the attorney was properly disqualified under these facts. *See supra* §§ 14.8–.12.

However, the decision contains language, arguably dicta, indicating the court's view that representation of a family corporation may be sufficient to bar representation of one of the spouses in litigation in which the corporation is a critical element. *Woods*, 197 Cal. Rptr. at 189. In all events, in a nonlitigation context, such as discussed in the above four examples, the co-ownership of marital property, such as stock in a family corporation, does not provide a basis for a direct duty to the nonclient spouse. Further, in the context of divorce litigation, absent unique facts such as in *Woods*, representation of a corporation whose stock is owned by the spouses as marital property should not disqualify an attorney from representing one spouse against the other spouse who the attorney has not previously represented.

In State Bar of Wisconsin Standing Committee on Professional Ethics, Formal Opinion E-88-12 (1988) (Simultaneous Representation of Corporation and Corporate Officer), the committee determined that a lawyer who represents a closely held corporation in which *A* is the sole stockholder may also represent *A* in a divorce action, even if *A*'s spouse has a marital property interest in the stock. For a criticism of this opinion, as well as further discussion of *Woods*, see *Ethics and Dual Representation*, L. Marital Prop. F., May 1989, at 2; but see *Ethics and Dual Representation Revisited*, L. Marital Prop. F., Nov. 1989, at 4, for a response supporting the rationale of this ethics opinion and asserting that, consistent with the text of this section, there should not be an automatic finding of impermissible conflict and disqualification in this and in similar situations.

The above rationale is also supported by the Wisconsin Supreme Court's conclusion in *Jesse by Reinecke v. Danforth*, 169 Wis. 2d 229, 485 N.W.2d 63 (1992), in which the court applied the "entity rule." The court held that the lawyer who represented the corporation with respect to its formation, and also represented the individuals (who later became shareholders) in connection with pre-incorporation activities, was not disqualified from representing an unrelated third party in a lawsuit against two of the shareholders. The court concluded that the client was the corporate entity and not the individual shareholders and that services in connection with the incorporation (and advice with respect to corporate structure, etc.) for the prospective shareholders before the incorporation are deemed to be services for (and advice to) the corporation.

For a discussion of issues that can arise in representing one spouse in the context of a marital property agreement, see section 14.27, *infra*.

IV. [§ 14.24] Application of Rules and Suggested Factors to Specific Joint Representation Situations

A. [§ 14.25] In General

The facts of a particular case have a substantial bearing on ethical conclusions. Thus, the situations of joint representation discussed under this heading should be considered illustrative only and are not to be relied on as authoritative. They are intended to aid analysis of particular situations facing attorneys in the marital property setting.

In resolving ethical problems, the Rules of Professional Conduct for Attorneys and their application to the particular factual circumstances must be considered; additional guidance may be found in the comments following each rule. Further, in using this book, the factors and discussion in sections 14.2–.23, *supra*, should be considered before referring to the specific situations under this heading.

For additional views on applying the ABA model rules to particular factual circumstances, see the *ACTEC Commentaries*, *supra* note 10, and *Representing Husband and Wife*, *supra* note 5. *See also* Bruce S. Ross, *How to Do Right by Not Doing Wrong: Legal Malpractice and Ethical Considerations in Estate Planning and Administration*, 28 *The Annual Phillip E. Heckerling Institute on Estate Planning* ch. 8 (1994); Hazard, *supra* note 13; references cited at sections 14.4–.5, *supra*.

B. [§ 14.26] Marital Property Agreements

1. [§ 14.27] General Marital Property Agreements

From an ethical perspective, the general rule of thumb is that each party to a marital property agreement, especially a premarital agreement, should be represented by independent counsel.

The hazards inherent in representing a spouse (or a person about to enter marriage) with respect to a marital property agreement (particularly when an attorney's actions are judged with the benefit of hindsight) are well illustrated by the case of *Estate of Campbell v. Chaney*, 169 Wis. 2d 399, 485 N.W.2d 421 (Ct. App. 1992). In that case, the attorneys represented the future husband in preparing a premarital agreement containing a waiver of the elective share of the wife-to-be. The validity of the agreement was challenged after the husband's death by his widow, who sought to receive her elective share from his estate rather than a lower amount prescribed by the premarital agreement.

The estate settled with the widow and brought a malpractice action against the attorneys who represented the husband, claiming that their negligence in drafting the agreement allowed the widow to assert her claim and caused the estate to settle with her. The issue on appeal was whether the estate would have to prove that it would have lost in the widow's lawsuit, in which case a "trial within a trial" would be required. The court of appeals held that a trial within a trial was not necessary and that the estate would not have to prove that it would have lost such a lawsuit in order to recover any loss (cost of litigation and amount paid to settle her claim) resulting from the widow's claim.

The court held that the issue was not the validity of the premarital agreement, but whether the attorneys' alleged negligence forced the estate to engage in litigation in which it otherwise would not have been involved. This, in turn, would depend on whether the attorneys failed to live up to the requisite standard of care in preparing the premarital agreement and whether such negligence (if found) "caused weakness" in the agreement that caused the widow's claim. Of course, the estate also would be required to demonstrate that the settlement it reached was reasonable and made in good faith. *Id.* at 409–10.

The difficulties faced by an attorney who represents one party to a marriage agreement when the other party is not represented are illustrated by *In re Marriage of Foran*, 834 P.2d 1081 (Wash. Ct. App. 1992). This case involved a premarital agreement that was held, as a matter of law, to be unreasonable and economically unfair to the wife, who had been unrepresented. As a result, under Washington law, the burden was placed on the husband, who had been represented, to establish that the agreement had been entered into by the wife voluntarily and with full knowledge of her rights. In fact, the evidence indicated that the agreement was (1) the result of duress; (2) presented to the wife nearly on the eve of marriage; and (3) presented to the wife with only general information as to its effect.

On the day the agreement was signed, the husband's lawyer delivered to the parties the draft of the agreement and an explanatory letter. The letter confirmed that the lawyer solely represented the husband and that, if the wife had questions regarding her rights or the legal import and effect of the agreement, she should seek separate counsel solely on her behalf.

The Washington court stated that when a premarital agreement is economically unfair, its enforcement requires proof that each party entered into the agreement voluntarily and *intelligently*. In this case, the court concluded that the wife had not entered into the agreement intelligently, since it was not established that she fully understood its legal consequences (i.e., that it was economically unfair). The attorneys general letter, written at the last moment, was insufficient to satisfy this test. The attorney did not explain to the unrepresented spouse why it was so important to seek advice from separate counsel (in this case, according to the Washington court, for the purpose of assisting the wife in negotiating an economically fair contract and to explain clearly the economic effects of the agreement). The court in no way implied, however, that the attorney had not lived up to his ethical responsibilities, including those regarding the potential conflict of interest.

It should also be noted that Washington's tests for validity and enforceability of a marriage agreement are different from Wisconsin's tests. Accordingly, the case is not instructive regarding Wisconsin law. See section 7.14, *supra*, regarding the enforceability of marital property agreements, and section 7.14(a)(4), *supra*, regarding the effect of lack of separate counsel. Nonetheless, the *Foran* case provides insight with respect to some of the various ethical considerations involved and the possible precautions that may be indicated under some circumstances, with respect to the professional responsibilities of an attorney representing one spouse when the other spouse is unrepresented.

Other than divorce, the situation of spouses entering into a general marital property agreement is as inherently conflicting or antagonistic as can be found in the marital property setting. *See supra* § 14.22. However, consistent with the factors outlined in section 14.5, *supra*, and applying the rule of informed written consent following consultation, there are situations in which joint representation may be appropriate. In such cases, the attorney should exercise special caution regarding provisions that may affect property division or support in the event of a divorce. In addition, whenever a marital property agreement includes provisions relating to divorce (for example, property division or maintenance), joint representation is not appropriate except in the most unusual circumstances. Generally, each party should be represented by independent counsel. A spouse may elect not to be represented, but this may present an ethical problem for the attorney representing the other spouse. For further discussion, see section 14.34, *infra*.

When independent representation is indicated, another issue relates to the form or required extent of such representation. This issue can be particularly difficult when the representation arises after the discussion and drafting stages have been completed. For example, one attorney may have drafted a marital property agreement for the spouses, pursuant to their informed consent to joint representation. However, the spouses may then decide to include divorce provisions (or, for other reasons, joint representation may no longer be appropriate). At that point, each spouse needs independent representation. The spouses may consent to the original attorney's continued representation of one of the spouses, and the other spouse may engage a second attorney with the expectation that he or she will merely advise regarding the divorce provisions. What is the extent of the duty of the second attorney with respect to the proposed agreement as a whole? How vigorous must the second attorney's advocacy be in order to fulfill his or her duties in the representation?

Similarly, the spouses may agree that their attorney will represent only one of the spouses in the preparation of a marital property agreement and that, after it is prepared, the other spouse will take the agreement to another attorney who the spouses expect will simply review it on behalf of the other spouse.

The following illustrations provide examples of common factual situations involving general marital property agreements in which joint representation may be appropriate. In each, assume the agreement does not include provisions for the disposition of property at divorce.

1. First marriage for both parties, and both parties are employed in roughly equivalent positions, have approximately equal estates, and are knowledgeable and "independent."

2. First marriage for both parties, and neither party has a significant estate; a "traditional" marriage is planned (with wife a stay-at-mother and husband as primary wage earner), neither party is more knowledgeable than the other, and the parties want all their property classified as marital property.

3. First marriage for both parties, and the parties share common goals and objectives with respect to their desire to provide for one another and ultimately for their children in a tax-efficient manner.

4. Second marriage for both parties, and each party has children from a prior marriage; each also has a separate estate, and although one estate is larger than the other, the difference is not substantial; in addition, both parties are knowledgeable and "independent," and want their property to remain separate and pass to their respective children by prior marriage.

Assume that the attorney explains generally both the marital property system and the advantages, disadvantages, and implications of joint representation. After that, the parties ask the attorney to help them develop the agreement, and they provide written consent to the joint representation. In each of the examples above, if factors 1 through 9 in section 14.5, *supra*, or other facts do not tip the scale in favor of independent representation, joint representation would generally be ethically permissible. It is suggested that a confirming letter be sent to the clients, briefly summarizing the lawyer's explanation, the parties' request, and their respective consents. A sample letter, which should be tailored to each particular case, appears in section 14.35, *infra*.

While joint representation of spouses with respect to an agreement that contemplates the disposition of property at divorce is generally ill-advised, it will not necessarily render the agreement invalid. The New York Court of Appeals held, in a divorce action in which the spouses' separation agreement was challenged on the basis of joint representation, that

> [A]s long as the attorney fairly advises the parties of both the salient issues and the consequences of joint representation, and the separation agreement arrived at was fair, rescission will not be granted. While the potential conflict of interests inherent in such joint representation suggests that the husband and

> wife should retain separate counsel, the parties have an absolute right to be represented by the same attorney provided "there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement."

Levine v. Levine, 436 N.E.2d 476, 479 (N.Y. 1982) (citations omitted). The court ruled that the fact that the husband's attorney represented both parties did not, without more, establish overreaching by the husband. The court emphasized that the trial court found that the attorney had remained neutral throughout his involvement (apparently, the parties had agreed on the essential terms before contacting the attorney).

It is significant that joint representation is contemplated by the Wisconsin Marital Property Act. Under the Act, the fact that one party is unrepresented or both are represented by one counsel does not by itself make the marital property agreement unconscionable or otherwise affect its enforceability. Wis. Stat. § 766.58(8); *see supra* § 7.14a(4). It should be emphasized that this statutory provision does not resolve the ethical questions,[36] but it appears to reflect a policy permitting, if not encouraging, joint representation in appropriate situations. When independent representation is waived, it is suggested that the waiver also be contained in the marital property agreement itself.

2. [§ 14.28] Limited Marital Property Agreements

A marital property agreement between spouses may be used for limited as well as general purposes. *See supra* Chapter 7. Subject to considerations reflected in factors 1 through 9, *see supra* § 14.5, independent counsel may be needed less frequently for limited agreements. Often, the purpose of a limited agreement may be to accommodate a joint desire of the spouses, sometimes based on a decision arrived at independently of the lawyer. After analyzing the factors and applying the rule of informed consent, the lawyer may conclude that joint representation is appropriate. The following are examples of limited marital property agreement situations in which joint representation likely will be appropriate:

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[36] The Legislative Council supplemental note to 1985 Trailer Bill § 177m, amending § 766.58(8), is in accord. *See* Wis. Stat. Ann. § 766.58 Legis. Council Comm. Supplemental Notes Relating to 1985 Act 37 (West 1993).

1. Agreement to provide that income on presently owned marital or nonmarital property, and property traceable to that property, shall be individual property. Caution is indicated if this would cause substantial inequality between the parties or if the agreement covers future acquisitions (for example, assets acquired by the spouse by gift or inheritance), but joint representation may still be appropriate.

2. Agreement to provide that specific life insurance on the life of a spouse, not owned by one of the spouses (for example, owned by a child or trust), will not have a marital property component even if marital funds are used to pay premiums.

3. Agreement to provide that either spouse may freely name the beneficiary of specific life insurance or an employee benefit held by that spouse, with the other spouse waiving all marital or deferred marital property claim to it, even if the item has a marital property component.

4. Agreement to provide sole management and control of specific assets (or a class of assets) held by the spouses or by one spouse.

5. Agreement to reclassify an asset or a limited number of assets as the individual property of one of the spouses (for example, to permit specific bequests of that property or to facilitate estate tax planning).

See also supra § 14.27 (comments following illustrations).

C. [§ 14.29] Ownership; Management and Control

Advising spouses regarding their respective ownership interests in property and their rights of management and control presents classic conflicts of interest. *See supra* §§ 14.15–.22. However, if the attorney does not have reason to believe that there is underlying hostility or conflict, and if the factors do not indicate the advisability of separate counsel, *see supra* § 14.5, the attorney may proceed to give advice and perform professional services if the spouses consent under the procedures discussed in section 14.11, *supra*.

In the joint representation situation involving ownership or management and control of marital property, even though written consent is given, it is important that the attorney keep both spouses informed of the advice given to either of them, because the advice to one probably will affect the other. If a spouse to whom advice is given insists that this information not be conveyed to the other spouse and proceeds with the contemplated action, the attorney may be forced to withdraw as counsel for both spouses (unless the other spouse consents to the attorney continuing to serve as counsel for the advised spouse). *See supra* § 14.12. An appropriate letter of consent to joint representation, *see supra* § 14.11, waiving confidentiality between the spouses, would effectively avoid this problem. However, the letter is revocable prospectively by either spouse, and each remains free to obtain independent counsel at any time. It appears that, in a joint representation situation, one spouse's insistence that information not be conveyed to the other spouse, as described above, may amount to a revocation of that spouse's waiver of confidentiality and his or her consent to joint representation. *See supra* § 14.11, *infra* § 14.32.

A consent to joint representation should be current. A "blanket" consent, covering *all* future transactions, without more, is not sufficient. However, it does not seem to be necessary to obtain a new consent for each possible conflict of interest within a general area for which consent previously has been given. A rule of reason applies, and continuing consent may be implied by the course of dealing with the spouses. On the other hand, if a new matter arises involving considerations not related to the original explanation and consent, the lawyer should explain the new considerations to the spouses and obtain a new informed consent. In that instance, it is advisable to send a letter to the spouses, obtaining their written confirmation of continuing consent. If new conflicts of interest arise, involving substantial matters and differing considerations, a new written consent by the spouses would be required. *See supra* § 14.12.

In sum, joint representation creates for the attorney a continuing duty to disclose to the clients subsequent developments that might affect the attorney's independent judgment and the spouses' prior consent. *See* Annotated Code, *supra* note 19, at 243–44.

D. [§ 14.30] Credit Transactions

The considerations involved in representing spouses in ownership and management and control situations, *see supra* § 14.29, also apply to credit transactions. In addition, in nearly all unilateral credit transactions by a spouse, there is an immediate economic effect (advantageous or detrimental) on the other spouse and the marital property of the spouses. Differing interests, if not direct conflicts of interest, may be inherent in credit transactions. For example, a credit transaction by one spouse that creates an obligation in the interest of the marriage or family exposes to creditors all marital property of the spouses, including the other spouse's income. *See supra* Chapter 5. Further, a spouse is required to act in good faith with respect to the other spouse in credit transactions involving marital property. *Id*.

Accordingly, if the attorney represents both spouses (except when the joint representation has concerned an unrelated transaction), it is advisable that the other spouse be informed of professional services or advice rendered to one spouse. Under joint representation, unless the other spouse has consented in writing in advance to the particular representation relating to credit, the attorney should advise the other spouse before proceeding.

E. [§ 14.31] Personal Injury Litigation

Various conflicts of interest may arise in connection with personal injury accident claims and the litigation or settlement of those claims. For example, the question of the allocation of recovery involves a potential conflict if damages are sought for both loss of income and pain and suffering. Under section 766.31(7)(f), a recovery for personal injury is individual property except that portion attributable to expenses paid or otherwise satisfied with marital property and except for the amount attributable to loss of income during marriage. As a result, a conflict can arise in negotiating a settlement, structuring a settlement, and developing the theory and presentation of the case, as well as in other instances.

An attorney who represented both spouses before the accident and is asked to represent the injured spouse, or an attorney who is asked to represent both spouses with or without any prior representation, should be alert to these and related conflicts. The attorney should proceed with joint representation only after concluding that he or she may adequately represent both spouses under the guidelines of SCR 20:1.7 (*see supra* § 14.11) and after concluding that none of the factors in section 14.5, *supra*, or any other fact points to the necessity of independent representation. It is recommended that the attorney send a letter to the spouses, summarizing the attorney's explanation and giving the parties the opportunity to request in writing that the attorney serve, with such writing to contain their respective consents. Such a letter can be modeled after the sample letters in sections 14.35–.36, *infra*.

F. [§ 14.32] Estate Planning

Estate planning represents an ideal situation for joint representation, particularly because of the advantages of coordinated planning, the promotion of harmony, and the efficiencies that can be obtained by the use of one attorney for both spouses. Nevertheless, the attorney must be alert to the potential ethical problems, particularly those that may arise as the planning progresses.[37] It also should be noted at the outset that the conflict-of-interest rules under SCR 20:1.7 were intended to deal with parties in directly adversarial situations, such as in litigation, and not with estate planning (and related areas such as probate and trust administration). *See supra* § 14.8; *see also* Developments, *supra* note 5, at 2; Bruce, *supra* note 5 (discussion and sample joint representation letters); *supra* §§ 14.4–.12 (additional references).

The general principles outlined in sections 14.2–.14, *supra*, apply to estate planning. However, unless an acrimonious relationship exists or the factors discussed in section 14.5, *supra*, point to the necessity of independent counsel, one attorney may represent both spouses in developing their estate plan, preparing the documents, and implementing the plan. The situation is no more inherently conflicting than some of the others described above, *see supra* §§ 14.26–.31, but because the estate planning process involves disposition of all of a spouse's assets, significantly affects each spouse's interest in marital property, and may affect each spouse's credit, special care is required.[38]

If, after the attorney has generally explained the marital property system, the estate planning process, the spouses' respective rights, and the advantages and disadvantages of joint representation, the spouses ask the attorney to proceed on their joint behalf and consent in writing to joint representation, there is no reason why the attorney cannot represent both spouses. This assumes, of course, that the attorney has concluded that the matter is appropriate for joint representation. *See supra* §§ 14.5–.12. For spouses who are existing pre-Act estate planning clients, the explanation may be less extensive, but not with respect to the marital property system and the spouses' respective rights.

[37] *See* Flaherty, *Conflicts of Interest Arising in the Two-Spouse Estate Planning Context*, Est. Gift & Tr. J. 17, 20 (1982).

[38] *See* James R. Wade, *When Can a Lawyer Represent Both Husband and Wife in Estate Planning?*, Prob. & Prop., Mar./Apr. 1987, at 12.

