Marital Property Law in Wisconsin

Fourth Edition
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Marital Property Law in Wisconsin

Fourth Edition

Volume I

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Notes on the Fourth Edition

The fourth edition of *Marital Property Law in Wisconsin* incorporates the statutory and common law developments affecting marital property in Wisconsin that were reported on in the 2005 and 2007 supplements and adds new material reflecting cases that have been issued and statutes that have been amended since the 2007 supplement. Among the most significant developments are U.S. Supreme Court cases concerning bankruptcy-law restrictions on attorneys and spouses' rights under employee-benefit plans and Wisconsin Supreme Court and Court of Appeals cases on marital property agreements, divisibility of assets, and exclusivity of the Wisconsin Marital Property Act's remedies. The book contains updated sample forms. All case citations, statutes, and regulations have been updated, as have the index and the appendices.

Preface

Marital Property Law in Wisconsin has been a leading source of information regarding Wisconsin's community property system for more than 25 years. Attorneys and courts alike have relied on this book for guidance on marital property matters, and we are confident that the fourth edition of this book will prove to be an influential, as well as a practical, resource for those wading into the thicket of marital property law.

On behalf of the State Bar of Wisconsin, we express sincere thanks to the authors for their efforts in updating and improving this book.

We also wish to recognize members of the State Bar CLE Books staff for their role in the development of this new edition. Thanks are due to Attorney-Editor Margie DeWind for her editorial work and for shepherding the book to publication; and to Jackie Johnson and Lana Ferstl for coordinating the production of the revision.

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Foreword

More than 26 years ago—on April 4, 1984—Wisconsin became the ninth community property state in the United States by enacting the Wisconsin Marital Property Act. The first edition of this book was published at the end of 1984 in response to that historic legislation. A second edition followed in November of 1986 after enactment of a "Trailer Bill" on October 22, 1985. The book was periodically supplemented thereafter and was completely revised and rewritten in 2004. This is the revised fourth edition.

The six original authors of this book (Judge McGarity, and Messrs. Christiansen, Haberman, Haydon, Kinnamon, and Wilcox) were members of the State of Bar of Wisconsin Special Committee on Marital Property, which existed between April 1979 and the passage of the Wisconsin Marital Property Act. Additional authors (Messrs. Halley, Herbach, Smith, and White) have come on board as the result of retirements or the need to secure greater in-depth coverage of substantive areas treated by the book.

In the preface to the first edition, we noted that the subject matter was new and complex, pervading the day-to-day practice of law. Although the subject matter is no longer new, it remains complex and pervasive. It is the authors' hope that this book will continue to assist attorneys understand Wisconsin's community property law.

The book provides considerable in-depth analysis of issues with community property law implications, but it is not exhaustive. We have tried to indicate where questions exist and have used our best judgment in providing answers. Although some case law interpretations and some additional statutory changes have occurred in the intervening 25 years since the enactment of the Wisconsin Marital Property Act, there remain many areas where there is little or no precedent upon which to rely.

This book is intended to be a working tool for attorneys seeking information about Wisconsin's community property law. As we indicated 25 years ago, we hope that it will stimulate thinking about the subject,

and we are very appreciative of readers contacting us with new ideas and comments about the book.

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June 2010

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Introduction; History; Basic Principles; and Constitutionality

I. History [§ 1.1]

A. Introduction [§ 1.2]

On April 4, 1984, 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], became law. Eight months earlier, in July 1983, the National Conference of Commissioners on Uniform State Laws approved the Uniform Marital Property Act (1983) at its annual conference. Although the Wisconsin Act is derived from UMPA, it differs from UMPA in many important respects. The Wisconsin Act also has its own unique history that differs from the history underlying UMPA.[1]

➢ ***Note.*** The Uniform Marital Property Act [hereinafter UMPA], is reprinted in appendix A, *infra*. To date, no other state has enacted UMPA or any version of it. Also, UMPA has not been amended since its promulgation in 1983.

When the Wisconsin Marital Property Act was enacted on April 4, 1984, it was understood and explicitly stated that a trailer bill would be necessary to implement the legislation. Two months later, in June 1984, the Legislative Council, whose members consist of legislators from both houses, created the Special Committee on Marital Property Implementation. The special committee, with the help of the Legislative Council, immediately began working on a trailer bill.