The following ethics opinion succinctly states the ethical considerations involved and the propriety of proceeding in this manner:

> A lawyer may represent both husband and wife in estate planning matters provided the lawyer makes full disclosure of the possible effect of this multiple representation on the exercise of his independent professional judgment on behalf of each client, explaining in plain English the meaning and personal impact of the plans ultimately crafted. The clients should be willing to waive their rights of having the lawyer guard each client's confidence. The lawyer should be authorized to disclose all the assets involved to each party, as well as to disclose the terms of each will. Whether the lawyer conducts this business in separate or joint meetings does not matter so long as he makes full disclosure. Since one spouse more likely holds the bulk of assets and will probably pay the lawyer, the lawyer should exercise care not to permit this spouse to regulate or distort his judgment. While the potential for conflict exists between the husband and wife, they may seek one lawyer as a problem solver, not as an advocate, with the expectation that they may have to accept compromises for the overall advantage of the family.

Allegheny County (Pa.) Bar Ass'n Prof. Ethics Comm., Op. (Mar. 1, 1983) (reprinted in ABA/BNA Manual (Ethics Opinion, 1980–85), *supra* note 17, at 801:7401–:7402).

Because of the complexities of marital property and the additional areas of potential conflict and divergence of interest, it is suggested that either before, at, or soon after the initial estate planning conference, the attorney should send an explanatory letter to the spouses, confirming the consultation and requesting the spouses' written consent. *See* SCR 20:1.7 ABA cmt. (Consultation and Consent). A sample letter, which requires tailoring in each instance, appears in section 14.36, *infra*. The letter follows the general format of the suggested letter in Flaherty, *supra* note 37.

Questions may arise over whether, after performing estate planning services for both spouses, an attorney may thereafter draft inconsistent planning documents for one of the spouses. The general rule is that he or she may not, absent an informed, written consent, but requesting such consent may not be possible because the attorney could then violate the confidentiality rules of model rule 1.6 (SCR 20:1.6). *See supra* §§ 14.7–.13. This situation was illustrated by the following opinion of the Ethics Committee of the State Bar of Arizona:

> Lawyer A drafts separate wills for Mr. and Mrs. X, both of which contain substantially the same clauses by which both leave their property to each other. Both Mr. and Mrs. X are aware of the contents of each will. Later Mrs. X

> comes to A and wants to have her will changed so that all of her property would be left to her children. Although Mrs. X may, of course, dispose of her property as she sees fit, and although Mr. X has no legal right in her property, A would be diluting his loyalty to Mr. X if he made the change in Mrs. X's will. He should not do that and should not inform Mr. X of the proposed change.

State Bar of Ariz. Comm. on Rules of Prof. Conduct, Op. 76-15 (Aug. 10, 1976). *See also supra* § 14.13 (discussion of Florida Ethics Opinion 95-4).

This situation, involving the completion of a coordinated estate plan for the spouses and a later change in one spouse's desires, places the lawyer in a dilemma. Assuming that the above facts involve continued joint representation, the Arizona ethics opinion seems correct in proscribing the lawyer from preparing the inconsistent will or codicil. However, if there is prior consent to joint representation, and one spouse requests the attorney to prepare a new inconsistent will or codicil, the lawyer should be permitted to inform both parties that one spouse has asked the lawyer to prepare a change that is inconsistent with the coordinated plan. The lawyer should then explain that he or she cannot proceed without consent being renewed by both spouses.

The rule has been succinctly stated as follows: "When the interests of clients diverge and become antagonistic, their lawyer must be absolutely impartial between them, which, unless they both or all desire him to represent them both or all, usually means that he may represent none of them." Drinker, *supra* note 7, at 112. For example, if two persons for whom an attorney prepared a contract or mortgage become involved in a dispute concerning the contract or mortgage, the lawyer may not be able to represent either in the dispute. *Id.* at 113. However, in the spousal context, with appropriate consent, the attorney may possibly represent one spouse in the dispute. *See supra* §§ 14.12, .23; *see also* State Bar of Wis. Standing Comm. on Prof. Ethics, Formal Op. E-83-9 (1983) (Attorney's Obligation When Clients Develop Adverse Interest).

The attorney should be alert to other areas of potential conflict in the estate planning context and explain them to the spouses as the estate planning proceeds. *See* Developments, *supra* note 5, at 10. Among these other areas are the following:

1. Classification of property, including deferred and terminable interest marital property;

2. Consents for beneficiary designations, including gift tax aspects;

3. Effect of transfers to revocable trusts;

4. Selection of fiduciaries (and attorneys, if appropriate);

5. Classification of debts and directions for payment;

6. Forced and voluntary elections; and

7. Will substitute marital property agreements (Washington wills).

An attorney preparing a will for his or her spouse and naming the attorney or a person related to him or her as beneficiary presents another ethical issue in estate planning. The rule for this situation is found in SCR 20:1.8(c), which provides:

> A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where:
>
> (1) the client is related to the donee,
>
> (2) the donee is a natural object of the bounty of the client,
>
> (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and
>
> (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Prior to a 1991 amendment to SCR 20:1.8(c) by the Wisconsin Supreme Court, paragraph (4) of the rule further required that the bequest to the lawyer could provide no more than the lawyer would receive under the laws of intestacy. With the exception of that change, SCR 20:1.8(c) is based on the decisions of *State v. Collentine*, 39 Wis. 2d 325, 159 N.W.2d 50 (1968), and *State v. Beaudry*, 53 Wis. 2d 148, 191 N.W.2d 842 (1971). *See also State v. Gulbankian*, 54 Wis. 2d 599, 196 N.W.2d 730 (1972); State Bar of Wisconsin Standing Committee on Professional Ethics, Formal Opinion E-80-1 (1980) (Drafting Will for Partner's Spouse) (applying rule that disqualification of one lawyer in an organization generally disqualifies all affiliated lawyers).

With regard to the common representation of husband and wife in estate planning matters, see generally *ACTEC Commentaries*, *supra* note 5; *Representing Husband and Wife*, *supra* note 13; *see also supra* §§ 14.4–.5. With regard to client confidence issues in representing a husband and wife in estate planning matters, see the discussion at section 14.13, *supra*. On the subject of representation of multiple clients in the estate planning context, see *In re Estate of Koch*, 849 P.2d 977 (Kan. Ct. App. 1993), discussed at section 14.5, *supra*. For a discussion separate versus joint representation generally see section 14.4, *supra*.

G. [§ 14.33] Probate

The attorney serving as counsel for the personal representative must be alert to normal conflicts of interest plus those inherent in the probate process and the representation of a fiduciary.

These have been heightened by the adoption of the marital property system. The general considerations outlined in sections 14.2–.14, *supra*, apply, but in some circumstances the factors tending to favor joint representation may not apply or may not be persuasive. Further, the rules of consent may not be practical in view of some of the fiduciary relationships. In such instances, independent representation may be required.

The following five illustrations offer some guidance.

1. Independent personal representative (who is not the spouse); surviving spouse is the sole beneficiary of the estate (or the only other beneficiaries are beneficiaries of pecuniary or specific bequests that can be satisfied without regard to questions of classification of assets or debts). In this case, the attorney for the surviving spouse may serve as attorney for the personal representative, and consent is not required because no conflicts of interest appear. Note, however, that if a dispute were to arise between the personal representative and the surviving spouse, the attorney would need to withdraw from representation of both (at least with respect to the issue in dispute), or with the consent of both parties represent only one of them with respect to such issue.

2. Independent personal representative (who is not the spouse); surviving spouse is not the sole beneficiary of the estate (spouse owns his or her one-half interest in the former marital property, but, for example, the residue of the estate passes in trust for the decedent's children). In this scenario, the attorney for the surviving spouse probably should not serve as attorney for the personal representative without the consent of the personal representative and the surviving spouse. (Further, the lawyer may have a duty to advise the personal representative to seek approval of the interested persons before consenting to the representation.) The primary reason is that it is the personal representative's duty

to assert classification of individual property rather than marital property and to assert other positions conflicting with the surviving spouse's interest. It should be noted that the responsibilities regarding classification are vested in the personal representative and not the attorney. If a specific conflict arises between the personal representative and the surviving spouse, separate representation may be required, and the attorney may not represent either party without the consent of both. If the surviving spouse obtains independent counsel, the original attorney for the surviving spouse still should not represent the personal representative without the spouse's consent. The results suggested in this paragraph may be different if the spouses have entered into a marital property agreement which clearly delineates what marital property rights exist.

3. The attorney represented the spouses during the decedent's lifetime and is appointed personal representative under the deceased spouse's will; the surviving spouse is not the sole beneficiary of the estate. It appears that in this case, the attorney may serve as personal representative, attorney for the estate, and attorney for the surviving spouse (despite the fact that the attorney, as personal representative, must exercise independent judgment regarding classification of property, payment of debts and expenses, and so on), because the decedent created the apparent conflict, and the persons interested are free to challenge such exercise. If, however, a conflict arises and a challenge is made, the attorney may not serve as attorney for the surviving spouse, and independent representation is required.

4. Independent personal representative (who is not the spouse); in this situation, the attorney who prepared the decedent's estate plan, but did not represent the decedent's spouse, may represent the personal representative. If all the assets pass to the surviving spouse, or there are no questions concerning marital or deferred marital property, the attorney also may represent the decedent's spouse with regard to his or her interest in the estate, without approval of the personal representative.

5. The surviving spouse is not the sole beneficiary of the estate; the surviving spouse is appointed personal representative under the decedent's will. In this case the surviving spouse's attorney may serve as attorney for the personal representative. The surviving spouse (and hence, his or her attorney in each capacity) has a conflict of interest between his or her duty as personal representative to assert classifica-

tions of property that will enhance the probate estate, and his or her personal interest to assert the contrary with respect to marital and individual property. However, since the decedent presumably knew of the potential conflict, and the personal representative is free to select his or her own counsel, the attorney may proceed with representation unless an actual conflict arises.

In connection with probate, in addition to the considerations outlined in sections 14.2–.14, *supra*, and this section, the attorney should be alert to other areas of potential conflict. Among these are the following:

1. Classification and collection of property, and asserting individual or marital interests therein;

2. Use of presumptions, and possibly not attempting to rebut them if advantageous to the estate;

3. Treatment of property passing independent of probate;

4. Validity and effect of marital property agreements, consents, and waivers by the decedent;

5. Violation of good faith duty by the other spouse;

6. Forced and voluntary elections; and

7. Payment of debts and expenses.

For further discussion, see Developments, *supra* note 5.

For a thorough discussion of the various ethical issues and dilemmas facing the lawyer for a fiduciary in the trusts and estates context, see *Counseling the Fiduciary*, a report of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar Association, *reprinted at* 28 Real Prop. Prob. & Tr. J. 825 (1994); *see also* Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. Ill. L. Rev. 889 (1994); ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 94-380 (1994) (Counselling a Fiduciary), the summary of which states as follows:

> A lawyer who represents the fiduciary in a trust or estate matter is subject to the same limitations imposed by the Model Rules of Professional Conduct as are all other lawyers. The fact that the fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's

> obligations to the fiduciary client under the Model Rules, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. Specifically, the lawyer's obligation to preserve the client's confidences under Rule 1.6 is not altered by the circumstance that the client is a fiduciary.

Both the *ACTEC Commentaries*, *supra* note 10, and the report *Counseling the Fiduciary* take a more expansive approach on the subject of disclosures by the lawyer for the fiduciary. For example, the Commentary on Model Rule 1.6 states: "[T]he fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries." The report *Counseling the Fiduciary* describes various circumstances under which duties may arise to beneficiaries even where the lawyer represents only the fiduciary.

H. [§ 14.34] Divorce

Each spouse should be separately represented in divorce proceedings. Although there is a contrary view that it may be appropriate to represent both spouses in no-fault divorce proceedings (based on the philosophy that one should not create a controversy between parties when none exists), *see Annotated Code*, *supra* note 19, at 238 (citing *Klemm v. Superior Court*, 142 Cal. Rptr. 509 (1977)), the prudent rule is stated by the March 25, 1983, Opinion of the Ethics Committee of the Mississippi State Bar (published after submission to the bar's board of commissioners):

> An attorney may not represent both parties in a no-fault divorce. The interests of the parties are conflicting, inconsistent, diverse, and otherwise discordant, no matter what the parties themselves believe. Serving one client's interest may result in not adequately representing the other client's interest. The lawyer's loyalty will be divided.

ABA/BNA Manual (Ethics Opinions, 1980–85), *supra* note 17, at 801:5104–:5105.

A formal opinion in Wisconsin based on ABA code canon 5 flatly holds that an attorney may not represent both spouses in a divorce proceeding. State Bar of Wis. Standing Comm. on Prof. Ethics, Formal Op. E-84-3 (1984) (reprinted at 57 Wis. Bar Bull. 40, 88 (June 1984)). Former Wisconsin Supreme Court Rule 20.23(3)(b) (EC 5 15) stated that "A lawyer should never represent in litigation multiple clients with differing interests . . . ." In the committee's opinion, divorce under chapter 767 is litigation, whether contested or uncontested, and divorcing spouses have differing interests (even if they appear to be in agreement, since the probabilities of unrevealed differing interests remain high), and therefore joint representation is improper.

Another formal opinion, State Bar of Wis. Standing Comm. on Prof. Ethics, Formal Op. E-79-2 (1979) (reprinted at 57 Wis. Bar Bull. 40, 61 (June 1984)), disapproved of a proposed agreement between a lawyer and a married couple considering divorce under which the lawyer proposed to mediate disputes arising in the course of settlement negotiations. The committee concluded that under the facts of the opinion, such a role was unethical because the lawyer would be serving as legal counsel for the parties, which placed the lawyer in an unresolvable position of conflict in view of the adversarial nature of divorce proceedings. However, Formal Opinion E-79-2, which predated Wisconsin's adoption of model rule 2.2, was subsequently withdrawn by Formal Opinion E-97-3, which states that "An attorney may serve as an intermediary between two current clients, such as a husband and wife in a divorce action, if the requirements of SCR 20:2.2 are met. . . ."[39]

The Wisconsin Marital Property Act does not affect the Family Code itself, but the Act's added complexities relating to ownership of property, credit transactions, good faith duty, interspousal remedies, and the like emphasize the necessity of separate representation for each spouse in an action for divorce or related relief.

Consistent with the principle that each spouse should be separately represented in a divorce proceeding, one lawyer should not represent both spouses in connection with a marital property agreement that includes provisions for property division or maintenance in the event of dissolution of the marriage. Section 767.255(3)(L) provides that a written agreement by spouses or parties intending to be married "concerning any arrangement for property distribution" is a factor to be considered by the court in

[39] To summarize, a lawyer should not undertake a joint representation of spouses in a divorce proceeding, but a lawyer may serve as an intermediary in resolving disputed issues if the requirements of SCR 20:2.2 are met. Note that the new ABA model rules (currently under consideration in Wisconsin—see discussion at section 14.9, *supra*) do away with model rule 2.2 and incorporate its requirements into model rule 1.7 (for client representations) and a new model rule 2.4 (specifically for mediation).

determining the property division at dissolution. The statute also provides that such an agreement is binding upon the court unless the terms are inequitable as to either party. In addition, section 767.26(8) provides that agreement concerning financial support is a factor to be considered by the court in determining maintenance payments. Since advice and representation concerning such provisions may involve conflicts of interest, *see supra* § 14.8, and ultimately may involve divorce proceedings, joint representation is inappropriate except in the most unusual circumstances. From the standpoint of litigation, moreover, such provisions may be viewed as in the nature of a stipulation, for which independent counsel would be required.

A recent trend may represent a caveat to the above general principles. "Collaborative divorce" has received a significant amount of attention in Wisconsin. The concept is that each spouse is independently represented, but the lawyers enter into engagement agreements with their respective clients, and both spouses and both lawyers enter into a stipulation that they will conduct the divorce under the principles of collaborative divorce. Each lawyer agrees that the lawyer will not represent either spouse in adversarial proceedings. The lawyers and their respective clients agree to waive confidentiality and the right to object to requests for information, and agree affirmatively to provide full, honest and open disclosure of all information, whether requested or not. The lawyers agree to withdraw if their respective clients propose to withhold or misrepresent information. The lawyers also agree to not take unfair advantage of (and, in fact, to correct) each other's mistakes. This process has been discussed in three separate articles in the May 2002 issue of Wisconsin Lawyer.[40] One of the authors makes a compelling case that the ethical and malpractice issues inherent in the collaborative divorce model are insurmountable. He bases his opinion on the argument that the stipulation entered into by all of the parties and lawyers causes each lawyer to "represent" both spouses, not just the spouse who nominally retained the lawyer. Whether his argument will prove persuasive remains to be seen, but even to proponents of collaborative divorce, his viewpoint should serve as a warning as well as a road map to the careful structuring of such a representation.[41]

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[40] The articles are collected at the Wisconsin State Bar web site. The link at time of publication is http://www.wisbar.org/wislawmag/2002/05/young.html.

[41] The authors suggest that there are five potential models for handling a divorce. First, both parties may proceed pro se. Second, one party may be represented and the other may proceed pro se. Third, both parties may be independently represented. Fourth, the parties may be independently represented

Attorneys should also exercise caution with respect to joint representation in the preparation of a marital property agreement if the effect is a change in the character of an asset or assets that significantly affects the composition of the property subject to division at divorce. *See* Wis. Stat. § 767.255(2)(a). For example, a marital property agreement may reclassify an asset acquired by gift or transfer at death to marital property, which would not otherwise be subject to property division under section 767.255 except upon a finding of hardship. This may result in the reclassified asset becoming subject to property division under the rationale of *Bonnell v. Bonnell*, 117 Wis. 2d 241, 344 N.W.2d 123 (1984). Whether joint representation is appropriate in such a situation will depend on a consideration of the circumstances, including the factors discussed at section 14.5, *supra*. *See also supra* § 14.11.

V. [§ 14.35] Sample Letter Regarding Marital Property Agreement Representation

This sample letter relates to representing spouses in the preparation of a general marital property agreement, as discussed at section 14.27, *supra*. It should be tailored for the facts involved, and it should not be used without consideration of the ethical requirements and factors discussed in this chapter.

Dear [Both Parties]:

You have asked us to perform professional services in connection with the preparation of a Marital Property Agreement.

Before proceeding, it is imperative that each of you understands that this "joint representation" involves differing interests, as well as potential or actual conflicts of interest. These affect our ability to serve each of you with independent professional advice. In addition, adherence to the lawyer's duty to preserve each client's confidences may not be possible.

On the other hand, in amicable circumstances such as these, where each of you apparently has the same overall objectives, the use of one attorney or firm can assist in developing the Agreement, encourage the resolution of possible differing interests, and, of course, produce cost savings and efficiencies.

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by lawyers in a collaborative divorce. Fifth, the parties may retain a single lawyer as a mediator. The last two alternatives in particular require special attention to ethical requirements.

In serving you jointly, we will strive not to be an advocate for either of you. However, this may not be possible, and it may result in favoring one of you to the detriment of the other. Similarly, we cannot keep information confidential between the two of you, since we will be serving both of you. Therefore, by requesting this joint representation, each of you is authorizing us to reveal all information relating to each party's income, assets and liabilities, contents of documents, and other disclosures and information, to the other party.

Our recommendations concerning the Agreement will affect each of your interests in assets and income during your marriage, in the event of a divorce, and at the time of the death of one or both of you. [The present and future classification of assets and income under the Wisconsin Marital Property Act is of major significance. There may be substantial differences in resolving which assets are now or should become marital, individual, or other types of property, and the extent of your present or future respective interests in these assets and income and in mixed property.] [The classification of present and future assets and income under the Wisconsin Marital Property Act is of major significance. There may be substantial differences in resolving whether, or to what extent, your future acquired assets or income should become marital, individual, or other types of property, and the extent of each of your future respective interests in these assets and income and in mixed property.] *[Use first bracketed language for an agreement between spouses and second bracketed language for a premarital agreement.]*

Similarly, the Agreement will affect your respective rights over the management of assets, ability to obtain credit, responsibilities to creditors, duty of support, decision making during marriage, and related subjects. Also, our recommendations will affect the income, property, and other obligations of either of you in the event of termination of your marriage or in the event of your death.

There are other areas of differing interests or potential conflicts, such as the incidence of gift, income, or estate taxation, various consents to contemplated actions, duties of good faith with respect to managing marital property, and myriad other possible differing interests.

In this matter, or in any other matter, each of you may prefer to have, and should feel free to seek, the advice of separate counsel so that each of your interests will be fully protected, your confidences will not be compromised, and each of you will have the benefit of completely independent advice. Indeed, as to the question itself of whether you both should proceed with joint representation, either of you should feel entirely free to seek, and are encouraged to obtain, the advice of another attorney.

Each of you should decide whether you wish our firm to represent you jointly in connection with the development of your Marital Property Agreement, its preparation, and these related matters. Assuming that you wish to consent to our proceeding on behalf of both of you on such a joint representation basis, please sign and return the enclosed copy of this letter. Please contact me if you have any questions concerning any of this explanation.

Very truly yours,

____

Each of us have reviewed the above, and we each realize that there are many areas of differing interests, as well as potential or real conflicts of interest, between us in connection with a proposed Marital Property Agreement for us and related matters. We each understand that, at any time, either of us may have separate, independent counsel in connection with these matters. After considering all of the above, we each request that you and your firm represent both of us in connection with the development of our Marital Property Agreement, its preparation, and related matters, and we each consent to that joint representation. We each also understand that, as between each of us and you and your firm, there are no confidential communications since you represent both of us (but that, with respect to third persons, the ethical rules relating to confidential communications will continue to apply).

____
[Wife] [Prospective Wife]

____
[Husband] [Prospective Husband]

VI. [§ 14.36] Sample Letter Regarding Estate Planning Representation

This sample letter relates to representing spouses in the preparation of an estate plan, as discussed in section 14.32, *supra*. It should be tailored for the facts involved, and it should not be used without consideration of the ethical requirements and factors discussed in this chapter.

Dear [Wife and Husband]:

You have asked us to perform various estate planning services for you.

Before proceeding, it is important that each of you understands that this "joint representation" involves differing interests, if not potential or actual conflicts of interest. These may affect our ability to serve each of you with independent professional advice. In addition, adherence to the lawyer's duty to preserve each client's confidences may not be possible.

On the other hand, in amicable circumstances such as these, where each of you apparently has the same overall objectives, the use of one attorney or firm can assist in developing a coordinated overall plan, encourage the resolution of possible differing interests, and, of course, produce cost savings and efficiencies.

In serving you jointly, we will strive not to be an advocate for either of you. However, this may not be possible, and it may result in favoring one of you to the detriment of the other. Similarly, we cannot keep information confidential between the two of you, since we will be serving both of you. Therefore, by requesting this joint representation, each of you is authorizing us to reveal each party's income, assets and liabilities, contents of documents, and other disclosures and information, to the other party.

Our recommendations concerning your estate planning will affect each of your interests in assets and income, both during your lifetimes and after your deaths. The classification of property under the Wisconsin Marital Property Act is of major significance. There may be substantial differences in resolving which assets are marital, individual, or other types of property, and the extent of your respective interests in these assets and in mixed property. Our recommendations, and your actions, will naturally affect the income, property, and other obligations of either of you in the event of termination of your marriage or at the death of one or both of you.

Similarly, your desires may differ with respect to how you wish your property to pass upon each of your deaths, or by gifts. There are other areas of differing interests or potential conflicts, such as the incidence of gift, income, or estate taxation, various consents to contemplated actions, management and control rights that you have with respect to your marital property, duties of good faith with respect to managing marital property, and myriad other possible differing interests.

In all the various aspects of your planning, or in any other matter, each of you may prefer to have, and should feel free to seek, the advice of separate counsel so that each of your interests will be fully protected, your confidences will not be compromised, and each of you will have the benefit of completely independent advice. Indeed, as to the question itself of whether you should proceed with joint representation, either of you should feel entirely free to seek, and are encouraged to obtain, the advice of another attorney.

Each of you should decide whether you wish our firm to represent you jointly in connection with your estate planning and these related matters.

Assuming that you wish to consent to our proceeding on behalf of both of you on such a joint representation basis, please sign and return the enclosed copy of this letter. Please contact me if you have any questions concerning any of this explanation.

Very truly yours,

____

We each have reviewed the above, and we each realize that there are many areas of differing interests, as well as potential or real conflicts of interest, between us in connection with our estate planning and related matters. We each understand that, at any time, either of us may have separate, independent counsel in connection with these matters. After considering all of the above, we each request that you and your firm represent both of us in our estate planning and related matters, and we each consent to that joint representation. We each also understand that, as between each of us and you and your firm, there are no confidential communications since you represent both of us (but that, with respect to third persons, the ethical rules relating to confidential communications will continue to apply).

____
[Wife]

____
[Husband]

14

Ethical Considerations

Book sections supplemented: 14.3, 14.4, 14.5, 14.7, 14.9, 14.10, 14.11, 14.12, 14.13, 14.27, 14.32, and 14.34

14.3 [General Approach to Representing One or Both Spouses] General Considerations

Page 3: Amend last sentence in footnote 1

Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2005–06 Wisconsin Statutes, as affected by acts through 2007 Wisconsin Act 19.

Page 4: Insert new paragraphs after first partial paragraph

On January 5, 2007, the Wisconsin Supreme Court issued an order formally adopting the new "Ethics 2000" changes to the Rules of Professional Conduct for Attorneys, effective on July 1, 2007. Wis. Sup. Ct. Order 04-07, 2007 WI 4, 293 Wis. 2d xv, *available at* http://www.wicourts.gov/sc/rulhear/DisplayDocument.html?content=pdf&seqNo=27737. The new rules are found in SCR chapter 20 and completely replace the prior version of that chapter.

The Wisconsin Ethics 2000 Committee, with its petition to the supreme court to revise the ethics rules, submitted comments that the court designated as "Wisconsin Committee Comments" in its final order repealing and recreating SCR chapter 20. Generally, Wisconsin Committee Comments indicate points of difference between an American Bar Association (ABA) Ethics 2000 Model Rule of Professional Conduct (hereinafter "model rule") and the corresponding rule adopted in Wisconsin. The court also added comments where it adopted changes that differed from the model rule or deemed additional guidance appropriate; the court designated these in its order as "Wisconsin Comments." The court did not adopt the Wisconsin Committee Comments or the Wisconsin Comments, nor did it adopt the Preamble or ABA comments to the model rules, but these items may be consulted for guidance in interpreting and applying the new rules. *See* Wis. Sup. Ct. Order 04-07, 2007 WI 4, 293 Wis. 2d xv. The Wisconsin Committee Comments and the Wisconsin Comments, the Preamble and Scope section to the model rules, and the ABA comments have been published in the court's final order and are reprinted as part of SCR chapter 20 in the Wisconsin Statutes.

See also Timothy J. Pierce & Dean R. Dietrich, *Wisconsin's New Rules of Professional Conduct for Attorneys*, Wis. Law., Feb. 2007, at 12, *available at* http://www.wisbar.org/AM/Template.cfm?Section=Search_Archive1&template=/cm/htmldisplay.cfm&contentid=63193; Dean R. Deitrich & Timothy J. Pierce, *Overview: Court's Proposed Changes to Attorney Conduct Rules*, Wis. Law., July 2006, at 28, *available at* http://www.wisbar.org/AM/Template.cfm?Section=Search_Archive1&template=/CM/HTMLDisplay.cfm&ContentID=62700.

14.4 [General Approach to Representing One or Both Spouses] Independent, Joint and Separate Representation

Pages 6–7: Amend last textual sentence in carry-over paragraph

The new Supreme Court Rule ~~20:2:2~~ 20:1.7 continues to recognize~~s~~ the propriety of a lawyer serving as an "intermediary" when the lawyer believes that the matter can be resolved on terms compatible with the clients' best interests and that each client can make adequately informed decisions, and when each client provides informed consent to the common representation. *See infra* § 14.11.

Page 7: Insert new paragraph after first full paragraph

To coincide with the ABA's Ethics 2000 revision of the model rules, ACTEC in March 2006 published its fourth edition to the *Commentaries*. The new edition may be ordered from ACTEC using the form located on the ACTEC Web site, at http://www.actec.org/public/commorder.asp (last visited Aug. 15, 2007). Individuals without Internet access may contact ACTEC by phone at (310) 398-1888.

14.5 [General Approach to Representing One or Both Spouses] Suggested Factors for Determining Independent or Joint Representation

Page 9: Read in conjunction with third sentence in first paragraph of section

The Ethics 2000 revisions to SCR chapter 20, *see* Supp. § 4.3, removed SCR 20:2.2 from the Rules of Professional Conduct for Attorneys as of July 1, 2007. The issues it addressed are now included in SCR 20:1.7.

Page 11: Amend first sentence in last partial paragraph on page

~~Further, consistent with SCR 20:2.2, the~~ The attorney should strive to accommodate differing interests, promote harmony, and avoid unnecessary discord.

14.7 [Ethical Principles Applicable in the Marital Property Context] Identification of Relevant Sections of Rules of Professional Conduct for Attorneys and Related Authority

Pages 14–15: Read in conjunction with section

On January 5, 2007, the Wisconsin Supreme Court issued an order formally adopting the new "Ethics 2000" changes to the Rules of Professional Conduct for Attorneys, effective on July 1, 2007. Wis. Sup. Ct. Order 04-07, 2007 WI 4, 293 Wis. 2d xv. The new rules are found in SCR chapter 20 and completely replace the prior version of that chapter.

The text of the new rules and related Comments are provided in Supplement sections 14.9, 14.11, 14.12, 14.13, and 14.32.

Page 15: Delete last paragraph of section

14.9 [Ethical Principles Applicable in the Marital Property Context] [Conflict of Interest] Various Sources of Guidance

Pages 15–21: Read in conjunction with section

On January 5, 2007, the Wisconsin Supreme Court issued an order formally adopting the new "Ethics 2000" changes to the Rules of

Professional Conduct for Attorneys, effective on July 1, 2007. Wis. Sup. Ct. Order 04-07, 2007 WI 4, 293 Wis. 2d xv.

The starting point for any analysis of conflicts of interest is SCR 20:1.7. The version of the new SCR 20:1.7 set out below was adopted with one significant modification from the model rule. As with the model rule, the new rule as adopted in Wisconsin requires that any informed consent be confirmed in writing; the Wisconsin rule further requires that the writing be "signed by the client." Here is the text of the new SCR 20:1.7:

> SCR 20:1.7 Conflicts of interest current clients. (a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in a writing signed by the client.

The ABA comments to the model rules were not adopted by the court, but have been published and may be consulted for guidance in interpreting and applying Wisconsin's new rules. The following are relevant portions of the ABA comments on model rule 1.7:

> **Special Considerations in Common Representation**
>
> [29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover,

because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing Rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

> [33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

The new SCR 20:1.7 sets out a new standard for consent to a concurrent conflict of interest—namely, "informed consent." *See* Supp. § 14.11, *infra*.

14.10 [Ethical Principles Applicable in the Marital Property Context] [Conflict of Interest] Suggested Analytical Framework for Conflicts of Interest

Pages 21–26: Replace section

On January 5, 2007, the Wisconsin Supreme Court issued an order formally adopting the new "Ethics 2000" changes to the Rules of Professional Conduct for Attorneys, effective on July 1, 2007. Wis. Sup. Ct. Order 04-07, 2007 WI 4, 293 Wis. 2d xv. The revised SCR chapter 20 no longer includes SCR 20:2.2. That former rule on intermediaries has been omitted from the rules as of July 1, 2007. For the text of the new SCR 20:1.7 and relevant ABA comments, see Supplement section 14.9.

14.11 [Ethical Principles Applicable in the Marital Property Context] [Conflict of Interest] Consent to Joint Representation

Pages 26–27: Read in conjunction with footnote 26 and third paragraph of section

On January 5, 2007, the Wisconsin Supreme Court issued an order formally adopting the new "Ethics 2000" changes to the Rules of Professional Conduct for Attorneys, effective on July 1, 2007. Wis. Sup. Ct. Order 04-07, 2007 WI 4, 293 Wis. 2d xv.

The new SCR 20:1.0 (Terminology) provides the definition of "informed consent" in subsection (f):

> (f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

The ABA comment to this definition (numbered as rule 1.0(e) in the model rules) provides:

> [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.
>
> [7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed" see paragraph (n) [in Wisconsin, see SCR 1.0(q)].

For the text of the revised SCR 20:1.7, see Supplement section 14.9.

14.12 [Ethical Principles Applicable in the Marital Property Context] [Conflict of Interest] Representing One Spouse Following Joint Representation

Page 31: Add to end of section

On January 5, 2007, the Wisconsin Supreme Court issued an order formally adopting the new "Ethics 2000" changes to the Rules of Professional Conduct for Attorneys, effective on July 1, 2007. Wis. Sup. Ct. Order 04-07, 2007 WI 4, 293 Wis. 2d xv; *see also* Wis. Sup. Ct. Order 06-04, 2007 WI 48, ___ Wis. 2d ___ (eff. July 1, 2007), *available at* http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=28907 (making nonsubstantive stylistic amendment to SCR 1.9(b)(2)).

The new SCR 20:1.9 has been modified to deal more flexibly with imputed conflicts that arise when lawyers change law firms. The text of the new rule follows:

> SCR 20:1.9 Duties to former clients. (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by sub. (c) and SCR 20:1.6 that is material to the matter; unless the former client gives informed consent, confirmed in a writing signed by the client.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

14.13 [Ethical Principles Applicable in the Marital Property Context] Client Confidences

Pages 31–34: Read in conjunction with section

On January 5, 2007, the Wisconsin Supreme Court issued an order formally adopting the new "Ethics 2000" changes to the Rules of Professional Conduct for Attorneys, effective on July 1, 2007. Wis. Sup. Ct. Order 04-07, 2007 WI 4, 293 Wis. 2d xv.

The new SCR 20:1.6 has been modified in a manner that does not materially affect the analysis in Book section 14.13. The revised rule provides as follows:

> SCR 20:1.6 Confidentiality. (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).
>
> (b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.
>
> (c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably likely death or substantial bodily harm;
>
> (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (3) to secure legal advice about the lawyer's conduct under these rules;
>
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (5) to comply with other law or a court order.

Page 32: Amend citation after first sentence in first full paragraph on page

SCR 20:1.8(b), .9<u>(c)(1)</u>.

14.27 [Application of Rules and Suggested Factors to Specific Joint Representation Situations] General Marital Property Agreements

Page 46: Amend third sentence in last paragraph

See section 7.14, *supra*, regarding the enforceability of marital property agreements, and section ~~7.14(a)(4)~~ 7.45, *supra*, regarding the effect of lack of separate counsel.

14.32 [Application of Rules and Suggested Factors to Specific Joint Representation Situations] Estate Planning

Page 56: Replace second sentence in first full paragraph on page and accompanying quotation

The rule for this situation is found in SCR 20:1.8, which, as of July 1, 2007, provides:

> A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, nor prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, except where (1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

14.34 [Application of Rules and Suggested Factors to Specific Joint Representation Situations] Divorce

Pages 60–63: Read in conjunction with section

Note that the references to section 767.255 and subsections of that statute in Book section 14.34 should be modified to refer to section 767.61 and the corresponding subsections of that statute. Similarly, the reference to section 767.26(8) in Book section 14.34 should be modified to refer to section 767.56(8). No substantive change has occurred with respect to these provisions, being part of a reorganization of chapter 767 effected by 2005 Wisconsin Act 443.

Page 61: Read in conjunction with last sentence in first full paragraph on page and footnote 39

The Ethics 2000 revisions to SCR chapter 20, *see* Supp. § 4.3, removed SCR 20:2.2 from the Rules of Professional Conduct for Attorneys as of July 1, 2007. The concepts covered in that rule are now addressed in SCR 20:1.7.

Page 61: Amend last partial sentence on page

Section ~~767.255(3)(L)~~ 767.61(3)(L) provides that a written agreement by spouses or parties intending to be married "concerning any arrangement for property distribution" is a factor to be considered by the court in . . . .

Page 62: Amend second full sentence on page

In addition, section ~~767.26(8)~~ 767.56(8) provides that agreement concerning financial support is a factor to be considered by the court in determining maintenance payments.

Page 63: Amend first citation and second textual sentence in first paragraph on page

See Wis. Stat. § ~~767.255(2)(a)~~ 767.61(2)(a). For example, a marital property agreement may reclassify an asset acquired by gift or transfer at death to marital property, which would not otherwise be subject to property division under section ~~767.255~~ 767.61 except upon a finding of hardship.

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Appendices

Appendix A

The Uniform Marital Property Act with Comments

UNIFORM MARITAL PROPERTY ACT

INDEX

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Uniform Marital Property Act
Prefatory Note

"The institution of property is the embodiment of accidents, events, and the wisdom of the past. It is before us as clay into which we can introduce the coloration and configuration representing our wisdom. How great, how useful this new ingredient may be will largely determine the future happiness, and perhaps the continued existence of our society." Powell, *The Law of Real Property* (Rohan 4th ed. 1977).

Marriages have beginnings and endings. For their participants, the period between these points *is* the marriage. This Act is a property law. It functions to recognize the respective contributions made by men and women during a marriage. It discharges that function by raising those contributions to the level of defined, shared and enforceable property rights at the time the contributions are made.

The challenge to create such a framework is not new. Basic differences in approaches to marital economics go back for many centuries. *See* Donahue, *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 Mich. L. Rev. 59 (1979); Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 Cornell L. Rev. 45 (1981). In modern times the challenge was well articulated twenty years ago by the Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women. In 1963 that Report said:

> Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind. Accordingly, the Committee concludes that during marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property. Such right should survive the marriage and be legally recognized in the event of its termination by annulment, divorce, or death. This policy should be appropriately implemented by legislation which would safeguard either spouse against improper alienation of property by the other.

In the twenty years after those words much has changed regarding the institution of marriage, even though the challenge has not been fully met.

A prime example is the very demography of marriage and its terminal events. In 1963, 66.31% of all terminated marriages ended by death and 33.69% by divorce. By 1979 only 42.77% terminated by death, while 57.23% ended by dissolution. For half a decade the ratio of marriages to dissolution has been about two to one. The latest figures were 2,438,000 marriages and 1,219,000 divorces in 1981. The two to one ratio contrasts with 1930, when there were six marriages to every dissolution.

Statistics are not the only evidence of dramatic change. Statehouses have reflected it. Beginning with California at the end of the 60's and promulgation of the Uniform Marriage and Divorce Act in the early 70's, no-fault divorce has swept the statute books. In 1983 Illinois and South Dakota stand alone in adhering to fault-based divorce, and efforts to change to no-fault continue in Illinois. "Equitable distribution" of property became the handmaiden of no-fault divorce in the Uniform Marriage and Divorce Act and in most other reforms. Forty-one traditional common law jurisdictions now use some form of *property division* as a principal means of resolving economic dilemmas on dissolution. Adding the eight community property jurisdictions in which such a division is an inherent aspect of spousal property rights yields a total of 49. The one state missing on the property division roster is Mississippi. These property division developments address and typically adopt sharing concepts and bring many common law jurisdictions close to a deferred community property approach to divorce. Cheadle, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. Rev. 1269 (1982); *see also* Younger, *op. cit., supra*.

The ferment of change has not been limited to dissolution. The Uniform Probate Code was promulgated in 1969. Fourteen states are now listed as Code states or as substantially conforming states. Article II of the Code contains the concept of an augumented estate. It borrows heavily from New York's 1966 version of the idea. It is an advance on traditional forced-share procedures, operating by the creation of a larger universe of property against which a spousal right of election is exercisable. It accomplishes this by penetrating the veil of title and other techniques which have developed to insulate assets from the reach of forced-share statutes. In the official comment to the Code the augmented estate provisions are described as preventing arrangements by the owner of wealth which would transmit property to other than a surviving spouse by means other than probate for the deliberate purpose of defeating the rights of a surviving spouse.

It is worth noting that the Code's provisions, as well as conventional forced-share provisions in common law states, leave a gap. They transform assets into a sharing mode in a meaningful way only when the "have-not" spouse survives. If the sequence of death is the opposite, the have-not spouse has no power to dispose of assets over which he or she has no title in any common law jurisdiction.

The long-arm augmented estate provisions of the Uniform Probate Code may not go far enough to accommodate the perception of most laymen. A significant empirical study published in 1978 indicates a widespread public preference for a distribution of an *entire* intestate estate to a surviving spouse, whether or not there are surviving children. Fellows, Simon & Rau, *Public Attitudes About Distribution At Death And Intestate Succession Laws In The United States*, 1978 Am. B. Found. Research J. 319.

Obviously the "everything to each other" mode is confined to dispositions at death. An imposing body of case law testifies to a paradigm shift in this view when the question of "Who should get what and when?" is asked at a dissolution! And it is the equitable distribution court's demanding role in the judicial process to monitor and referee the ensuing contests in the divorce courts. Burgeoning advance sheets clearly indicate just how difficult the referee's job is when it must be done well over a million times a year!