On April 10, 1985, the first trailer bill to the Act was introduced as 1985 Senate Bill 150. When, after several months, the legislature remained deadlocked over the bill, a Committee of Conference was appointed. On October 8, 1985, the committee issued its report, which recommended that the legislature adopt and concur in Conference Substitute Amendment 1, which was attached to the report. Both houses accepted the conference report, and the trailer bill as amended by the

[1] Unless otherwise indicated, all references to the Wisconsin Statutes are current through the 2007–08 Wisconsin Statutes, as affected by acts through 2009 Wisconsin Act 189. Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

Committee of Conference was enacted on October 22, 1985, as 1985 Wisconsin Act 37 [hereinafter 1985 Trailer Bill]. (Links to bills affecting the Act are provided in appendix B, *infra*). The 1985 Trailer Bill did not change the Act's original effective date (January 1, 1986). The special committee was reauthorized by the Legislative Council during the 1985 and 1987 legislative sessions and was responsible for recommending a second trailer bill to the Act. 1987 Wisconsin Act 393 [hereinafter 1988 Trailer Bill].

In May 1988, the Legislative Council reestablished the special committee, for the purpose of preparing a third trailer bill. *State of Wisconsin Blue Book 1989–90*, at 395. The special committee was divided into two working groups: one studying the relationship of the marital property law to divorce, and one studying marital property implementation in general. Additional trailer legislation was introduced but not enacted. The special committee was continued for the 1991 legislative session, however, and a third trailer bill, 1991 Wisconsin Act 301 [hereinafter 1992 Trailer Bill], was passed in 1992. The 1992 Trailer Bill became effective May 14, 1992.

In addition to enacting the 1992 Trailer Bill, the legislature enacted 1991 Wisconsin Act 224, which amended provisions of the Probate Code to make changes in the nature of deferred marital property for intestate estates. The special committee was not continued following the 1991 legislative session. Nonetheless, the legislature has continued to make changes to the provisions of the law.

1993 Wisconsin Act 160 changed the treatment of individual retirement account (IRA) assets traceable to a rollover from a deferred-employment-benefit plan in the case of marital property assets.

The comprehensive revisions to the Probate Code under 1997 Wisconsin Act 188, effective January 1, 1999, included a wholesale revision to the former deferred marital property election against probate assets and the augmented marital property estate election against nonprobate assets. For a discussion of the elections before 1999, see section 12.135, *infra*. 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 which provides for a pecuniary amount rather than an item-by-item election.

2005 Wisconsin Act 216 amended several provisions of chapter 766 and corresponding provisions of the Wisconsin Probate Code, discussed at various places in chapters 2, 10, and 12, *infra*.

B. Overview of the History of Community Property at the National Level [§ 1.3]

The debate over whether a state should have a common law property system or a community property system was not new when the Wisconsin Legislature began to study the issue. For example, during the California constitutional convention in 1849, one of the issues debated was whether California should adopt a separate property system or a community property system. The debate is described in Scott Greene, *Comparison of the Property Aspects of the Community Property and Common Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 Creighton L. Rev. 71, 76 (1979). Another account of the debate is reproduced in William A. Reppy, Jr., *Community Property in California* 9 (1980).

In 1936, Professor Richard Powell published an article, *Community Property—A Critique of Its Regulation of Intra-Family Relations*, 11 Wash. L. Rev. 12 (1936), in which he compared the common law system to the community property system. He found

> the community property system lacking as a system of marital property. Its complexity is such as not to be offset by those values claimed for it by its most ardent protagonists. It injects useless uncertainty and unjustifiable barriers into transactions between the spouses as a unit and third persons. It submerges the individual husband or wife in a purely imaginary third entity—the family, in a fashion promoting the ultimate welfare of no one except those parasites who live on litigation-breeding rules of law and have no care for the social implications of the statutes and decisions of their jurisdiction. The writer realizes that many may be shocked at his disregard of the alleged protection of helpless wives implicit in this system. Somehow he cannot bring himself to believe that the husbands of California and of Washington are more ruthless, less loving, than the husbands of Pennsylvania and New York. The wives of those two old states have not found themselves suffering under the closest approach to the individualistic standard yet existent in any of these United States. The vaunted protection of married women is an intellectual hangover from the time when woman

> was a salable chattel and ill consorts with the modernity and wisdom otherwise so characteristic of the West Coast.

Id. at 38 (footnote omitted).

In 1967, Michael Vaughn also published a comparison, *The Policy of Community Property and Inter-Spousal Transactions*, 19 Baylor L. Rev. 20 (1967). He said:

> In summary, the policy of community property is basically one of equality. The husband and wife are to be accorded the status of equals, because of the actual contribution that each makes to the marriage—because of their status as partners in a "marital partnership based on the view that two individuals are equally devoting their lives and energies to furthering the material as well as the spiritual success of marriage." The partnership purpose is to create a successful marriage, and a concise statement of the policy of community property is that it is to treat the spouses as equals because of the actual contribution of each to the accomplishment of the partnership purpose.

Id. at 40–41.

A wave of reform relating to the property rights of married women occurred in the United States in the mid-1800s in the form of the Married Women's Property Acts. In 1839, Mississippi became the first state to adopt such an act. Wisconsin enacted its Married Women's Property Act in 1850. These acts generally permitted women to own their own property as separate property, make contracts, engage in business, sue or be sued, be liable for their own debts, and so forth.

The next significant waves of reform relating to the property rights of married women did not occur until more than 100 years later, in the 1970s. At that time, no-fault divorce and equitable division (also called equitable distribution) at divorce swept through most of the 50 states. *See* Doris Jonas Freed & Henry H. Foster, *Divorce in the Fifty States: An Overview As of 1978*, 13 Fam. L.Q. 105 (1979).

During the same period, a different wave of reform moved through the eight community property states: the concept of equal management and control. Before 1967, all eight community property states provided for male management of community property. A Louisiana statute, for example, expressly provided that the husband was the "head and master of the partnership." In 1967, Texas became the first community property

state to amend its law to provide that each spouse could manage the property that he or she could manage if single. Between 1972 and 1980, the other seven community property states changed their laws to provide for equal management of community property by husband and wife. An excellent history of the community property reform movement is contained in Cantwell, *Man + Woman + Property = ?*, 6 Prob. Law. (1980).

➢ ***Comment.*** Effective January 1, 1980, the Louisiana statute was changed to grant spouses equal rights in the disposition of community property. On March 23, 1981, the U.S. Supreme Court declared the "head and master" statute unconstitutional on the ground it constituted gender-based discrimination. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

In 1983, the National Conference of Commissioners on Uniform State Laws adopted UMPA. UMPA created a community property system that essentially treats spouses as partners at all times in the marriage: during marriage, at divorce, and at death.

Effective as of May 23, 1998, Alaska adopted the Alaska Community Property Act, codified in title 34, chapter 77, of the Alaska Statutes. Under the Alaska Community Property Act, property of spouses is classified as community property only to the extent provided in a community property agreement or a community property trust. Alaska Stat. § 34.77.030 (current through the 2009 First Regular Session and the First Special Session of the 26th Legislature). Whether property classified as community property under the Alaska elective system of community property will be regarded as community property for federal tax purposes (and in particular I.R.C. § 1014(b)(6)) is questionable.

C. The Role of Congressional Tax Policy [§ 1.4]

In addition to the property law reforms briefly discussed in the preceding section, Congress's enactment and amendment of the Internal Revenue Code has played an important role in the development of community property law in the United States.

The federal income tax was authorized by the 16th Amendment to the U.S. Constitution in February 1913. Thirteen years later, in *United States v. Robbins*, 269 U.S. 315 (1926), the U.S. Supreme Court was

faced with the question of whether spouses in California should report their income separately, one-half each. If spouses reported their community income on two separate returns, this income splitting would result in significant income tax benefits to couples in California. The Court held that the wife's interest in community income was a "mere expectancy" and ruled that the wage-earning spouse should report all the income, not just half of it.

Because of *Robbins*, California changed its community property law to clarify that each spouse had "present, existing and equal interests" in community property assets. This change led to the issue of income splitting again being considered by the U.S. Supreme Court. (One year earlier, in four test cases, the Supreme Court had decided that residents in four other community property states could file separate returns. *See Poe v. Seaborn*, 282 U.S. 101 (1930) (Washington); *Goodell v. Koch*, 282 U.S. 118 (1930) (Arizona); *Hopkins v. Bacon*, 282 U.S. 122 (1930) (Texas); *Bender v. Pfaff*, 282 U.S. 127 (1930) (Louisiana).) This time, in *United States v. Malcolm*, 282 U.S. 792 (1931), the Court ruled that each spouse owned half the earned income and that the earned income should be split for income tax purposes.