In 1981 yet another shift was added to the catalog of change. After years of debate, tax-free interspousal transfers entered the stage under the auspices of the Economic Recovery Tax Act of 1981. *Wall Street Journal* columnist Vermont Royster furnished a characteristically succinct summary of it all:

> "The marriage ceremony may say you two are now one and even include that phrase about with all my worldly goods I thee endow. The Internal Revenue Service has always taken a different view. It's wanted its share.
>
> .... wait until January 1, 1982, and .... after that magic date you can share with your spouse as much as you please of those worldly goods .... without so much as a by-your-leave from the federal tax man. In 1982 no more gift and estate taxes between spouses." Wall St. J., Sept. 2, 1981.

Heavy economic responsibilities of married couples and methods of coping with them point to yet another trendline of the last few decades. It is that of the two-worker households in which sharing the burden of producing family income is becoming routine. In more than half of American marriages with two spouses present there is a working wife and the number is growing. When there are children, the ratio is even higher. In more than two-thirds of current upper income marriages ($24,000 or more) there are two wage earners. Sharing of responsibility for wages from *outside* the home is altering traditional spousal roles and particularly economic roles, rights, and responsibilities.

Thus the stage is set by substantial social and legislative change in the duration of marriages and in the economics of the termination of marriages by dissolution and death.

The Uniform Marital Property Act makes its appearance on that stage to offer a means of establishing present shared property rights of spouses *during* the marriage. This approach is bottomed on two propositions. The first is creation of an immediate sharing mode of ownership. The second proposition is that the sharing mode during marriage is an ownership right already in existence at the end of a marriage. Thus recognition and perfection of shared and vested ownership rights in marital property are in place at divorce or death. They do not have to come to fruition as a result of a court-ordained and possibly adversary "division" or by a statutorily-sanctioned "transfer."

Is the Uniform Marital Property Act a panacea for the malaise of marriage? Will it lower the divorce rate? Save the family? Eliminate marital violence? Be fully comprehensible? Be welcomed by all? Lower the cost of the family house? Create better parents? Solve child abuse? Avoid probate? Lower the cost of death or divorce?

Perhaps some but certainly not all of the above. If it does affect any of those considertions, it will take time and the process will be subtle. The disintegrating forces operating on marriages and families are many and complex. It would be a bold claim to suggest that any legislation could fully identify and rectify the problems in such an area. But the obvious and apparent existence of problems in the economic area of marriage certainly justifies an effort to identify and rectify them. The Uniform Marital Property Act is precisely such an effort.

What are the root concepts?

> FIRST: Property acquired during marriage by the effort of spouses is shared and is something the couple can truly style as "ours." Rather than an evanescent hope, the idea of sharing implicit in viewing property as "ours" becomes reality as a result of a present, vested ownership right which each spouse has in all property acquired by the personal efforts of either during the marriage. That property is "marital property." (Section 4).
>
> Except for its income, property brought into the marriage or acquired afterward by gift or devise is not marital but "individual property." Its *appreciation* remains individual property. However, the *income* of that property becomes marital property, so that *all* income of a couple is marital property. (Section 4).

Property already owned when the Act becomes effective or owned by couples moving into an adopting state will take on the characteristics of marital property only at death or marital dissolution and then only if it would have been marital property under the Act had the Act been in effect when and where the property was acquired. Prior to death or dissolution the Act ordains no change in the classification of property of a couple acquired at a time when the Act did not apply. (Section 4(h), 17 and 18).

SECOND: The system which the Act creates to manage and control marital property accords a considerable measure of individual option. "Management and control" is a phrase of art in the Act. Basically management and control rights flow from the form in which title to property is held. If only one spouse holds property there is no requirement for the other spouse to participate in management and control functions. If both spouses hold property they must both participate in management and control unless the holding is in an alternative ("A *or* B") form. Couples can select their own options as they deem appropriate. (Sections 3, 5, 10 and 11). Management and control is different from ownership. Ownership rights are not lost by relinquishing or even neglecting management and control rights. In essence, the Act's management and control system is substantially similar to the existing procedures of title based management in common law states. (Section 5).

To guard against possible abuses by a spouse with sole title, a court can implement the addition of the name of the other spouse to marital property so that it is held, managed and controlled by both spouses. (Section 15).

The rule on gifts of marital property to third parties provides a safe harbor for smaller gifts. Unless aggregate gifts of marital property by one spouse to a third party in a calendar year are less than a specified dollar amount or are reasonable in amount with respect to the economic position of the spouses when made, both spouses must join in making the gift. A failure to procure that joinder renders the gift voidable at the option of the non-participating spouse. (Section 6).

THIRD: The varying patterns of today's marriages are accommodated by an opportunity to create custom systems by "marital property agreements." Full freedom to contract with respect to virtually all property matters is possible under the Act. By a marital property agreement a couple could opt-out of the provisions of the Act in whole or in part. Conversely, they could opt-in by agreeing that the Act's provisions will apply to all or a part of the property they own before they became subject to its terms.

As a protection, and to ease matters of proof, the Act requires that marital property agreements be made in writing and signed by both spouses. (Section 10). Marital property agreements are enforceable without consideration.

FOURTH: On dissolution the structure of the Act as a *property statute* comes into full play. The Act takes the parties "to the door of the divorce court" only. It leaves to existing dissolution procedures in the several states the selection of the appropriate procedures for dividing property. On the other hand the Act has the function of confirming the *ownership* of property as the couple enters the process. Thus reallocation of property derived from the effort of both spouses during the marriage starts from a basis of the equal undivided ownership that the spouses share in their marital property. A given state's equitable distribution or other property division procedures could mean that the ownership will end that way, or that it could be substantially altered, but that will depend on other applicable state law and judicial determinations. An analogous situation obtains at death; with the Act operating primarily as a property statute rather than a probate statute.

At divorce and death special provisions will apply to property of a couple acquired before the Act applied to that couple. If any of that property would have been marital property under the Act, had the Act been in effect when and where it was acquired, then such property will be treated as if it were marital property at divorce. Property of the deceased spouse having that characteristic will be treated in that manner at death. This represents a deferred approach to reclassification of the property of spouses which does not otherwise have the characteristics of marital property due to the time or place of its acquisition. The deferral is to the time of marital termination at divorce or death. Those are events at which states have long altered the classification of their citizens' property by equitable distribution provisions or by forced share and augmented estate provisions. The Act builds on those established patterns already followed by the states by creating the deferred classification with respect to property owned by couples before the Act applied to them. A provision effecting automatic reclassification of such property with the passage of the Act would amount to retroactive legislation and would risk constitutional attack. *See* Irish, *A Common Law State Considers A Shift to Community Property*, 5 Community Prop. J. 227 (1978). On the other hand, the deferred approach of the Act operates only prospectively, tracking the procedure of the bulk of existing state legislation that prescribes forms of marital sharing effective only at divorce or death. (Sections 17 and 18).

FIFTH: Creditors may have claims that arise before marriage and after marriage. The premarital creditor is denied a bonanza by a marriage. (Section 8(b) (iii)). That creditor can only reach what would have been reached had there been no marriage. Postmarital obligations may subject both marital and individual property to claims. Obligations incurred by a spouse during marriage are presumed to be incurred in the interest of the marriage and the family and those obligations may be satisfied from all marital property and the other property of the incurring spouse. (Section 8(a) and (b) (ii)).

SIXTH: Bona fide purchasers of property for value are protected in their transactions with spouses by reliance on the manner in which property is held. They are under no duty to look "underneath" the manner of holding and are fully protected for not doing so. (Section 9).

In addition to those root concepts, a series of enabling provisions offer convenient support for the system. These include special methods of holding property, including a survivorship form of ownership (Section 11); dispositions by a probate avoidance feature in marital property agreements (Section 10(c)(6)); and remedies for disputes between the spouses affecting their property, including interspousal property accountings (Section 15). There are procedures to deal with marital and individual property which becomes intermixed. (Section 14). Special rules deal with complex property rights in life insurance and deferred employee benefits. (Sections 12 and 13). Conventional concurrent and survivorship forms may be used for marital property. (Section 11(d)). As an option for use in states that recognize tenancy by the entireties, existing tenancy by the entireties property continues to be available to perpetuate the creditor protection it affords. (Section 19).

Some of the root concepts can be traced to the sharing ideal which is at the center of the historical community property approach. The fundamental principle that ownership of all of the economic rewards from the personal effort of each spouse during marriage is shared by the spouses in vested, present, and equal interests is the heart of the community property system. It is also the heart of the Uniform Marital Property Act. Common law states have been moving closer and closer to the sharing concept in both divorce and probate legislation, and the Uniform Marital Property Act builds on the direction of that movement. Sharing is seen as a system of elemental fairness and justice so that those who share in the many and diverse forms of work involved in establishing and maintaining a marriage will have a protected share in the material acquisitions of that marriage. The Act creates and protects that share without forcing a spouse to await the completion of a gift from the other spouse or the garnering of proof of dollar-for-dollar contributions to the purchase price of assets acquired over the years of marriage. Under the Act, the sharing of property is recognized by creation of a present interest simultaneously with acquisition of property by effort during marriage. The interest is legally defined and enforceable. It permeates assets as they are acquired and continues to permeate them as they are invested and reinvested, as they are exchanged and transferred, and as they grow or diminish.

Such a law translates the emotional and perceived concept of "ours" into a verified legal reality. And while that parallels sharing under community property systems, the Act is more accurately characterized as a *sui generis* approach, and as one which utilizes equally useful ideas developed in common law jurisdictions, such as title based management and control. In addition, it is a response to the twenty-year-long challenge of the President's Commission on the Status of Women issued in 1963 to face the reality that each spouse makes a different but equally important contribution in a marriage. Though drafted with an awareness of various community property statutes and cases, the Uniform Marital Property Act is not an image of any of them. It is a statute speaking to the realities and equities of marriages in America in the Eighties.

UNIFORM MARITAL PROPERTY ACT

SECTION 1. GENERAL DEFINITIONS.

In this [Act]:

(1) "Acquire" in relation to property includes reduction of indebtedness on encumbered property and obtaining a lien on or security interest in property.

(2) "Appreciation" means a realized or unrealized increase in the value of property.

(3) "Decree" means a judgment or other order of a court.

(4) "Deferred employment benefit" means a benefit under a plan, fund, program, or other arrangement under which compensation or benefits from employment are expressly, or as a result of surrounding circumstances, deferred to a later date or the happening of a future event. Such an arrangement includes a pension, profit sharing, or stock-bonus plan; an employee stock-ownership or stock-purchase plan; a savings or thrift plan; an annuity plan; a qualified bond-purchase plan; a self-employed retirement plan; a simplified employee pension; and a deferred compensation agreement or plan. It does not include life, health, accident, or other insurance, or a plan, fund, program, or other arrangement providing benefits comparable to insurance benefits, except to the extent that benefits under the arrangement: (i) have a present value that is immediately realizable in cash at the option of the employee; (ii) constitute an unearned premium for the coverage; (iii) represent a right to compensation for loss of income during disability; or (iv) represent a right to payment of expenses incurred before time of valuation.

(5) "Determination date" means the last to occur of the following: (i) marriage; (ii) 12:01 a.m. on the date of establishment of a marital domicile in this state; or (iii) 12:01 a.m. on the effective date of this [Act].

(6) "Disposition at death" means transfer of property by will, intestate succession, nontestamentary transfer, or other means that take effect at the transferor's death.

(7) "Dissolution" means: (i) termination of a marriage by a decree of dissolution, divorce, annulment, or declaration of invalidity; or (ii) entry of a decree of legal separation or separate maintenance.

(8) "During marriage" means a period that begins at marriage and ends at dissolution or at the death of a spouse.

(9) Property is "held" by a person only if a document of title to the property is registered, recorded, or filed in a public office in the name of the person or a writing that customarily operates as a document of title to the type of property is issued for the property in the person's name.

(10) "Income" means wages, salaries, commissions, bonuses, gratuities, payments in kind, deferred employment benefits, proceeds, other than death benefits, of a health, accident, or disability insurance policy, or of a plan, fund, program, or other arrangement providing benefits comparable to those forms of insurance, other economic benefits having value which are attributable to the effort of a spouse, dividends, interest, income from trusts, and net rents and other net returns attributable to investment, rental, licensing, or other use of property, unless attributable to a return of capital or to appreciation.

(11) "Management and control" means the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, institute or defend a civil action regarding, or otherwise deal with, property as if it were property of an unmarried person.

(12) "Marital property agreement" means an agreement that complies with Section 10.

(13) A person has "notice" of a fact if the person has knowledge of it, receives a notification of it, or has reason to know that it exists from the facts and circumstances known to the person.

(14) "Presumption" or a "presumed" fact means the imposition on the person against whom the presumption or presumed fact is directed of the burden of proving that the nonexistence of the presumed condition or fact is more probable than its existence.

(15) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property.

(16) "Written consent" means a document signed by a person against whose interests it is sought to be enforced.

Comment

1. The definition of "acquiring" assures the inclusion in the word of all transactions which increase dominion and control over assets. In a typical marital situation, payment on a mortgage will be an important means of building assets. The definition makes it clear that this is a means of acquisition.

2. "Appreciation" has certain differential consequences, depending on whether it is from individual property or is created or enhanced by the effort of one spouse expended on individual property of the other spouse. The definition makes it clear that a specific realization, such as a sale, is *not* necessary for it to be a factor in marital property economics.

4. The major provisions of the definition are derived from The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406. In the Act the definition is intended to cover and include plans of both private and public employers.

5. The Act will apply to those couples now domiciled in an adopting state as well as those who move to one in the future. It will also apply to couples who marry in an adopting state after the Act is in effect. The definition of "determination date" creates a flexible formula to establish for individual couples in these three separate configurations the specific date as of which the Act is in effect with respect to their property. Use of 12:01 a.m. as the triggering incident of the determination date eliminates the necessity of referring throughout the Act to events occurring "*on or* after" the determination date.

7. A legal separation or decree of separate maintenance is a dissolution. Specific authority to deal with the consequences of a legal separation is included as bracketed Subsection (4) of Section 17 for states in which this procedure is still in use. It is suggested that the term should remain in the definition even if this subsection is not enacted in order to deal with possible multi-state problems that could involve a state still using the procedure.

8. The Act concerns the property of married persons. If a man and a woman are not married, the property they own is *not* marital property. It may have been marital property if their marriage has been dissolved, or if one of them is deceased, but on the occurrence of such an event it loses its classification as marital property. Consequently the term "during marriage" applies throughout the Act and describes a particular status. The period when certain property will be marital is during marriage and the Act's provisions addressed to "spouses" will apply then as well. Without marriage, a man and a woman are not spouses. When they are referred to as spouses, the connotation is that the event or relationship referred to takes place during marriage.

9. The word "title" is often viewed as the equivalent of "ownership." In the Act the method of referring to property to which there is typical and usual form of documentation of title is that of identifying it as being "held" by a person named in the documentation, since title is *not* synonymous with ownership in the Act. The concept of holding is used to avoid a continued reference to title and a construction that might encourage overlooking the separate legal status of title and ownership, which is a fundamental aspect of the Act. The result of the definition is that there will be some types of property that will not be held by either spouse. This is obviously true with respect to classic forms of bearer property without the Act, and the Act does not disturb that circumstance.

10. Section 4 classifies all income earned or accrued during marriage and after the determination date from any source as marital property. The "income" definition is a broad one and is intended to cover all forms of income and earnings, but to exclude returns of capital and appreciation.

11. Management and control issues are faced daily by partners and owners of various concurrent interests. They are solved daily as well. The management and control function is central to the Act, and the way in which the definition is applied is covered in Section 5.

14. The presumption provisions are derived from Rule 301(a) of the Uniform Rules of Evidence.

16. There are two types of writings that have special significance under the Act. One is a marital property agreement, fully described in Section 10. The other is the "written consent." This is a writing that states facts or consequences chargeable to and enforceable against a signatory. A written consent may have one or more signatories. It could be a conventional contract signed by two or more persons or it could be a simple memorandum of a type that would satisfy a statute of frauds requirement, signed by only one person. As an

example, a creditor can relinquish a right to proceed against marital property by the terms of Section 8(d). This is accomplished by a written consent, and that would be a one-signatory document affirming the relinquishment. As additional examples, Section 12(c)(5) specifies that a written consent of one spouse permits relinquishment of rights in a life insurance policy, while in Section 12(c)(6) the written consents of both spouses are prerequisites to another method of dealing with life insurance.

SECTION 2. RESPONSIBILITY BETWEEN SPOUSES.

(a) Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. This obligation may not be varied by a marital property agreement.

(b) Management and control by a spouse of that spouse's property that is not marital property in a manner that limits, diminishes, or fails to produce income from that property does not violate subsection (a).

Comment

Spouses are not trustees or guarantors toward each other. Neither are they simple parties to a contract endeavoring to further their individual interests. The duty is between, and is one of good faith. A spouse is not bound always to succeed in matters involving marital property ventures, but while endeavoring to succeed in a venture, must proceed with an appropriate regard for the property interests of the other spouse and without taking unfair advantage of the other spouse. *See* Cal. Civ. Code Sec. 5125(e) (Supp. 1980) for a similar provision in use in that state. *See also* Reppy, *Community Property in California*, pp. 174-75, 177 (1980). This is one of four provisions in the Act that cannot be varied by a marital property agreement. (Section 10(c)).

Subsection (b) clarifies the right of a spouse to regulate the income stream of property of that spouse that is not marital property without violating the Section. Since all income of that property during marriage and after the determination date is marital property, a question might arise regarding the application of Subsection (a) to the income stream. Subsection (b) resolves that question.

SECTION 3. VARIATION BY MARITAL PROPERTY AGREEMENT.

Except as provided in Sections 2, 8 (e), 9 (c) and 10 (b), a marital property agreement may vary the effect of this [Act].

Comment

This section is modeled on UCC Section 1-102(3). It is placed at this point in the chronology in the Act in order that its message be conveyed early and emphatically. The Act's property system applies if it is not changed. However, with four very limited exceptions (those of the good faith duty of Section 2, the protection of third parties under Sections 8(e) and 9(c), and the support of dependent children under Section 10(b)), there is freedom to change the Act by a marital property agreement. Thus, a couple may opt-out, opt-in, or do both in part. Custom-tailored marital property regimes are possible. The Act permits a couple to move its marital economics from status to contract and encourages a type of interspousal contractual freedom little known in common law states. It is important to the operation of the Act that the significance of this section be carried through to the use and application of its various provisions. For example, it is clearly intended that contractual variance is possible with respect to Section 4 (classification generally), Section 5 (management and control), Section 12 (life insurance classification), Section 13 (classification of employee benefits), Section 17 (marital dissolution), and Section 18 (disposition at death), although these are only examples. The provisions of this Section and Section 10 should always be read as a part of every other provision of the Act.

SECTION 4. CLASSIFICATION OF PROPERTY OF SPOUSES.

(a) All property of spouses is marital property except that which is classified otherwise by this [Act].

(b) All property of spouses is presumed to be marital property.

(c) Each spouse has a present undivided one-half interest in marital property.

(d) Income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property.

(e) Marital property transferred to a trust remains marital property.

(f) Property owned by a spouse at a marriage after the determination date is individual property.

(g) Property acquired by a spouse during marriage and after the determination is individual property if acquired:

(1) by gift or a disposition at death made by a third person to the spouse and not to both spouses;

(2) in exchange for or with the proceeds of other individual property of the spouse;

(3) from appreciation of the spouse's individual property except to the extent that the appreciation is classified as marital property under Section 14;

(4) by a decree, marital property agreement, written consent, or reclassification under Section 7 (b) designating it as the individual property of the spouse;

(5) as a recovery for damage to property under Section 15, except as specifically provided otherwise in a decree, marital property agreement, or written consent; or

(6) as a recovery for personal injury except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property.

(h) Except as provided otherwise in this [Act] the enactment of this [Act] does not alter the classification and ownership rights of property acquired before the determination date.

(i) Except as provided otherwise in this [Act] and to the extent it would affect the ownership rights of the spouse that existed in the property before the determination date, during marriage the interest of a spouse in property owned immediately before the determination date is treated as if it were individual property.