The tax advantages of income splitting enjoyed by residents of community property states caused some common law states to follow California's lead and consider switching to a vested community property system. In 1939, Oklahoma adopted a conventional (also called elective) community property system. However, the U.S. Supreme Court decided in *Commissioner v. Harmon*, 323 U.S. 44 (1944), that conventional (or elective) community property is an assignment of income for income tax purposes that makes income splitting impermissible. After *Harmon*, there was a flurry of legislative activity between 1945 and 1947, when Oklahoma, Hawaii, Oregon, Nebraska, Michigan, and Pennsylvania all adopted mandatory (also called legal) community property systems to achieve income splitting for their residents. Similar bills were pending in other state legislatures, including Wisconsin's.

The adoption of legal community property systems by some of the common law states prompted the Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 111. The purpose of the 1948 act was to provide parity between the community property states and the common law states. The act provided for:

1. The option of joint income tax filing by spouses as an alternative to separate filing;

2. A marital deduction for federal estate tax purposes (under this deduction, half the predeceasing spouse's estate could be left to the surviving spouse tax free);

3. A full adjustment in basis for both halves of community property when one spouse dies;

4. A marital deduction for gift tax purposes; and

   ➢ ***Historical Note.*** As originally adopted and until 1976, the gift tax marital deduction was substantially different from the estate tax marital deduction. Under the estate tax marital deduction, one spouse could give half of his or her total assets to the other spouse tax free. However, under the gift tax marital deduction, one spouse could only give half of *each item* to the other spouse tax free. Therefore, under the estate tax marital deduction, one spouse could retain half the estate and transfer the other half to the surviving spouse tax free. By contrast, under the gift tax marital deduction, if one-half of the estate was left to the other spouse, only half of the half, or one-fourth of the whole, would be tax free.

5. Gift splitting under which a gift by one spouse to a third party was treated as having been made by both spouses if the nondonee spouse joined in the gift.

   See chapter 9, *infra*, for a discussion of tax issues.

The 1948 Revenue Act ended the common law states' experiments with community property. However, the cycle would start again 14 years later, after the U.S. Supreme Court decided *United States v. Davis*, 370 U.S. 65 (1962). In *Davis*, the Court ruled that an unequal division of legally owned assets between spouses as a result of a divorce was a sale or exchange for capital-gains tax purposes. Again, as when they reacted to the *Poe* and *Malcolm* decisions, the common law states desired the tax benefits of the community property system. In a community property system, co-ownership of assets by spouses is more prevalent, so there are fewer *Davis*-type problems, and capital-gains tax consequences are less severe. Colorado, Oklahoma, Kansas, and some other states reacted to

the *Davis* rule by creating a species of common property ownership arising at the commencement of the divorce proceeding. *See, e.g.*, Minn. Stat. § 518.003 (subd. 3b) (West, WESTLAW current with laws of the 2010 Regular Session through Chapter 188); Mo. Stat. § 452.330 (West, WESTLAW current through the end of the 2009 First Regular Session of the 95th General Assembly); N.C. Gen. Stat. § 50-20(k) (West, WESTLAW current through S.L. 2009-577 (end) of the 2009 Regular Session); *Imel v. United States*, 523 F.2d 853 (10th Cir. 1975) (Colorado); *Collins v. Commissioner*, 412 F.2d 211 (10th Cir. 1969), and *Collins v. Oklahoma Tax Comm'n*, 446 P.2d 290 (Okla. 1968) (Oklahoma); *Cady v. Cady*, 581 P.2d 358 (1958) (Kansas). This species of property was akin to community property.

Congress overruled *Davis* when it enacted the Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494. The fact that both the Revenue Act of 1948 and the Tax Reform Act of 1984 extended tax benefits enjoyed by community property states to the common law states following experimentation by the common law states is striking.

The Internal Revenue Code played one additional role in facilitating change from a common law property system to a community property system. Community property reform began to gain momentum in the middle and late 1970s. However, the federal gift-tax law was a serious impediment to enactment of a community property system by a common law state because a change to a community property system at that time would have resulted in transfers of ownership between spouses, which most likely would have been subject to federal gift tax. Richard W. Bartke, *Marital Sharing—Why Not Do It By Contract?*, 67 Geo. L.J. 1131 (1979). However, in 1976, Congress liberalized the federal gift-tax law by passing the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520. In 1981, Congress completely eliminated gift tax on qualifying interspousal gifts by passing the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172. Thus, serious tax impediments to the adoption of a community property system were removed.