Comment

The Section creates the heart of the Act. It contains a general presumption, a series of property rules, an income rule, classification rules, and transition rules.

Classification: "Classification" is an essential process in applying the Act. In classification the essential sorting process is taking place: What is a given item or aggregation of property? Marital property? Individual property? Property owned before the determination date which had a wholly different set of ownership incidents not established by the Act at all? All property has a classification — a generic and basic set of characteristics — and the process is devoted to establishing those precise characteristics and answering those questions. The most important parts of the answer depend on *source* and *time of acquisition*. Title is *not* an answer since title functions under the Act principally to establish management and control rights and the facilitation of third party transactions flowing from the exercise of management and control rights. Under the Act title does *not* function as a classification index. Reclassification is just what the word implies — it is a change in classification, generally from marital to individual or vice versa.

The General Presumption: The first building block in the Act's operation is the general presumption in Subsection (b). The bias of the presumption favors classifying spousal assets as marital property. Thus at the beginning of any process of classifying spousal assets, everything is presumed to be marital property. When there is adequate proof to overcome the general presumption, then the proof will prevail and classification will be otherwise. But the "easy way," when there are no records or proof, will result in the operation of the presumption and in the classification of all spousal property as marital.

The Present Interest: A second building block is the creation of a *present* equal undivided interest for each spouse. This is a distinct departure from existing versions of "marital property" arising out of equitable distribution developments in family law. Those family-law interests set forth in marital property definitions in equitable distribution statutes are delayed-action in nature and come to maturity only during the dissolution process. Marital property under the Act is created *as assets are acquired* by the spouses, whether from income from the effort of either spouse during marriage, as income attributable to passive or investment sources, or as appreciation of or in an exchange for or rollover of existing marital property. When the assets are acquired from such sources, the incidents and attributes of marital property, including the creation of a present legal interest, attach simultaneously with the acquisition. The assets so acquired are instantly classified or characterized as marital property. The classification persists until the marriage terminates by dissolution or death, or until occurrence of a "reclassification" by one or another of the methods provided in the Act.

The Income Rule: The third feature is an income rule, creating an easily comprehended system. By treating all income from any source as marital property, the Act affords a simple and understandable arrangement. In the majority of marriages, most income will be spent sooner or later. In those so affluent that this does not happen, the rule can either be followed or changed by a marital property agreement. In the latter group of marriages, some extra recordkeeping following an agreed bifurcation of income from marital and individual property should not pose an undue burden.

The income rule poses some "front-end" and "tail-end" problems. The "front-end" problem pertains to income received shortly after the determination date from effort or accrual of rights before the determination date. Actual ownership of such income became fixed before the determination date and it should not be and is not classified as marital property. This is handled by providing that income is marital only if "earned or accrued" after the determination date *and* during marriage.

With a disintegrating marriage in a state which has had the Act for a reasonable period of time, a cash basis or actual receipt rule at dissolution could give rise to significant abuses. This is the potential "tail-end" problem. Receipt of income under the management and control of one spouse could be delayed voluntarily until the dissolution was complete, to the prejudice of the former spouse who was not in such a position of control. Hence the earned or accrued rule of the Act also addresses this problem. The accounting and classification problems of the accrual or constructive receipt system used in the Act to deal with the tail-end problem obviously could necessitate tracing activities, but the potential for manipulation and diversion with a cash basis rule is such that the difficulty is justified.

Transition to the Income Rule: There is an additional important element in the treatment of income. All property of couples already married when the Act becomes law in an adopting state has a set of characteristics not created by the Act. The Act has been drafted to avoid altering those characteristics during the on-going marriage as far as the *principal* of the pre-adoption property is concerned. However the income rule obviously affects post-adoption income, classifying it as marital property. Post-adoption income is just that. It is not principal, and it is received and regulated by the Act's provisions only when the claim of right to it occurs by virtue of its having been earned or accrued *after* adoption. Hence the Act's income rule is not retroactive.

Trusts: Marital property transferred to a trust remains marital property and does not become "something else" under Subsection (e). A marital property agreement could provide otherwise. The subsection's principal enabling function is to permit the creation of revocable living trusts by one or both spouses without any automatic reclassification of property committed to the trust. If the trust is created by both spouses, or if created by one and consented to by the other, it would itself be a sufficient written form of marital property agreement to effect any reclassification directed by its terms if the other requirements of Section 10 are met. A trust created by one spouse would necessarily be measured by the good faith provisions of Section 2. The subsection would have no application to testamentary trusts, since marital property is the property of spouses. When a former spouse dies leaving a will that creates a trust, the property funding the trust can no longer be marital property. It could, and ordinarily would, be the decedent's share of *former* marital property.

Appreciation of Individual Property: Individual property definitions for post-determination date acquisitions are furnished in a listed format. In addition to such acquisitions by gift or inheritance, there are other obvious inclusions. One of special importance concerns *appreciation* of individual property. Assume that one spouse comes to a marriage subject to the Act as the owner of a valuable piece of real estate. It is individual property. If it quadruples in value, it is *still* individual property. While its income is marital property, the property itself *and* its appreciation in value is almost always individual property. One exception is the special rule announced in Section 14(b). That rule is concerned with the application to the individual property of one spouse of personal effort by the other spouse. It could apply in limited situations, but establishing it requires a very strong showing. Another possible exception could arise from mixing marital property with the individual property, also dealt with in Section 14. If the components of the mixed property can be traced, then no reclassification will occur. Monetary contributions to real estate acquisition or improvement are typically traceable, so that this form of reclassification regarding real estate should not be a frequent issue.

Donated Property: The rule treating property received by gift as individual property applies to gifts made to only one spouse. If a gift is made to both spouses, the donated property is marital property. This would apply to gifts to both in any form, including transfers to them as joint tenants, tenants in common, or in one of the title forms included in Section 11.

Effect on Existing Property: Subsection (h) states an important transitional rule. It can be assumed that in an adopting state one spouse might own property absolutely, and that a couple might also own property concurrently or as community property. The latter would be true of a couple which moved into an adopting state from one of the existing community property states as well as a couple in an adopting community property state. All of the property of a married couple in an adopting state on hand at the determination date would have a particular classification. Certain incidents would already have attached to the manner of ownership. Survivorship would be an incident of jointly held or entireties property. A tenancy in common would consist of undivided interests, with each interest subject to individual rights of disposition. Community property would have the incidents described in the *Uniform Disposition of Community Property Rights at Death Act*, and possibly others developed between the spouses by agreement. Trust interests would be regulated by governing instruments. The Act is *not* designed to alter these various incidents of ownership or to reclassify such property.

With minor exceptions, the arrival of the determination date for such a couple would neither reclassify any of their property as marital property nor as *any* type of property other than what it was prior to the determination date. The exceptions all operate on that property only *after* the determination date. They are limited and include only the "deferred marital property" approach at dissolution and death set forth in Sections 17 and 18, the income treatment set forth in Subsection (d), and the specific provisions of Subsection (i).

Note that Subsection (h) applies to property of *spouses* owned before the determination date. On the other hand Subsection (f) deals specifically with property owned *before marriage* by persons marrying in an adopting state after the Act is effective. It follows the traditional pattern of community property and dissolution-based marital property statutes in clearly classifying solely owned property owned before marriage as individual property effective with the marriage. Except for its income, individual property under the Act is analogous to solely owned property in a common law state or to separate property in an American community property state. Texas, Louisiana and Idaho separate property is even more kindred, since the income of separate property in those states is community property.

The "As If" Treatment: Subsection (i) is a statutory statement to identify pre-determination date property that is solely owned as functioning with a "fraternal twin" relationship to individual property under the Act. It is a transitional rule, stated as it is to avoid a direct substantive reclassification of pre-determination date property, but to clarify the functional treatment of it in applying the Act. It is important that it be read as the "as if" rule that it is, and not as a reclassification statute.

The exceptions in Subsection (i) are intended to avoid any interference with actual ownership incidents in property owned prior to the determination date. For example, community property owned prior to the determination date should not be treated functionally as individual property in applying the Act. On the other hand, tenancy in common property could function as if it were individual property under the Act's provisions with each owner's undivided interest being treated as though it were individual property. A tenancy in common of individual property of the respective spouses is possible under the Act.

Property "that is not marital property": There are references in the Act to property of a spouse ".... that is not marital property ...." (Sections 8(b) and 14(a)); property ".... having any other classification ...." (Section 14(a)); ".... property of the designated owner of the policy ...." (Section 12(c)(4)); ".... all property then owned by the spouses .... which would have been marital property ...." (Section 17(1)); or ".... all property then owned by the spouse .... which would have been marital property ...." (Section 18(a)). It is reasonable to ask why such references are not to *individual* property and to ask further whether the Act fractionalizes all property of spouses into marital *or* individual property. The explanation is part of the transition problem and is consonant with Subsections (b) and (i). Property in existence prior to adoption is *not* individual property, by definition, since the classification of individual property is a creation of the Act. Property in existence prior to adoption of the Act is whatever it is without the Act. Subsection (h) makes it clear that the Act does not go about reclassifying that property. Hence there will be a multitude of couples that will have property that is "something else" than marital property or the individual property established by the Act. That "something else" type of property is property of a spouse that ".... is not marital property ....." property ".... having any other classification ...." and the like. Hence such descriptions are intentional in the reference they make to the "something else" or pre-determination date property to which they point.

SECTION 5. MANAGEMENT AND CONTROL OF PROPERTY OF SPOUSES.

(a) A spouse acting alone may manage and control:

(1) that spouse's property that is not marital property;

(2) except as provided in subsections (b) and (c), marital property held in that spouse's name alone or not held in the name of either spouse;

(3) a policy of insurance if that spouse is designated as the owner on the records of the issuer of it;

(4) the rights of an employee under an arrangement for deferred employment benefits that accrue as a result of that spouse's employment;

(5) a claim for relief vested in that spouse by other law; and

(6) marital property held in the names of both spouses in the alternative, including a manner of holding using the names of both spouses and the word "or."

(b) Spouses may manage and control marital property held in the names of both spouses other than in the alternative only if they act together.

(c) The right to manage and control marital property transferred to a trust is determined by the terms of the trust.

(d) The right to manage and control marital property does not determine the classification of property of the spouses and does not rebut the presumption of Section 4 (b).

(e) The right to manage and control marital property permits gifts of that property only to the extent provided in Section 6.

(f) The right to manage and control any property of spouses acquired before the determination date is not affected by this [Act].

(g) A court may appoint a [conservator, guardian] to exercise a disabled spouse's right to manage and control marital property.

Comment

Title Based System: If Section 4 is the heart of the Act, then Section 5 and its management and control system is its aorta. Management and control is a title based system and to that extent will parallel the management and control rights which typically follow title in common law states. However, there is a very basic difference. While title is virtually synonymous with ownership in the common law system, it is perhaps best understood as a *nominee* relationship under the Act. Title can be viewed as something of a permeable membrane that presents one state of affairs to third parties while encompassing an ownership relationship between the spouses within that relationship which may well be different from the title-side of the membrane. To lawyers long attuned to common law concepts of the impermeable membrane view of title, the thrust is a new one. A fairly useful illustrative analogy is the fractionalization of title which occurs when a trust is created. A trustee has "legal title" (and management rights) while a beneficiary (usually undisclosed on legal title) has equitable and beneficial rights. Two sets of rights coexist, yet the outside world need deal only with the trustee as apparent owner, notwithstanding the beneficiary's completely valid, enforceable, coexisting, but usually undisclosed rights. In the marital property situation, the spouses as co-owners are analogous to the beneficiaries and a spouse as sole holder of marital property is analogous to the trustee as title holder. This comment is *not* intended to imply that marital property creates a trust, but simply to use an analogy to illustrate the coexisting relationships that are present in both situations.

Sole Management: Under Section 5 either spouse has sole management and control rights of a marital property asset which that spouse "holds" alone. No joinder for management and control functions would be required for that property. Holding is defined in Section 1(9) and that definition and this Section function together to treat conventional title as the method of determining holding.

Concurrent Holding: Management and control of concurrently held assets is dealt with specifically. The rights are related to the use of "and" or "or" in the title. If "and" is used in the concurrent title, *both* spouses manage and control, and joinder of both is required to discharge management and control functions. If "or" is used, it means what it says, and either spouse may manage and control the asset. Section 11(c) effectively applies the provisions on management and control of concurrent property not only to the special optional forms authorized by Section 11, but to conventional forms already in use in adopting states.

Bearer property and other property not "held" can be managed and controlled by either spouse, and no joinder is required. (Section 5(a)(2)). Section 5(a)(2) permits a spouse to manage and control property not held in the name of either spouse; this covers bearer property. The term "held" in Section 1(9) does not extend to bearer property, and the provisions of Section 5(a)(2) integrate with that by permitting one spouse to manage and control any marital property that does not come within the purview of the holding definition in Section 1(9).

Special rules apply to insurance and employee benefits, and claims for relief. Insurance is managed and controlled by its owner. Employee benefits are managed and controlled by the employee on whose behalf they accrue. A claim for relief is managed and controlled by the spouse in whom the claim is vested by other law. (Section 5(a)(3), (4) and (5)).

SECTION 6. GIFTS OF MARITAL PROPERTY TO THIRD PERSONS.

(a) A spouse acting alone may give to a third person marital property that the spouse has the right to manage and control only if the value of the marital property given to the third person does not aggregate more than [$500] in a calendar year, or a larger amount if, when made, the gift is reasonable in amount considering the economic position of the spouses. Any other gift of marital property to a third person is subject to subsection (b) unless both spouses act together in making the gift.

(b) If a gift of marital property by a spouse does not comply with subsection (a), the other spouse may bring an action to recover the property or a compensatory judgment in place of the property, to the extent of noncompliance. The other spouse may bring the action against the donating spouse, the recipient of the gift, or both. The action must be commenced within the earlier of one year after the other spouse has notice of the gift or 3 years after the gift. If the recovery occurs during marriage, it is marital property. If the recovery occurs after a dissolution or the death of either spouse, it is limited to one-half of the value of the gift and is individual property.

Comment

Since each spouse has a present undivided ownership in marital property, unrestricted gifts of marital property to a third person by one spouse of property managed and controlled by that spouse could defeat the interest of the other spouse in the donated property. Section 6 deals with gifts to third persons by spouses who have sole management and control rights. It has an absolute safe-harbor provision permitting gifts of a specified dollar amount per year to one individual. The amount is bracketed and should be set at any level determined to be appropriate in an adopting state. It also has a less objective test of reasonableness with reference to the economic position of the spouses when made. The section has teeth in the form of a right of recovery. The section is specific in authorizing a recovery of only the portion of the gift that exceeds the permissible limit, rather than the entire gift. If the gift was of a specific item, the alternative recovery of a compensatory judgment is available to avoid awkward fractionalized ownership of such an item after the recovery action.

SECTION 7. PROPERTY TRANSACTIONS BETWEEN SPOUSES.

(a) Restrictions on the power of spouses to enter into property transactions with each other are abolished.

(b) Spouses may reclassify their property by gift or marital property agreement.

SECTION 8. OBLIGATIONS OF SPOUSES.

(a) An obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or the family.

(b) After the determination date:

(i) a spouse's obligation to satisfy a duty of support owed to the other spouse or to a child of the marriage may be satisfied only from all marital property and all other property of the obligated spouse that is not marital property;

(ii) an obligation incurred by a spouse in the interest of the marriage or the family may be satisfied only from all marital property and all other property of that spouse that is not marital property;

(iii) an obligation incurred by a spouse before or during marriage that is attributable to an obligation arising before marriage or to an act or omission occurring before marriage may be satisfied only from property of that spouse that is not marital property and that part of marital property which would have been the property of that spouse, but for the marriage; and

(iv) any other obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, may be satisfied only from property of that spouse that is not marital property and that spouse's interest in marital property and in that order.

(c) This [Act] does not alter the relationship between spouses and their creditors with respect to any property or obligation in existence on the determination date.

(d) Provisions of a written consent signed by a creditor which diminish the rights of the creditor provided in this section are binding on the creditor.

(e) No provision of a marital property agreement adversely affects the interest of a creditor unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred. The effect of this subsection may not be varied by a marital property agreement.

(f) This [Act] does not affect the exemption of any property of spouses under other law.

Comment

Basic Doctrine: The section builds on a doctrine that has been developed and followed in Arizona, Louisiana and Washington. Ariz. Rev. Stat. Ann. Sec. 25-215 (1956); La. Rev. Civ. Code Ann. art. 2360; Wash. Rev. Code Ann. Sec. 26.16.205 (1974). *See also* McClanahan, *Community Property Law in the United States*, Sec. 10.4 (1982). The doctrine may be described as a "family purpose" doctrine, and it concerns the obligations incurred during the marriage and establishes a bifurcation separating those obligations that have a relation to the marriage, or the family, or the community, from those obligations incurred for the purely personal purposes of an incurring spouse. The Louisiana statute uses the terms ".... for the common interests of the spouses ...." in its definition of obligations having a relation to the marriage. The obligation having a relation to the marriage is treated in the three states as a community obligation. Obligations for personal purposes are treated as those of the incurring spouse, and that spouse's separate property is available to satisfy them, along with the spouse's interest in community property. *See Casper v. Valley Bank*, 28 Ariz. 373, 237 P. 175 (1925); *Garrett v. Shannon*, 13 Ariz. App. 332, 476 P.2d 538 (1970); *Beyers v. Moore*, 45 Wash. 2d 68, 272 P.2d 626 (1954).

The method used in the Act is to begin with a presumption. The same technique is used in Louisiana. La. Rev. Civ. Code Ann. art. 2361. An obligation incurred by a spouse during marriage is presumed to be incurred in the interest of the marriage or the family. The presumption specifically includes obligations arising out of an act or omission and thus covers the tort field. This is consistent with the development of the underlying family purpose doctrine. *See De Pinto v. Provident Security Life Ins. Co.*, 375 F.2d 50 (9th Cir. 1967); *McHenry v. Short*, 29 Wash. 2d 263, 186 P.2d 900 (1947); *McFadden v. Watson*, 51 Ariz. 110, 74 P.2d 118 (1938); *Benson v. Bush*, 3 Wash. App. 815, 502 P.2d 1245 (1972).

With the presumption as a background, the section proceeds to establish four categories of obligations with which a couple may be involved, and to clarify what property is available to satisfy those different categories of obligations.

Support: All marital property and all other property of the obligated spouse is available to satisfy an obligation of support owed to the other spouse or a child of the marriage.

Family Purposes: Obligations falling within the presumption, being for the interest of the marriage, may be satisfied from all marital property and from the property of the incurring spouse that is not marital property. *See* Comment to Section 4 for discussion of "property that is not marital property."

Premarital Obligations: A premarital obligation or an obligation incurred during marriage but attributable to an act or omission before marriage is to be satisfied from the property of the incurring spouse that is not marital property and from the marital property that would have been the property of the incurring spouse but for the marriage. This latter quantum of property is different from a spouse's undivided half-interest in marital property. Assume a marriage with only one spouse earning wages and assume that that spouse had a premarital obligation for child support of a child of a prior marriage. The obligation could be satisfied from any property of the obligated spouse that was not marital property. It could also be satisfied from the wages or the savings from the wages earned during the marriage. If marriage had not occurred, the wages would have been the solely owned property of the obligated spouse. Thus Subsection (b)(iii) renders all of those wages available, even though the wages would typically have created marital property. In the converse situation, if the obligation had been that of the spouse creating no wages, none of the employed spouse's wages, *nor any marital property created with them*, would be available for such an obligation. This prevents a windfall to the premarital creditor by a marriage, for no interest in marital property attributable to the effort of the new spouse of the obligated party becomes available to enhance the assets available to that creditor to satisfy a debt of the obligated spouse. The objective is that the marriage should be neutral as far as the premarital creditor is concerned, neither adding to nor detracting from the assets available for satisfaction of the claim.

All Other Obligations: Obligations not covered by the first three categories may be satisfied out of the property of the incurring spouse that is not marital property and from the interest of the incurring spouse in marital property. Subsection (b)(iv) specifically establishes the order of satisfaction by requiring that marital property should be reached after other property is exhausted. In this instance the marital property to be reached is the undivided one-half interest of the incurring spouse and is not the same as the property which the premarital creditor can reach. Under this fourth category would fall obligations incurred during marriage that were not incurred in the interest of the marriage or the family. *See de Elche v. Jacobsen*. 95 Wash. 2d 237, 622 P.2d 835 (1980).