D. Brief History of the Property Rights of Married Persons in Wisconsin [§ 1.5]

The history of the property rights of married persons in Wisconsin has largely paralleled national developments, although Wisconsin has led the nation in some important respects.

➢ ***Note.*** For additional history on the adoption of a community property system in Wisconsin, see June Miller Weisberger, *The Wisconsin Marital Property Act: Highlights of the Wisconsin Experience in Developing a Model for Comprehensive Common Law Property Reform*, 1 Wis. Women's L.J. 5 (1985) (the first of two articles on the subject).

Wisconsin adopted its version of the Married Women's Property Act in 1850. 1850 Wis. Laws ch. 44. This Act was contained in chapter 766 of the 1981–82 Wisconsin Statutes. In 1921, the legislature enacted chapter 529 of the Laws of 1921, which added the following section to the Wisconsin Statutes:

> **6.015 Women to Have Equal Rights. (1)** Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects. The various courts, executive and administrative officers shall construe the statutes where the masculine gender is used to include the feminine gender unless such construction will deny to females the special protection and privileges which they now enjoy for the general welfare. The courts, executive and administrative officers shall make all necessary rules and provisions to carry out the intent and proposes of this statute.

It has been stated that this statute was the first such equal-rights statute ever passed by a state legislature. Wisconsin Commission on the Status of Women, *Wisconsin Women and the Law* xi (3d ed. 1979). Section 6.015 subsequently became section 766.15.

In contrast to the federal income tax system, Wisconsin retained its system of separate income reporting for income tax purposes. After 1948, when the federal system was changed to permit joint filing, Wisconsin's separate-income-reporting system served as a reminder that Wisconsin had a common law property system.

In the 1970s, significant events contributing to the enactment of the marital property law occurred in all three branches of Wisconsin's government: executive, judicial, and legislative. These events are described in the following subsections.

1. Executive Branch [§ 1.6]

In January 1975, then Governor Patrick J. Lucey recreated the Governor's Commission on the Status of Women. The commission was originally created in 1964 in response to an "invitation to action" issued to the states in the 1963 report of the President's Commission on the Status of Women. The recreated Wisconsin commission began an examination of Wisconsin's laws as they applied to women. The commission published a number of influential reports and pamphlets that heightened interest in the subject. *See, e.g.*, *The Marriage Partnership* (c. 1979); *Real Women, Real Lives: Marriage, Divorce, Widowhood* (1978); *That Old American Dream & the Reality Or Why We Need Marital Property Reform* (1977); Toward A True Marriage Partnership (1976); *Wisconsin Women: Know Your Rights* (1968); Wisconsin Women and the Law (3d ed. 1979). Other organizations also published materials about Wisconsin law and its application to women. *See, e.g.*, Irish, *A Common Law State Considers a Shift to Community Property*, 5 Community Prop. J. 277 (1978) (supported by grants from the Smongeski Foundation and the Wisconsin Governor's Commission on the Status of Women); League of Women Voters of Wisconsin, *His ... Hers ... Theirs: Marital Property* (1978); Marygold Shire Melli, *The Legal Status of Homemakers in Wisconsin* (1977, Center for Women Policy Studies).

2. Judicial Branch [§ 1.7]

As the executive branch was examining Wisconsin's laws as they applied to women, several Wisconsin court decisions highlighted the key difference between a separate property system and a community property system. A good example is *Rasmussen v. Oshkosh Savings & Loan Ass'n*, 35 Wis. 2d 605, 151 N.W.2d 730 (1967). In that case, the husband earned wages and the wife worked in the home. The husband regularly turned his earnings over to his wife, who managed the family funds. Over the years, she deposited savings into separate savings accounts for each of their two sons. Each son was designated as beneficiary of the account for him. When the wife predeceased her husband, one son's account contained approximately $1,800, and the other son's account contained approximately $3,100. Upon learning of the existence of the two accounts after his wife's death, the husband brought suit claiming ownership of both accounts.