The provisions of the section can be altered if a creditor is willing to diminish the rights established by the section. For example, one spouse with substantial amounts of individual property might wish to limit the possible obligation of the other spouse, even though the purpose of the obligation was clearly in the interest of the marriage. That spouse could obtain a writing from a creditor under Subsection (d) which would accomplish this. In the absence of it, Subsection (b)(ii) would subject the interest of the nonincurring spouse in marital property to the obligation. *See* N.M. Stat. Ann. Sec. 40-3-9A(4).

Marital Property Agreements: For purposes of a creditor's rights under the section, a marital property agreement may not redefine or reclassify marital property in a manner that has any adverse effect on the creditor unless the creditor had actual knowledge of the adverse provision when the credit was extended.

SECTION 9. PROTECTION OF BONA FIDE PURCHASERS DEALING WITH SPOUSES.

(a) In this section:

(1) "Bona fide purchaser" means a purchaser of property for value who: (i) has not knowingly been a party to fraud or illegality affecting the interest of the spouses or other parties to the transaction; (ii) does not have notice of an adverse claim by a spouse; and (iii) has acted in the transaction in good faith.

(2) "Purchase" means to acquire property by sale, lease, discount, negotiation, mortgage, pledge, or lien or otherwise to deal with property in a voluntary transaction other than a gift.

(3) A purchaser gives "value" for property acquired: (i) in return for a binding commitment to extend credit; (ii) as security for or in total or partial satisfaction of a pre-existing claim; (iii) by accepting delivery pursuant to a pre-existing contract for purchase; or (iv) generally, in return for any other consideration sufficient to support a simple contract.

(b) Notice of the existence of a marital property agreement, a marriage, or the termination of a marriage does not affect the status of a purchaser as a bona fide purchaser.

(c) Marital property purchased by a bona fide purchaser from a spouse having the right to manage and control the property under Section 5 is acquired free of any claim of the other spouse. The effect of this subsection may not be varied by a marital property agreement.

Comment

Third parties will deal with the spouse or spouses who manage and control, and that in turn depends on which spouse "holds" marital property. When one who satisfies the bona fide purchaser requirements deals with a spouse who has management and control rights under Section 5, the transaction is free from the claim of the other spouse. This section is one of three parts of the Act that cannot be altered by a marital property agreement. (Section 10(c)). Between the spouses, the section does not function to eliminate any claim, since it is addressed solely to the protection of bona fide purchasers. The definition of "purchase" follows UCC Sec. 1-201(32). The effect of a marital property agreement on a creditor is discussed in the Comment to Section 8.

SECTION 10. MARITAL PROPERTY AGREEMENT.

(a) A marital property agreement must be a document signed by both spouses. It is enforceable without consideration.

(b) A marital property agreement may not adversely affect the right of a child to support.

(c) Except as provided in Sections 2, 8 (e), and 9 (c) and in subsection (b), in a marital property agreement spouses may agree with respect to:

(1) rights and obligations in any of their property whenever and wherever acquired or located;

(2) management and control of any of their property;

(3) disposition of any of their property on dissolution, death, or the occurrence or nonoccurrence of any other event;

(4) modification or elimination of spousal support;

(5) making a will, trust, or other arrangement to carry out the agreement;

(6) a provision that upon the death of either of them, any of their property, including after-acquired property, will pass without probate to a designated person, trust, or other entity by nontestamentary disposition;

(7) choice of law governing construction of the agreement; and

(8) any other matter affecting their property not in violation of public policy or a statute imposing a criminal penalty.

(d) A marital property agreement may be amended or revoked only by a later marital property agreement. The amended agreement or the revocation is enforceable without consideration.

(e) Persons intending to marry each other may enter into a marital property agreement as if married, but the agreement becomes effective only upon their marriage.

(f) A marital property agreement executed during marriage is not enforceable if the spouse against whom enforcement is sought proves that:

(1) the agreement was unconscionable when made; or

(2) that spouse did not execute the agreement voluntarily; or

(3) before execution of the agreement, that spouse:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse;

(ii) did not voluntarily sign a written consent expressly waiving any right to disclosure of the property or financial obligations of the other spouse beyond the disclosure provided; and

(iii) did not have notice of the property or financial obligations of the other spouse.

(g) A marital property agreement executed before marriage is not enforceable if the spouse against whom enforcement is sought proves that:

(1) that spouse did not execute the agreement voluntarily; or

(2) the agreement was unconscionable when made and before execution of the agreement that spouse:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse;

(ii) did not voluntarily sign a written consent expressly waiving any right to disclosure of the property or financial obligations of the other spouse beyond the disclosure provided; and

(iii) did not have notice of the property or financial obligations of the other spouse.

(h) An issue of unconscionability of a marital property agreement is for decision by the court as a matter of law.

(i) If a provision of a marital property agreement modifies or eliminates spousal support and that modification or elimination causes one spouse to be eligible for support under a program of public assistance at the time of dissolution, the court may require the other spouse to provide support to the extent necessary to avoid that eligibility, notwithstanding the terms of the agreement.

(j) A document signed before the effective date of this [Act] by spouses or unmarried persons who subsequently married each other which affects the property of either of them and is enforceable by either of them without reference to this [Act] is not affected by this [Act] except as provided otherwise in a marital property agreement made after the determination date.

Comment

The Act provides almost unlimited contractual freedom for persons who want to amend, avoid or adopt its provisions. This is codified in this section. An important characteristic of a marital property agreement is that it will usually be a postmarital agreement. On the other hand, a premarital agreement precedes the marriage by definition. Conceptually, the typical attitude toward a premarital agreement is that it will be changed infrequently after the marriage, if at all. On the other hand, the approach in this Act toward marital property agreements is that there may, and usually will, be many of them made at numerous times during a marriage. Section 10(e) specifically sanctions entry into a marital property agreement before marriage, but provides that it becomes effective only upon marriage of the parties to it. If they do not marry, the agreement would be a nullity.

Multiple Agreements: A number of separate and distinct marital property agreements might be in existence in a given marriage. In adopting states, spouses would be able to execute as many of these agreements as needed during their marriage. The policy announced by the section is that any arrangement that changes the application of the Act should be a marital property agreement. In turn it should conform with Section 10.

Scope: The specific group of matters which a marital property agreement can cover, set out in Subsection (c), is not exclusive. Paragraph 8 of the subsection extends the opportunity for contracting between spouses to any other matters not in violation of public policy or any statute imposing a criminal penalty.

Enforceability: There are two sets of provisions regarding enforceability. One is parallel to the *Uniform Premarital Agreements Act*. (Subsection (g)). These provisions apply to marital property agreements made before marriage. The second set of provisions applies to marital property agreements made after marriage. (Subsection (f)). The postmarital requirements elevate the test of "unconscionable when made" as a disqualifying factor. In the postmarital agreement an agreement may not be enforced against a spouse who proves that the agreement was unconscionable when made.

Although the Act sets forth a specific group of requirements for enforceability, they are not exclusive. Ordinary contract defenses not specifically ruled out by the Act (as lack of consideration is) remain available.

Dispositions At Death: Paragraph 6 of Subsection (c) contains provisions substantially similar to those in Washington law. Wash. Rev. Code Ann. Sec. 26.16.120 (1974). These have been in effect in Washington since 1881, and they constitute a valuable and useful method of nonprobate disposition. The language in the Act contains after-acquired property provisions. It is intended to be used on an omnibus basis with respect to all property, or on a more limited basis with respect to a specified asset or group of assets. It constitutes a statutory authorization for a disposition other than one under the Statute of Wills. In that respect, it also follows certain of the policies announced in Section 6.201 of the *Uniform Probate Code*, although the latter is seen by many as being drafted to apply on an asset-by-asset basis rather than on the omnibus basis available in Subsection (c)(6). It should be noted that since the provisions of this type of agreement are incorporated in a marital property agreement, they may not be altered unilaterally. A discussion of the use of the agreements in Washington appears in Cross, *The Community Property Law of Washington*, 49 Wash. L. Rev. 729, 798, 805 (1974). A version of the arrangement in use in another state can be found in Idaho Code Sec. 15-6-201 which incorporates the idea into Idaho's version of Sec. 6.201 of the *Uniform Probate Code*. *See also* Bell, *Statutory Survivorship Contracts in the State of Washington*, 1 Community Prop. J. 239 (1974; Note, *The Community Property Agreement: A Probate Cure With Side Effects*, 18 Gonz. L. Rev. 121 (1983); Note, *A First Look at the Community Property Agreement in Idaho*, 12 Idaho L. Rev. 41 (1975).

No Consideration Required; Formalities: No consideration is required for a marital property agreement, and the agreement, amendments, and revocations of the agreement require the signature of *both* spouses. Subsection (d) relates to amendments and revocations and requires that these be by later marital property agreements. These would necessarily be documents signed by both spouses, since Subsection (a) requires that all marital property agreements be signed by both spouses.

Existing Agreements: Subsection (j) deals with a transitional problem. From the point of view of comprehensibility and ease of administration, it would be desirable to convert agreements relating to the subject matter of the Act to marital property agreements under the Act with the adoption of the Act. However, such legislation could be seen as impairing the obligation of those agreements and as retroactive, and it is therefore avoided. Thus a predetermination date agreement dealing with subject matter such as that in the Act will simply continue to stand on such authority as it had without the Act, and the Act neither helps nor hinders that agreement.

SECTION 11. OPTIONAL FORMS OF HOLDING PROPERTY, INCLUDING USE OF "AND" OR "OR", SURVIVORSHIP OWNERSHIP.

(a) Spouses may hold marital property in a form that designates the holders of it by the words "(name of one spouse) or (name of other spouse) as marital property." Marital property held in that form is subject to Section 5 (a) (6).

(b) Spouses may hold marital property in a form that designates the holder of it by the words "(name of one spouse) and (name of other spouse) as marital property." Marital property held in that form is subject to Section 5 (b).

(c) A spouse may hold individual property in a form that designates the holder of it by the words "(name of spouse) as individual property." Individual property held in that form is subject to Section 5 (a) (1).

(d) Spouses may hold property in any other form permitted by law, including a concurrent form or a form that provides for survivorship ownership.

(e) If the words "survivorship marital property" are used instead of the words "marital property" in the form described in subsection (a) or (b), marital property so held is survivorship marital property. On the death of a spouse, the ownership rights of that spouse in survivorship marital property vest solely in the surviving spouse by nontestamentary disposition at death. The first deceased spouse does not have a right of disposition at death of any interest in survivorship marital property. Holding marital property in a form described in subsection (a) or (b) does not alone establish survivorship ownership between the spouses with respect to the property held in that form.

Comment

Although the provisions of the Act do not require any particular form of labeling of title-documented property, that kind of labeling will be desirable in an adopting state. For a couple wishing to be specific and definite with respect to the classification of property, the labeling device provided by the section is a desirable provision for holding property.

Relationship to Management and Control: The section goes beyond mere labeling and provides specific confirmation of management and control rights with respect to types of labeling which are congruent with Section 5. Use of the Act's designation of property as marital property in a conjunctive or a disjunctive form will have different effects on management and control rights. The conjunctive ("and") form will require management and control by both spouses and joinder of both in transactions affecting the property. The disjunctive ("or") form permits management and control by either spouse without the necessity of joinder by the other.

Other Forms: Affirmative recognition of the ability to hold marital property in any form permitted by other law is provided by Subsection (d). This is consistent with the underlying difference under the Act between ownership and the integrated matters of title or holding and management and control.

Survivorship Ownership: An important substantive addition made by the section is a survivorship ownership feature. If the appropriate words described in the section are added to the designation by which the property is held, then survivorship ownership will follow that. If those words are not used, there is a specific statement that survivorship is not achieved by using the marital property form in either the conjunctive or the disjunctive form. It is important to note that survivorship marital property can be created with respect to marital property held in *either* the disjunctive form or the conjunctive form. This feature creates a wider option than would be afforded by limiting survivorship to the disjunctive form only. Management and control rights are unaffected by the addition of the survivorship language and relate back to the provisions in the last sentences of Subsections (a) and (b). The survivorship estate is not a form of joint tenancy but is a new statutory estate created by the section. It is not intended to carry on the arcane doctrines of joint tenancy but simply to establish a nonprobate survivorship incident by the utilization of the appropriate words on a document of title or other medium by which property is held. It is consistent with the policy of Section 10(c)(6) and Section 6.201 of the *Uniform Probate Code*.

An adopting state will wish to review banking statutes dealing with concurrent ownership rights to assure appropriate recognition of the provisions of the section and coordination with existing provisions of banking statutes.

SECTION 12. CLASSIFICATION OF LIFE INSURANCE POLICIES AND PROCEEDS.

(a) In this section:

(1) "Owner" means a person appearing on the records of the policy issuer as the person having the ownership interest or, if no person other than the insured appears on those records as a person having that interest, it means the insured.

(2) "Ownership interest" means the rights of an owner under a policy.

(3) "Policy" means an insurance policy insuring the life of a spouse and providing for payment of death benefits at the spouse's death.

(4) "Proceeds" means the death benefit from a policy and all other economic benefits from it, whether they accrue or become payable as a result of the death of an insured person or upon the occurrence or nonoccurrence of another event.

(b) If a policy issuer makes payments or takes actions in accordance with the policy and the issuer's records, the issuer is not liable because of those payments or actions unless, at the time of the payments or actions, it had actual knowledge of inconsistent provisions of a decree or marital property agreement or of an adverse claim by a spouse, former spouse, surviving spouse, or persons claiming under a deceased spouse's disposition at death.

(c) Except as provided in subsections (d), (e), and (f):

(1) The ownership interest and proceeds of a policy issued after the determination date which designates the insured as the owner are marital property without regard to the classification of property used to pay premiums on the policy.

(2) The ownership interest and proceeds of a policy issued before the determination date which designates the insured as the owner are mixed property if a premium on the policy is paid from marital property after the determination date without regard to the classification of property used to pay premiums on that policy after the initial payment of a premium on it from marital property. The marital property component of the ownership interest and proceeds is the part resulting from multiplying the entire ownership interest and proceeds by a fraction of which the numerator is the period during marriage that the policy was in effect after the date on which a premium was paid from marital property and the denominator is the entire period the policy was in effect.

(3) The ownership interest and proceeds of a policy issued during marriage which designates the spouse of the insured as the owner are individual property of its owner without regard to the classification of property used to pay premiums on the policy.

(4) The ownership interest and proceeds of a policy that designates a person other than either of the spouses as the owner are not affected by this [Act] if no premium on the policy is paid from marital property after the determination date. If a premium on the policy is paid from marital property after the determination date, the ownership interest and proceeds of the policy are in part property of the designated owner of the policy and in part marital property of the spouses without regard to the classification of property used to pay premiums on that policy after the initial payment of a premium on it from marital property. The marital property component of the ownership interest and proceeds is the part resulting from multiplying the entire ownership interest and proceeds by a fraction of which the numerator is the period during marriage that the policy was in effect after the date on which a premium was paid from marital property and the denominator is the entire period the policy was in effect.

(5) Written consent by a spouse to the designation of another person as the beneficiary of the proceeds of a policy is effective to relinquish that spouse's interest in the ownership interest and proceeds of the policy without regard to the classification of property used by a spouse or another to pay premiums on that policy. A designation by either spouse of a parent or child of either of the spouses as the beneficiary of the proceeds of a policy is presumed to have been made with the consent of the other spouse.

(6) Unless the spouses provide otherwise in a marital property agreement, designation of a trust as the beneficiary of the proceeds of a policy with a marital property component does not reclassify that component.

(d) This section does not affect a creditor's interest in the ownership interest or proceeds of a policy assigned or made payable to the creditor as security.

(e) The interest of a person as owner or beneficiary of a policy acquired under a decree or property settlement agreement incident to a prior marriage or parenthood is not marital property without regard to the classification of property used to pay premiums on that policy.

(f) This section does not affect the ownership interest or proceeds of a policy if neither spouse is designated as an owner in the policy or the records of the policy issuer and no marital property is used to pay a premium on the policy.

Comment

This section sets forth a series of rules regarding the classification of life insurance policies and the proceeds of them.

As with other provisions of the Act, it is important to review the section with an awareness that a marital property agreement can change its provisions.

Protected Parties: A series of definite rules operating on described objective facts protects certain parties to insurance policy transactions. The first protected party is the issuing insurance company. Subsection (b) relieves it from liability if it proceeds on the basis of the policy and its own records unless it has *actual knowledge* of other facts which would affect claims under the policy or those records.

The second protected party is a creditor to whom a policy is assigned or made payable. Subsection (d) provides that the section does not affect that creditor's interest in the policy, so that its provisions do not concern or impair the rights of the creditor.

The third protected party is a person who is an owner or beneficiary by virtue of provisions made in the dissolution of a prior marriage or as an incident to parenthood. In many dissolutions the maintenance of a life insurance policy for children of the marriage or for a former spouse is required. Subsection (e) accords to persons intended to be benefited from that type of provision protection from the other provisions of the section.

Finally, Subsection (f) provides that if neither spouse is an owner of a policy and no marital property is used to pay a premium on the policy, the section will have no effect on the policy or its proceeds. Thus, a typical business-based life insurance policy would ordinarily be unaffected by any provision of the section. Similarly, insurance owned and paid for by a child on the life of a parent would be unaffected by the section.

Carving out those four groups of protected persons leaves six separate situations with which the section deals.

The Basic Rule: The basic rule is found in Subsection (c)(1). If a policy is issued *after the determination date* and an insured spouse is the owner, it is a marital property policy, *without regard to the source of premium payments*. This situation is the typical garden-variety transaction in which one spouse is the owner of a policy on his or her life. The section offers a rule of comparative simplicity for that policy — it is marital property.

Straddles: The next situation dealt with is a "straddle." Subsection (c)(2) speaks of a policy that existed before the determination date which is owned by the insured and continues in force after the determination date. Payment of *any* premium on such a policy at any time *after* the determination date will operate as a reclassification of the policy ownership and proceeds. A formula is set forth in the section to establish the marital property component.

Spouse-Owned Insurance: Under Subsection (c)(3), the frequently used transaction of spouse-owned insurance is treated. The Act assumes that a designation of a spouse of an insured as an owner will typically be used if the parties desire that the non-insured spouse be the owner for all purposes. The effect of the Act is to perfect that treatment. While the spouses could always agree to an alternative treatment, unless they do, a policy owned by one on the life of the other will be individual property of the owner without regard to the source of premium payments.

Third Person Ownership: A fourth situation, dealt with in Subsection (c)(4), concerns a policy owned by third persons with premiums paid from marital property. The "straddle" system and accompanying formula is used to deal with the ownership interest and proceeds. The straddle is again initiated by the first payment of a premium from marital property.

Parent or Child as Beneficiary: Subsection (c)(5) presents a means of relinquishing marital property interests in life insurance and contains a presumption that the designation by a spouse of a parent or a child of either spouse as a beneficiary is made with the consent of the other spouse.

Trust As Beneficiary: The marital property component of a policy retains that classification even if a trust is designated as a beneficiary under Subsection (c)(6). Consent of both spouses to another classification is possible to alter this result.

SECTION 13. CLASSIFICATION OF DEFERRED EMPLOYMENT BENEFITS.

(a) A deferred employment benefit attributable to employment of a spouse occurring after the determination date is marital property.

(b) A deferred employment benefit attributable to employment of a spouse occurring during marriage and partly before and partly after the determination date is mixed property. The marital property component of that mixed property is the part resulting from multiplying the entire benefit by a fraction of which the numerator is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator is the total period of the employment. Unless provided otherwise in a decree, marital property agreement, or written consent, valuation of a deferred employment benefit that is mixed property shall be made as of the death of a spouse or a dissolution.

(c) Ownership or disposition provisions of a deferred employment benefit which conflict with subsections (a) and (b) are ineffective between spouses, former spouses, or between a surviving spouse and a person claiming under a deceased spouse's disposition at death.

(d) If an administrator of an arrangement for deferred employment benefits makes payments or takes actions in accordance with the arrangement and the administrator's records, the administrator is not liable because of those payments or actions unless, at the time of the payments or actions, it had actual knowledge of inconsistent provisions of a decree or marital property agreement or of an adverse claim by a spouse, former spouse, surviving spouse, or a person claiming under a deceased spouse's disposition at death.