In a 4–3 decision, the Wisconsin Supreme Court held that the money in both accounts belonged solely to the husband:

> Gifts from a husband to his wife are not presumed from the marital relationship but are governed by the same rules as gifts between strangers, namely, there must be an intention to part with the interest in and dominion over the property and there must be delivery of the property.…
>
> ….
>
> It is apparently a common practice in some American households for the husband, for the sake of convenience or for other reasons satisfactory to him, to turn over most or all of his earnings to his wife to meet the household and other expenses. The image of a housewife scrimping and saving some of this money is a popular one, but how much scrimping can be done by the wife depends in part upon the amount of funds turned over to her. A husband and wife may have an understanding that she is to receive an "allowance" for certain purposes and intend that any surplus shall belong to the wife. This is a kind of reward or incentive bonus for good management. Then too, the wife may, without any such definite understanding, be given funds for household purposes and the amount may or may not be sufficient; if not, she must ask for more. But if the allowance is sufficient or at times more than enough, one would think the surplus would still be impressed with the household purposes and be added to the amount of the next allowance.
>
> In other situations, the wife may act as the "business manager," handling all the finances for the family. Such control of the funds does not ordinarily give rise to a gift of any surplus after meeting family expenses, otherwise very few husbands would entrust their wives with the household finances. The general rule in separate-property states in which the husband and wife may own property separate from the other is that the excess left after paying the joint expenses of the husband, the wife, and the family, remains the property of the husband and does not automatically constitute a gift to the wife.…
>
> ….
>
> Where only the husband contributes the funds, the money earned by him is his property out of which he has a duty to support his family, and for this purpose he may make his wife the custodian of his earnings. But, in the absence of clear evidence to the contrary, the surplus after meeting such expenses remains his property.… Thus if a gift is to be found as the trial court did on the present facts, the evidence must be clear and convincing that the husband intended to make a gift of any excess to his wife.
>
> ….
>
> The trial court believed the failure of the husband to inquire concerning the money he turned over to his wife was evidence of a gift. While such evidence is not inconsistent with a gift, there is no rule that a husband must keep a constant check upon his wife in her handling of funds lest any surplus be considered hers by default. The evidence here fails to sustain the burden of proof of showing intent to make a gift.

Id. at 609–12.

Another significant case is *Skaar v. Department of Revenue*, 61 Wis. 2d 93, 211 N.W.2d 642 (1974). When the case arose, Wisconsin's state income tax system required each spouse to report his or her income separately. The plaintiff spouses both worked on their farm and contributed to producing the farm income. They claimed they were partners, although they had never entered into a formal partnership arrangement, and each spouse reported one-half the income. The Wisconsin Department of Revenue assessed additional income taxes to Mr. Skaar on the grounds that he and his wife were not legal partners and that all the farm income was owned by the husband and taxable to him. In a 4–3 decision, the court said that

> While the taxpayers may have desired to create a marital financial relationship similar to a partnership, it is clear they did not intend to create a bona fide partnership.
>
> Initially, the parties to a partnership must intend to contractually form the legal relationship of a partnership. Such an intent is not shown here. While the W.T.A.C. [Wisconsin Tax Appeals Commission] found that the parties had reached an oral understanding, such oral understanding does not show the necessary intent. The oral understanding is more consistent with their marital relationship than with the existence of a bona fide partnership.
>
> There do exist many indications that the taxpayers did not intend to create a bona fide partnership. They did not file partnership tax returns as required both federally and in Wisconsin. We think that if the taxpayers had intended to form a bona fide partnership they would not have violated the federal and Wisconsin legal requirement of filing. Likewise, the taxpayers failed to pay the federal self-employment tax for Mrs. Skaar which would have been required had such business arrangement been a partnership. Such tax surely would have been paid had the taxpayers intended to form a partnership and fulfill the legal requirements. The record discloses they were familiar with such requirements.
>
> There are other indications the taxpayers did not intend to form a partnership. There was no automobile liability insurance coverage for Mrs. Skaar even though had a bona fide partnership been created, Mrs. Skaar would be liable for the tortious acts of her partner. Similarly, the books of the farm operation were not kept in a manner consistent with a bona fide partnership in that there was no division of the farming operation profits between the taxpayers. In fact, the lower court found that the taxpayers did not consider themselves partners in a legal sense.
>
> The taxpayers argue that their desire to own everything together—their holding both farms in joint tenancy and their express desire to hold whatever personalty they own similarly—established the fact that they intended a partnership. Such is not the case. A partnership is not implied merely from

> a common ownership of property. The fact that the community recognized Mrs. Skaar as possessing the authority to buy into the farming enterprise and that Mrs. Skaar helped manage and operate the farm are not in themselves controlling. Such facts are as common to a marital relationship as they are to a partnership. Further, whatever testimony that is adduced as to the agreement itself is necessarily self-serving.
>
> … [T]he joint account into which all receipts, farm and other income are deposited is consistent with the relationship the taxpayers intend—that of marriage and not of partnership.
>
> ….
>
> *... We ... do not subscribe to the wisdom of income tax treatment of married persons in Wisconsin. We would prefer the federal system as it applies to married individuals. However, that is a matter for the legislature.*

Id. at 99–101 (emphasis added and footnotes omitted).