Comment

This section deals with marital property rights in employment benefits. Its provisions may be varied by a marital property agreement.

Protection: As with the payment of life insurance proceeds under Section 12, Subsection (d) protects an entity which makes payments in accordance with the employee benefit plan and its own records. Unless it has actual knowledge that a decree or marital property agreement requires some other payment, or actual knowledge of an adverse claim by a spouse or surviving spouse, that entity has no liability even though its payments may be inconsistent with such rights or claims.

The Two Formats: The section deals with two situations. A deferred employment benefit attributable to employment *after* the determination date is marital property under Subsection (a). Such a benefit attributable to employment during marriage and *before and after* the determination date is subject to a formula which uses time periods.

The Array of Problems: There are many significant and important problems regarding employee benefits which the Act does not address specifically. As a property statute, the thrust of the Act is to treat an appropriate quantum of an employee benefit as marital property. From that point on, a court dealing with the matter will have before it the many other problems in the field. These include valuation problems, questions regarding the time at which an interest is to be quantified and delivered, questions relating to whether the plan is or is not in pay status, problems with respect to events affecting the plan which can occur with the passage of time, federal preemption problems, problems with respect to the claims of prior spouses, and many other problems that are now being heard on a daily basis in courts throughout the nation. *See* 3 *Equitable Distribution Rep.* 109 (Special Pension Issue, April 1983); McClanahan, *Community Property Law in the United States*, Sec. 12.15 (1982); O'Neill, *Pensions As Marital Property: Valuation, Allocation and Related Mysteries*, 16 Creighton L. Rev. 743 (1983); Campbell, *Pension Plan Benefits as an Asset in Dissolution-of-Marriage Cases*, 61 Taxes 583 (1983); *Kalinoski v. Kalinoski*, 9 Fam. L. Rep. 3033 (Pa. Ct. of Comm. Pl. 1983). There is no consensus in the existing state of the law that justifies the formulation of more than the general policy in the section. Adopting states will already have dealt with many of these problems and the Act does not alter that case law, but simply operates to establish an appropriate marital property interest. The existing body of state case law may be applied to that property interest.

Some federal benefit programs, such as the Railroad Retirement Act (45 U.S.C. Sec. 231 *et seq.*), preempt state definitions of property which include pension benefits in dissolution property settlements. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). *See also Fritz v. Railroad Retirement Board*, 449 U.S. 166 (1980). Where there is federal preemption former spouses may themselves qualify as independent beneficiaries. In the case of the Railroad Retirement Act, *see* 45 U.S.C. Sec. 231a (c)(4) (divorced spouse annuity), and 45 U.S.C. Sec. 231a (d)(1)(v) (surviving divorced wife). *See also* the Uniform Services Former Spouses' Protection Act, 10 U.S.C. Sec. 1408, reversing the United States Supreme Court decision in *McCarty v. McCarty*, 453 U.S. 210 (1981), and enacting into law a time period formula bearing some analogy to that used in the section. The preemption problem exists independently of the Act, and obviously cannot be solved by actual or proposed state legislation in any event. *See* Reppy and Samuels, *Community Property in the United States*, p. 396 ff (1982).

SECTION 14. MIXED PROPERTY.

(a) Except as provided otherwise in Sections 12 and 13, mixing marital property with property having any other classification reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced.

(b) Application by one spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity on individual property of the other spouse creates marital property attributable to that application if:

(i) reasonable compensation is not received for the application; and

(ii) substantial appreciation of the individual property of the other spouse results from the application.

Comment

Commingling of the assets of spouses is an everyday occurrence without the Act, and will continue with or without it. The Act supplies a rule to deal with it. Under that rule, mixing properties that cannot be identified or traced after the mixing will result in a reclassification. Since the general presumption of Section 4 (b) operates to classify all spousal property as marital property, that will be the result in the absence of the ability to trace.

Tracing: The basic rule of Section 14 requires a tracing in order to "unmix" property. In turn the tracing would necessarily be done under the appropriate tracing rules of an adopting state. *See* McClanahan, *Community Property Law in the United States*, Secs. 6.7 and 6.8 (1982) and Reppy and Samuels, *Community Property in the United States*, Chapter 10 (1982), for discussion of tracing principles. U.C.C. Sec. 9-306 also supplies a version of tracing rules. The policy of the Act is to enhance the procedures and practices which create marital property. Consequently this section would have the effect of treating mixed property as marital property unless tracing was a possibility.

What of De Minimis Mixing? An obvious matter of concern is the possibility of serious injustice that could result from mixing a minimal amount of marital property with a substantial amount of other property. *See* Reppy and Samuels, *Community Property in the United States*, p. 128 ff (1982). For example, one principal payment might be made from marital property on a large mortgage on a valuable piece of individual real property. This would mix marital and individual property. Another example might be one deposit of marital property to a very large individual bank account. However these types of transactions lend themselves to solution by an application of tracing, since the underlying types of property are very much record-oriented. Meeting the burden of proof in a tracing process from the records should usually be possible.

A more difficult case is that of fungible properties — a large stamp, coin or precious gem collection, for example. These will create the same types of problems that they already create when they are not in unified ownership. Commingling of fungible goods without being willing to sacrifice ownership is a highly dangerous practice and would remain so under the Act. In reality the spouse who stands to gain from a reclassification arising from a "tainting" of a large collection of fungibiles with a small amount of marital property will have to carry the burden of proving that a mixing even occurred. In a sense that imposes the burden on that spouse to trace the marital property *into* the mixed property, which will be an effective though backward threshold method of tracing.

Commingled Accounts: Commingled accounts (such as bank accounts and mutual fund accounts to which continuing payments for new purchases are made) and increased value resulting from payments on liens on property are examples of types of mixed property which will undoubtedly occur and which will typically require solutions. Those problems and solutions for them already exist in dissolution and probate matters. The Act would necessarily build on the procedures for tracing that exist in an adopting state. In addition, accounts of that type are frequently accompanied by normal and routine documentation and records which would ease the tracing process.

One rather common mixing process will undoubtedly occur. Many bank accounts, mutual fund accounts and common-stock dividend reinvestment programs provide automatic reinvestment of dividends and interest. Under the Act, income is marital property. Hence the automatic reinvestment of income will be a mixing of marital property with other property if the accounts or common stock are not already marital property. Under the section this will reclassify the accounts or common stock to marital property absent tracing. Spouses wishing to avoid this result could avoid automatic reinvestment of dividends or interest in such programs or could create an individual property classification for the reinvested income by a marital property agreement.

Physical Labor: The section deals with another extremely important issue. It is the situation arising from the application to the individual property of one spouse of personal effort by the other spouse and carrying the burden of proving its elements will be difficult. The rule of the section is strict. It articulates a bias against creation of marital property from such an act unless the effort has been substantial and has been responsible for substantial appreciation. Routine, normal, and usual effort is not substantial. Though drawing a precise line as to what is substantial and what is not is not possible, the section does not create opportunity to translate for recognizing minimal effort to a property interest. The section is only satisfied by proof of (1) a truly substantial effort followed by (2) a truly substantial appreciation *attributable to the effort* for which (3) no reasonable compensation was received. Many situations can be visualized. Real property transactions are those in which the problem will typically occur. One spouse will bring real property into the marriage. After the marriage, that real property will be an important element in the economic life of the couple. The other spouse will improve it by physical labor. This might be work on a farm, or improvements or additions to a home or to a piece of commercial real estate. The statute operates to avoid the creation of marital property if reasonable compensation for the effort was paid at the time that it occurred. If the compensation was nominal or nonexistent, then the provisions of the section still require a showing that the effort was substantial and that substantial appreciation resulted from it. Otherwise there can be no quantification of the marital property created by the effort and the spouse expending the effort will simply have done so without anything demonstrable to show for it.

What is the Laborer's Right? Section 14(b) provides that the physical labor creates *marital property* when it is applicable. That would mean that the right of the spouse who created the marital property is to an interest in the asset, and not to a right of reimbursement or a lien for a specific amount. As the marital property component rises and falls in value, the interest rises and falls.

Burden of Proof: Many mixing problems that might otherwise exist will be resolved by burden of proof requirements. A spouse claiming a particular classification for an asset contrary to the general presumption of Section 4(b) will have the burden of proof on that claim, and failure to meet it would render any mixing issue moot. In particular meeting the burden of proof should be helpful in the *de minimus* mixing situations, since proving mixing, even of small amounts, is itself a form of tracing.

SECTION 15. INTERSPOUSAL REMEDIES.

(a) A spouse has a claim against the other spouse for breach of the duty of good faith imposed by Section 2 resulting in damage to the claimant spouse's present undivided one-half interest in marital property.

(b) A court may order an accounting of the property and obligations of the spouses and may determine rights of ownership in, beneficial enjoyment of, or access to, marital property and the classification of all property of the spouses.

(c) A court may order that the name of a spouse be added to marital property held in the name of the other spouse alone, except with respect to:

(1) a partnership interest held by the other spouse as a general partner;

(2) an interest in a professional corporation, professional association, or similar entity held by the other spouse as a stockholder or member;

(3) an asset of an unincorporated business if the other spouse is the only spouse involved in operating or managing the business; or

(4) any other property if the addition would adversely affect the rights of a third person.

(d) Except as provided otherwise in Section 6 (b), a spouse must commence an action against the other spouse under subsection (a) not later than 3 years after acquiring actual knowledge of the facts giving rise to the claim.

Comment

The section will create a change in the law of those states which prohibit litigation between spouses regarding property rights during an ongoing marriage. Since the Act creates respective vested interests in marital property while still permitting individual management and control of that property, there is an obvious possibility that management and control rights could be exercised in a way that damages or eliminates the interest of the spouse who does not hold the property. This section creates a remedy for this type of conduct. An important purpose of the section is creation of a remedy for a violation of the good faith responsibility between spouses required by Section 2. *See* McClanahan, *Community Property Law in the United States*, Sec. 9.12 (1982); Reppy and Samuels, *Community Property in the United States*, p. 243 ff (1982); Comment, *California's New Community Property Law — Its Effect On Interspousal Mismanagement Litigation*, 5 Pac. L.J. 723 (1974). It also affords a remedy for violations of specific provisions contained throughout the Act. However, it is not intended to reverse interspousal immunity beyond its terms unless an adopting state should choose to do so. Note that Section 6, dealing with gifts, also creates rights for one spouse to proceed against the other spouse. Those rights are in addition to the provisions of this section.

The Basis: The rationale of the section is well explained in De Funiak and Vaughn, *Principles of Community Property*, Sec. 151 (1971). There it is pointed out that in community property jurisdictions

> "…. it must follow as a logical result that each is entitled to protect or enforce against the other his or her rights in the common property or to enforce or protect as against the other his or her rights in separate property, even by civil action …. the common law fiction that husband and wife are one person, so that one cannot sue the other during coverture, is alien to the community property system's view of the spouses as individuals in their own right …. if this right to sue did not exist, one spouse, especially if the title to the property were in his or her name, might be enabled to appropriate community property to his or her own use or otherwise deny or injure the rights therein of the other spouse without the other spouse having any remedy whereby to defeat such conduct."

Accounting: The accounting remedy contemplated is a form of balancing of the property rights between the spouses. It is not intended that such an accounting would be the classic fiduciary accounting in either style or substance. In particular, it is not intended that such an accounting should prevent the balancing of losses and gains or that it should charge one spouse with losses while not crediting gains. Rather, the accounting would simply establish what is marital property and what is not. If an "unmixing" under Section 14 was appropriate, that would be accomplished in the accounting. In addition to the accounting, the rights of the spouses by way of ownership or beneficial enjoyment of or access to marital property or other property is a contemplated form of relief under the Act. The remedy could well include some form of separation of property if needed to protect the ownership or beneficial enjoyment of the spouses in any of their property. *See* Reppy and Samuels, *Community Property in the United States*, p. 247 ff (1982).

"*Add-A-Name*": One of the ways in which a spouse's interest could be injured would follow utilization of a one-spouse method of holding property and management or disposition of that property to the prejudice of the other spouse. In order to prevent this, the section has a specific provision for adding the name of a spouse to the form in which marital property is held. However, this procedure has certain safeguards and prohibitions. The "add-a-name" function cannot occur with respect to general partnership interests, professional entities, unincorporated businesses operated by the other spouse, or other property if a third party's interests would be adversely affected.

Statute of Limitations: The section contains a statute of limitations. This is intended to function as a means of clearing the records. It operates in a manner similar to that used in fraud-type statutes of limitations. The time period runs only after actual knowledge of facts which would give rise to a claim. If there is a dissolution or death, the statute of limitation provisions would be subject to an adopting state's limiting provisions for actions between parties to a dissolution and for claims against an estate set out in its dissolution and probate statutes.

If the statute of limitations operates during the course of a marriage to bar any actions, that bar will be in effect at death or dissolution. That could mean frustration in some circumstances, so that consideration of enforcement of rights under the section during the course of a marriage will be appropriate.

While it is not the purpose of the section to open the door to a torrent of interspousal "economic fault" litigation, it is nonetheless necessary to provide remedies for conduct that injures the interest of one of the spouses. The dominant theme of the relationship between the spouses toward their property is established by the good faith requirement of Section 2. As stated in the comment to that section, a spouse is not bound to succeed in an economic sense. An appropriate regard for the property interests of the other spouse and an avoidance of an unfair advantage are the norm under the good faith requirement. This section provides a remedy for interference or damage. If that can be proven, particularly against an allegation of good faith conduct by the other spouse, a remedy is appropriate. However, such matters should not be dredged up after the apparent ratification that would be implied by the passage of time. The specific statute of limitations has been added for that reason and in order to operate as something of a "cleansing" process in matters of marital economics.

SECTION 16. INVALID MARRIAGES.

If a marriage is invalidated by a decree, a court may apply so much of this [Act] to the property of the persons who were parties to the invalid marriage as is necessary to avoid an inequitable result.

Comment

The section should be read with Sections 208 and 209 of the *Uniform Marriage and Divorce Act* dealing with declarations of invalidity and putative spouses. Adopting states should also review their annulment provisions if they do not follow Section 208. The section is intended to deal only with spousal relations and not with unmarried cohabitation.

SECTION 17. TREATMENT OF CERTAIN PROPERTY AT DISSOLUTION.

Except as provided in Section 16:

(1) In a dissolution, all property then owned by the spouses that was acquired during marriage and before the determination date which would have been marital property under this [Act] if acquired after the determination date must be treated as if it were marital property.

(2) In a dissolution, any property of either spouse which can be traced to property received by a spouse after the determination date as a recovery for a loss of earning capacity during marriage must be treated as if it were marital property.

(3) After a dissolution, each former spouse owns an undivided one-half interest in the former marital property as a tenant in common except as provided otherwise in a decree or written consent.

[(4) In an action for legal separation, the court may decree the extent to which property acquired by the spouses after the legal separation is marital property and the responsibility of each spouse for obligations incurred after the decree of legal separation.]

Comment

The Act contains no provision which would make an immediate alteration in the classification of the property of couples to which it becomes applicable who had married before its effective date. *See* Comment to Section 4. That property will continue to have whatever characteristics it had before the Act became applicable to its owners. The policy reason for this approach is avoidance of constitutional problems which would attend any effort to alter existing rights in property acquired before the Act was effective.

The Concept of Deferral: To that extent, the Act parallels procedures followed when states adopt changes in intestate share and forced heirship provisions or changes which create equitable distribution structures to apply at dissolution. Such changes make no *immediate* change in the rights in property which existed at the time the changes become effective. However, with respect to all of that existing property, as well as property acquired after the statutory change, when a time of dissolution is subsequently reached, such statutes typically create a state-authorized system of division and disposition which is applied to that property. It is accepted that a state has an appropriate role in determining the disposition of property at dissolution. It has also been settled that provisions in state dissolution property settlement statutes can affect not only property which came into being after those statutes were enacted, but property which came into being before that. *Kujawinski v. Kujawinski*, 71 Ill. 2d 563; 376 N.E. 2d 1382 (1978); *Fournier v. Fournier*, 376 A.2d 100 (Me. 1977); *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (1974).

In addition, it appears to be settled that the domiciliary state's property division provisions will generally affect all property of the spouses, even though originally created or acquired in another state. Clark, *Law of Domestic Relations*, Sec. 11.4 (1968); LeFlar, *Conflict of Laws: Dividing Property When Marriage Ends*, 1 Fairshare No. 8 at p. 9 (Aug. 1981). Certain residual problems continue to arise regarding real property outside the domiciliary state, but as a practical matter, those are usually settled by *in personam* jurisdiction of the dissolution court over the parties and its authority to decree certain actions by those persons before it in a litigated case. LeFlar, *op. cit.* at p. 10.

The Act as a Property Statute: Under the Act, property which a couple acquires from their respective efforts, as well as all income earned or accrued after the Act becomes applicable to that couple will be marital property. Each spouse will own an undivided one-half interest in that marital property. Consequently, in analyzing the property marshalled in a dissolution proceeding, each spouse is the *owner* of half of the marital property. If a state has provisions authorizing the alteration of property ownership by equitable distribution at divorce after the application of appropriate factors, then those factors and that authorized division would apply to marital property as it applies to the property each spouse owns prior to the adoption of the Act. Assume, as an example, that in a common law state without the Act spouses own all of their property as tenants in common, and that the state has an equitable distribution statute authorizing reallocation of property ownership in dissolution after the application of a set of factors. Also assume that after the application of the factors, a determination is reached that Spouse A should receive sixty percent of the total divisible property and Spouse B should receive forty percent. The dissolution court would have jurisdiction to reallocate ten percent of the property of one of the two tenants in common in favor of the other one in order to create the sixty-forty ratio of ownership.

If instead, all property of the couple was marital property under the Act, with everything else being identical, the same court could and should attain the same result. In both instances, property "owned" by one spouse is being reallocated in an equitable distribution proceeding to the other spouse. That is the precise way in which the ownership element in marital property should be applied and administered by a dissolution court under its equitable distribution statutes or procedures.

Possible Adopting State Revisions: Obviously an adopting state may wish to review its equitable distribution procedures and consider revising them after giving recognition to the effect of the adoption of the Act. However, the Act can and should function in a cognate fashion with respect to existing dissolution legislation. Coordination would certainly be necessary if an existing body of statutory law establishes a defined class of "marital property" to be marshalled and divided in the dissolution process only. That definition would have to be altered or omitted so that the definition of marital property in the Act would not conflict. However, not all states applying equitable distribution procedures follow a *statutory* definition of marital property. Some states apply their equitable distribution procedures to *all* property whenever and from wherever derived (Connecticut, Massachusetts). Some have *judicial* definitions of the universe of property to which their statutes apply (Florida, Ohio). Others have presumptions as to an appropriate division (Arkansas, North Carolina, Wisconsin). Still others have developed patterns of division which may have the same effect as a presumption (Pennsylvania). There are some fifty different systems in use, and virtually none of them is identical with any of the rest. *See* Freed, *Equitable Distribution as of December 1982*, 9 Fam. L. Rep. 4001 (1983) and Freed, *Family Law in the Fifty States: An Overview*, 4 Fam. L.Q. 289 (1983). Even if substantial statutory identity exists, case law has developed different answers to identical questions in different jurisdictions.

Division in an Adopting State May Be Unequal or Equal: It is not the mission of the Act to enter into the territory of equitable distribution or other systems of property division at dissolution. It is intended to operate as a property statute and to establish that a definite vested property interest exists in marital property from the instant of the creation of that property which traces through investment and reinvestment of the original property to property acquired with its proceeds. Consequently, a distribution different from an equal one in a dissolution of spouses owning marital property would simply be a property division dealing with the existing property rights of the spouses in marital property and reaching a particular result to achieve an equitable distribution of the marital property. Dealing with vested property rights in such a division is already a typical part of equitable distribution procedures. The Act is not designed to interfere with such a division under the statutes and cases in an adopting state or to ordain an equal division when that is not otherwise indicated.

What the Act will do is to create a different balance of ownership *going in* to the equitable division procedure from one which typically exists in common law jurisdictions in which title and ownership are synonymous.

"Other Than Marital" Property At Dissolution: What has been said relates to actual marital property, which is property acquired by efforts of a couple and from their income from all sources after the Act applies to them. Such a couple could be a couple married after the Act is adopted. It could be a couple living in an adopting state, both before and after the Act was adopted. It could also be a couple domiciled elsewhere and moving into an adopting state after the adoption. The "determination date" will be that event which renders the Act applicable to the property of each couple coming under its provisions. In the three situations, there will only be one in which the provisions of the Act would cover all post-marital income and all property acquired by productive efforts of the couple from and after their marriage so long as they live in the adopting state. That will be the couple marrying in an adopting state after the Act becomes effective and remaining in it until dissolution. As to couples in the other two situations, presumably they would have some accumulation of "other than marital" property which existed before the determination date and which could well have been marital property if the Act had been in effect when and where that property was acquired. That is obvious in the case of a couple marrying in and living in an adopting state both before and after the Act becomes effective. All of the income earned or accrued and the property acquired by productive efforts of that couple during their marriage would have been marital property if the Act had been in effect when it was acquired. Similarly, with a couple moving into an adopting state following adoption but bringing with them property which they had acquired in other jurisdictions, their income earned or accrued and property acquired by their productive efforts which was owned prior to moving into the state would have been marital property if in fact the Act had applied when and where it was acquired.

The Deferred Approach: The situation calls for an approach to deal with the property of couples who are seeking a divorce but who own something "other than marital" property. Section 17 applies a *deferred* marital property concept to that other property. An example will help to illustrate how it operates. Assume a couple always lived in an adopting state but lived there before the adoption. Before the adoption but during marriage, they acquired Blackacre with the proceeds of the employment of one or both of them. After adoption of the Act, they acquired Whiteacre with proceeds of employment occurring after the adoption. Their marriage is now dissolving. Whiteacre is clearly marital property and is owned in the equal undivided interests specified by the Act because it was acquired after the Act as the result of personal effort of one or both spouses and was marital property from its inception. On the other hand, Blackacre is some form of property other than marital property. That is because the Act does not operate retroactively, and Blackacre was owned before the Act applied to the couple. However, with the filing of the divorce suit, Blackacre is treated *as if* the Act had been in force when it was acquired, and will therefore be treated in the dissolution proceeding in a manner similar to Whiteacre.

Comparison With Existing Approaches: The way in which the section and the deferral concept operates is not substantially different from much existing equitable distribution legislation which provides that as of dissolution all of the property of the couple takes on the characteristics either of marital property or separate property (e.g., Colorado, Illinois, Missouri). That constitutes a deferred approach to such property, creating a class of dissolution-only marital property as of a deferred time namely the institution of the dissolution proceeding. A number of such statutes and procedures are in place in the several states, and the way this section operates is to follow the technique used in those statutes with respect to property which *would have been* marital property if the Act had been in effect as to the couple when and where the property was acquired. *See* Freed, *op. cit.*

Certain Personal Injury Recoveries: Subsection (b) deals with a matter related to Section 4(g)(6). The latter provision classifies as individual property a recovery for personal injury except for the component of the amount of the recovery attributable to expenses paid from marital property. Under Subsection (b) there is a deferred reclassification of any of that recovery that can be traced to the personal injury recovery as allocable to a loss of earning capacity. In the first instance, Section 4(g)(6) avoids the necessity of an allocation. That should make the personal injury action simpler. Ultimately, an allocation would be possible under Subsection (b) but only if there was still on hand at dissolution a traceable portion of the personal injury recovery allocable to a loss of earning capacity during marriage.

An example is illustrative. Assume a massive personal injury and a recovery of $1,000,000. Assume no expenses were paid from marital property, so that the provisions of Section 4(g)(6) classified the entire amount as individual property. In a dissolution, some years later, the uninjured spouse is able to show that $200,000 of the amount still on hand is fairly allocable to a loss of earning capacity. Then $200,000 would be treated *as if* it were marital property, giving the uninjured spouse an opportunity to show that *before* the application of the appropriate equitable distribution factors, $100,000 could be treated as his or her marital property in the dissolution proceeding.

The rationale for the Subsection (b) treatment is that earnings are ordinarily marital property. By creating the possibility that residual amounts allocable to lost earnings could be marital property, an opportunity to achieve an equitable result in an appropriate case is presented. Loss of earning power is singled out because earnings would themselves have created marital property if they had not been lost. At dissolution it is appropriate to create some protection and replacement for the other spouse for the marital property that would have been there but for the injury. On the other hand, to have forced this determination at the time of the injury would impair the litigating posture, hence it is delayed to a point at which the issue significantly affects the interests of the uninjured spouse.

Oversight Problems: Subsection (c) is an "oversight" section. As pointed out in the Comments to Section 1(8), persons must be married to hold marital property. Ordinarily in a dissolution a disposition of all the property of the spouses will be made by decree or an agreement. Subsection (c) anticipates that this will occur, but makes a provision for a tenancy-in-common if satisfactory action has been omitted as to any former marital property. It is *not* a presumption or other indication that an equal division is either appropriate or required. Rather it deals only with oversight situations to clarify rights of former spouses when those rights have not been clarified by other documentation incident to the dissolution.

Subsection (d) is a bracketed section which would be appropriate in states in which a legal separation is recognized.

Contractual Variance: As with all provisions of the Act that contain no specific prohibition against contractual variance, the provisions of the section may be varied by a marital property agreement.

SECTION 18. TREATMENT OF CERTAIN PROPERTY AT DEATH OF SPOUSE.

(a) At the death of a spouse domiciled in this State, all property then owned by the spouse that was acquired during marriage and before the determination date which would have been marital property under this [Act] if acquired after the determination date must be treated as if it were marital property.

(b) At the death of a spouse domiciled in this State, any property of the spouse which can be traced to property received by the spouse after the determination date as a recovery for a loss of earning capacity during marriage must be treated as if it were marital property.

Comment

The Deferred Approach At Death: The deferred approach used in Section 17 at dissolution is also appropriate at death, and the reasons are substantially the same. A leading text explains the rationale:

> "[T]here was almost universal acceptance of the rule that, when spouses changed their domicile, taking their property with them, the move did not change the classification of the property in the new domicile .... [I]f this move were from one state to another state having the same system of marital-property law, no serious problems arose. But when the move was from a common law state to a community property state, serious problems arose and inequitable results were the rule, not the exception. To hold that separate property from a common law state was also the husband's separate property in the community property state, and then to subject it to the laws of wills and succession of the community property state relating to separate property, changed its attributes and legal characteristics, and the rights and interests of the spouses in this property in a major way. What had happened in all these cases was that the wife had lost the protection furnished to her in the common law state by dower, or a statutory interest in lieu thereof, and had acquired no protection of any kind under the laws of the community property state.... It was noticed that, in most of the cases which reached the reviewing courts, nearly all of the property brought from the common law states was in the name of the husband and, under their law, was his separate property. When this was treated as the husband's separate property in the community property state, he could devise it by will to others than the spouse, and often did, the wife receiving no part of the estate." McClanahan, *Community Property Law in the United States*, Sec. 13.9 (1982).

California developed the initial response to the problem described by McClanahan and its solution appears in Cal. Prob. Code Sec. 201.5. Idaho has followed the California approach in Idaho Code Secs. 15-2-202 and 15-2-203. *See also* Reppy, *Community Property in California*, p. 292 ff (1980). Section 18 is similar to this legislation, although it does not use the same terminology. The approach is to create a *deferred* property right which applies at death. When it applies, property of the *deceased* spouse which would have been marital after acquisition if it had been originally acquired under the Act is treated *as if* it had been so acquired for purposes of disposition at death. A provision regarding personal injury recoveries analogous to that in Section 17 is also included as Subsection (b).

The Property Right: There is an important parallel between the treatment of marital property at death and dissolution. It is that of the property right of the deceased spouse in the marital property as just that: a property right. The deceased spouse is the *owner* of a one-half undivided interest in marital property and it is subject to disposition at death as any other owned property. The ownership right is an integral part of the Act, expressly stated in Section 4(c). As with the same ownership right at divorce, it must be dealt with as an ownership right, and integrated into the probate system as property subject to disposition at death. If the spouse dies testate and the half interest in marital property is not disposed of by a non-testamentary method, it is subject to disposition as part of the testate estate. An attempt to dispose of *more* than the decedent's interest in marital property would be no different from an attempt to dispose of any other property a person did not own — it would be a nullity. It would amount to interference with the ownership right of the other spouse, subject to being dealt with as any such interference is already dealt with by applicable law.

Appropriate Intestacy Provisions: If a deceased spouse dies intestate, and an adopting state makes no change in its intestacy laws, the marital property interest of the decedent will be subject to intestate disposition. This raises interesting questions as to appropriate action in an adopting state. In the American community property states intestate disposition of separate property follows a pattern that varies from state to state as it does in common law states. All of the American community property states follow one pattern for disposing of community property and another for separate property. Obviously common law states have had no occasion for such a dual system and none is in place.

The typical intestate disposition of the first deceased spouse's interest in *community* property is in favor of the surviving spouse. However, that is not the universal rule. In California, Idaho, Nevada, New Mexico and Washington, upon the death of either spouse intestate, the decedent's half of the community property does pass to the surviving spouse. However, in Arizona, Louisiana and Texas, the decedent's half of the community property passes to the surviving spouse if there are no descendants. If there are descendants, the proportions vary from 100%, if all the surviving descendants are also descendants of the surviving spouse (Arizona), to one-half (Texas), to legal usufruct (life estate) only (Louisiana), to none, if one or more of the surviving descendants are not also descendants of the surviving spouse (Arizona).

Uniform Probate Code Provisions: There were significant historical reasons in the American community property states for bifurcating their intestate treatment of community and separate property which have never been present in American common law states. There would appear to be at least one element of community property intestacy law that ought to be followed by an appropriate alteration of intestacy laws by an American common law state adopting the Act. That would constitute following the recommendation set forth in Section 2-102A of the Uniform Probate Code. With respect to community property disposed of in intestacy, the recommendation was that "the one-half of community property which belongs to the decedent spouse passes to the [surviving spouse]." Apart from such an alteration, adopted to refer to marital property rather than community property, adopting states should *require* no substantial change in intestacy laws. Property other than marital property could remain subject to present patterns with the local preferences for particular schemes perpetuated. The logic of the alteration with respect to marital property is the logic at the heart of the Act, which is that of a sharing mode for marital acquisitions. A spouse who disapproves would have testamentary disposition as an option, and as noted below the testamentary disposition should not be subject to forced-share election.

Forced or Elective Shares: A corollary problem to intestate distribution is the elective share of a surviving spouse in testate dispositions. Among American community property states, only Louisiana's forced heirship provisions (in favor of others than the surviving spouse) interfere with the *first* deceased spouse's right of disposition of his or her share of the community. An adopting state should follow the majority rule and bar the enforcement of elective share rights of a surviving spouse against the interest in marital property of the first deceased spouse. The same reasoning would apply to the deferred marital property created by Section 18. The section itself establishes in the surviving spouse a half interest in the deferred marital property of the *deceased* spouse. Hence there is an effective statutory sharing in favor of the survivor in that property already established by the Act, and no further elective right in that property is needed or appropriate for that survivor. The result is that elective rights should be limited, if they are in fact perpetuated by an adopting state. They should apply only to individual property and other property in which the surviving spouse acquires no interest by the terms of the Act.

The Novel Question For Adopting States: With respect to elective share rights in an adopting state against property other than marital property or Section 18 deferred marital property, a substantial and novel question is presented. In community property states, separate property is not subject to elective rights by the other spouse. McClanahan, *op. cit.*, Sec. 11.4. The policy rational is that community property rights are adequate protection and separate property is separate and should be under the unfettered control of its owner. However, if an adopting state followed that pattern it would represent a considerable retreat from existing spousal protection in most common law states. It would appear appropriate for an adopting state to retain elective rights against all property other than marital property and Section 18 deferred marital property, rather than to switch to the community property structure. However a major policy issue is presented by this question which each adopting state will necessarily consider for itself. A compromise might be the use of a lesser forced-share percentage against individual property than is presently in place. Here the issue of sharing will necessarily be considered in its fullest form, and the issues confronted will be *de novo*, since they have not previously been considered in this form in either common law or community property states. The closest approach was California's debate over quasi-community property which resulted in Cal. Prob. Code Sec. 201.5, previously discussed, but this did not present identical issues. In considering any possible revisions, an adopting state may wish to consider the data revealed and discussed in Fellows, Simon & Rau, *Public Attitudes About Distribution At Death and Intestate Succession Laws in the United States*, 1978 Am. B. Found. Research J. 319; *see also* Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 Wash. L. Rev. 277 (1975).

Section 18 Protects the Survivor: Section 18 is itself a statute that emphasizes protection to the survivor rather than the decedent. It does not treat all property of *either* spouse in the deferred mode, but only property acquired by the *decedent*. Thus the survivor will acquire a one-half interest in that property without the necessity of any election and without regard to will provisions. As with marital property, the surviving spouse will own a share of the deferred marital property as a property right and not as a result of exercising any elective right. Review of elective share provisions regarding this property is necessary. If appropriate in a state's statutory scheme, an attempt by a first decedent to defeat the operation of Section 18 should be barred by appropriate elective share provisions which would confirm Section 18 rights in favor of the surviving spouse. In Idaho the interest of a survivor in Idaho quasi-community property is protected by forced-share provisions. Idaho Code Secs. 15-2-202, 203. In California the quasi-community interest is simply stated as a property interest of the survivor. Cal. Prob. Code Sec. 201.5.

The Administration Issue: Historically the entire community was administered when a spouse died. *See* De Funiak and Vaughn, *Principles of Community Property*, Secs. 205-07 (1971). This pattern has been eroding. At this time, California and Nevada require administration only of the decedent's interest in the community. Arizona, Idaho, New Mexico and Washington follow the traditional pattern, though all four have simplified administration procedures under their versions of the *Uniform Probate Code* or Washington's non-intervention provision. Texas and Louisiana have simplified procedures when there is a surviving spouse but no issue, in Texas, or when succession without administration occurs, in Louisiana. In addition, Texas has independent administration as a possibility. *See* Mennell, *Community Property*, p. 355 ff (1982). An adopting state will necessarily face the administration issue and will be forced to consider whether the California and Nevada solution represents the appropriate trend.

The following sums up state intestacy, elective share and probate law provisions that would be appropriate for consideration by an adopting state for application on the death of a spouse subject to the Act:

(1) Type of Property Subject to Testamentary Disposition	(2) Amount Subject to Disposition By Decedent	(3) What Are Survivor's Rights of Election as To Amount In Column 2?	(4) Intestate Disposition As to Amount In Column 2
Marital Property	One-half	None (already owns other half of marital property)	To surviving spouse. If no surviving spouse (because of simultaneous death) by existing law in adopting state
"Deferred Marital" or Section 18 Property	One-half	None, but should be given elective right to secure survivor's half if necessary as in Idaho	Same
All other property subject to disposition at death by decedent	All	As provided by existing law in adopting state	As provided by existing law in adopting state, including appropriate augmented estate provisions

As with all provisions of the Act that contain no specific prohibition against contractual variance, the provisions of the section may be varied by a marital property agreement.

[SECTION 19. ESTATE BY THE ENTIRETIES.

This [Act] does not affect the relationship between spouses and their creditors with respect to property held by spouses in an estate by entireties after the determination date.]

Comment

This is a bracketed section which would apply only in jurisdictions in which estates by the entireties are used. The effect of the section would be to permit the continuation of the creditor protection afforded by the tenancy by the entirety provisions. *See* 41 Am. Jur. 2d *Husband & Wife* Sec. 55.

SECTION 20. RULES OF CONSTRUCTION.

Unless displaced by this [Act], the principles of law and equity supplement its provisions.

SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 22. SHORT TITLE.

This [Act] may be cited as the "Uniform Marital Property Act."

SECTION 23. SEVERABILITY.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 24. TIME OF TAKING EFFECT.

This [Act] takes effect on January 1, 19[___].

SECTION 25. REPEAL.

The following Acts and parts of Acts are repealed:

Comment

In an adopting state, it would be necessary to consider the interrelationship between provisions of the *Uniform Marital Property Act* and all other statutes of the state that affect the property rights of spouses. In particular, Section 15 would require attention to provisions concerning interspousal immunity from suits. Section 18 would require attention to intestacy and forced share provisions of probate laws.

SECTION 26. LAWS NOT REPEALED.

This [Act] does not repeal:

(1)

(2)

(3)

Appendix B

Major Legislation Affecting Wisconsin Marital Property Act

Web sites for Legislation Affecting
Wisconsin Marital Property Act

Revisor of Statutes Bureau
http://www.legis.state.wi.us/rsb/stats.html

1985 Wisconsin Act 37
http://www.legis.state.wi.us/acts89-93/85Act37.pdf (direct link)

1987 Wisconsin Act 393
http://www.legis.state.wi.us/acts89-93/87Act393.pdf (direct link)

1991 Wisconsin Act 224
http://www.legis.state.wi.us/acts89-93/91Act224.pdf (direct link)

1991 Wisconsin Act 301
http://www.legis.state.wi.us/acts89-93/91Act301.pdf (direct link)

1993 Wisconsin Act 160
http://www.legis.state.wi.us/acts89-93/93Act160.pdf (direct link)

1995 Wisconsin Act 27
http://www.legis.state.wi.us/1995/data/acts/95Act27.pdf (direct link)

1995 Wisconsin Act 201
http://www.legis.state.wi.us/1995/data/acts/95Act201.pdf (direct link)

1997 Wisconsin Act 188
http://www.legis.state.wi.us/1997/data/acts/97Act188.pdf (direct link)

1997 Wisconsin Act 250
http://www.legis.state.wi.us/1997/data/acts/97Act250.pdf (direct link)

1997 Wisconsin Act 297
http://www.legis.state.wi.us/1997/data/acts/97Act297.pdf (direct link)

2005 Wisconsin Act 216
http://www.legis.state.wi.us/2005/data/acts/05Act216.pdf (direct link)

2005 Wisconsin Act 443
http://www.legis.state.wi.us/2005/data/acts/05Act443.pdf (direct link)

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(continued on reverse side)

- Wisconsin Governmental Claims and Immunities Handbook
- Wisconsin Judicial Benchbook, Vol. I: Criminal and Traffic
- Wisconsin Judicial Benchbook, Vol. II: Civil
- Wisconsin Juvenile Law Handbook (w/forms on CD)
- Wisconsin OWI Laws: Pocket Codebook
- The Wisconsin Public Records and Open Meetings Handbook
- The Wisconsin Rules of Evidence: A Courtroom Handbook
- Wisconsin Rules of Evidence, Pocket Edition
- Wisconsin Traffic Law Codebook
- Wisconsin Trial Practice

ELDER LAW

- Advising Older Clients and Their Families (2 vols.)
  - Vol. I only
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- Guardianship and Protective Placement for the Elderly in Wisconsin
- Wisconsin Elder and Disability Law Statutes (codebook)

EMPLOYMENT LAW

- A Guide to Wisconsin Employment Discrimination Law
- Hiring and Firing in Wisconsin
- Wisconsin Employment Law (3 vols.)
- Wisconsin Employment Law Codebook
- Wisconsin Wages & Hours Handbook
- Worker's Compensation Handbook

ETHICS

- Wisconsin Ethics Opinions

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- Family Law Casenotes and Quotes (3 vols.)
- The Guardian ad Litem Handbook (w/forms on CD)
- System Book for Family Law: A Forms and Procedures Handbook (2 vols.) (w/forms on CD)
- Voluntary Termination of Parental Rights and Adoption
- Wisconsin Children's Code and Juvenile Justice Code (codebook)
- Wisconsin Family Code and Related Statutes and Rules (codebook)
- Wisconsin Judicial Benchbook, Vol. III: Family
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- Wisconsin Juvenile Law Handbook (w/forms on CD)

GENERAL INTEREST

- Selected Wisconsin Public Utility Statutes (codebook)

INSURANCE

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PROBATE & ESTATE PLANNING

- Eckhardt's Workbook for Wisconsin Estate Planners (w/forms on CD)
- The Marital Property Classification Handbook
- Marital Property Law in Wisconsin
- Wisconsin Judicial Benchbook, Vol. V: Probate, Guardianship & Mental Health
- Wisconsin Probate & Estate Planning Statutes (codebook)
- Wisconsin Probate System: Forms & Procedures Handbook (w/forms on CD)

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- Drafter's Guide to Wisconsin Condominium Documents (w/forms on CD)
- Real Estate Transactions System
- Wisconsin Condominium Law Handbook
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