Yet another important Wisconsin case is *Wisconsin Department of Revenue v. Kersten (In re Estate of Kersten)*, 71 Wis. 2d 757, 239 N.W.2d 86 (1976), concerning the inheritance tax. The spouses in that case owned most of their farm's assets as joint tenants. The husband predeceased the wife. At the time of his death, the Wisconsin inheritance tax law required the surviving joint tenant to pay inheritance tax on the full value of joint tenancy with one important exception. Under the exception, if any portion of the joint tenancy was acquired by the surviving spouse for adequate and full consideration in money or money's worth, the portion so acquired was exempt from inheritance tax. Therefore, the question was whether the wife acquired any portion of the joint farm assets for adequate and full consideration in money or money's worth.

The wife argued that she furnished consideration in the form of her services rendered on the farm. The Wisconsin Supreme Court agreed and held that the wife did furnish adequate and full consideration for the acquisition of the joint farm assets in an amount equal to half the value of the joint tenancy. Therefore, the court held that one-half the assets held in joint tenancy were exempt from the Wisconsin inheritance tax.

In 1985, approximately one year after the Marital Property Act was enacted, the Wisconsin Supreme Court decided *Krueger v. Department of Revenue*, 124 Wis. 2d 453, 369 N.W.2d 691 (1985). In that case, the husband had transferred his one-half interest in the family farm to his wife pursuant to a divorce agreement. The Wisconsin Department of Revenue asserted that he had transferred appreciated property to his wife

in exchange for a release of his marital obligations to her and assessed an additional $10,879.98 in income taxes and interest. The husband challenged the assessment, claiming that the transfer to his wife was part of an overall equal division of their assets. In a 7–0 decision, the court said:

> Because we conclude that Wisconsin statutes presume an equal ownership interest in property acquired during marriage, Krueger's transfer of appreciated property to his wife, pursuant to a divorce settlement in which each party received approximately one-half of the marital property, did not constitute a taxable event for Wisconsin income tax purposes.
>
> ….
>
> … We conclude that Krueger's transfer of appreciated property was a nontaxable division of property: it operated to equally divide property he and his wife held under "a species of common ownership." …
>
> Krueger contends, and we agree, that the couple's property must be considered to be effectively co-owned, given the explicit legislative pronouncement of sec. 767.255, Stats., which presumes that upon the dissolution of a marriage all property which is not traceable to a gift or inheritance is to be divided equally between the parties except where specific factors are present to militate against such a division.… Thus, regardless of how the property which was acquired during the marriage may have been titled, each spouse in Wisconsin, since the statutory changes made effective in 1978, has presumptively an equal ownership interest in such property upon the dissolution of the marriage.…
>
> … We conclude that the best approach is to treat the transfer as a division by co-owners of jointly held property. Thus, the transfer does not result in a capital gain to the husband. Accordingly, the decision of the circuit court must be reversed.

Id. at 454–62.

In its opinion, the court referred to spouses as "equitable co-owners" of their property and said there was a trend toward viewing equitable-division statutes like section 767.255 (since renumbered as section 767.61) as creating a "constructive co-ownership of property," at least upon dissolution of the marriage. *Id.* at 461.

3. Legislative Branch [§ 1.8]

During the 1970s, the Wisconsin Legislature took steps to reform the rights of women and the property rights of married persons. In 1971 and 1973, the Wisconsin Legislature adopted an equality-of-sexes

amendment to the Wisconsin Constitution, although it was defeated by popular vote in a referendum in April 1973. In the 1975–76 session, the legislature passed 1975 Wisconsin Laws Chapter 94, an omnibus law that eliminated gender-based distinctions in the Wisconsin Statutes. In the same session, the legislature passed a comprehensive sexual assault law (1975 Wis. Laws ch. 184) and a new inheritance tax statute (1975 Wis. Laws ch. 222). The latter codified the *Kersten* result and provided that joint-tenancy property was to be taxed as being owned one-half by each spouse, with the surviving spouse paying inheritance tax on half.

Also in 1975, a group of legislators, lawyers, and other interested persons formed a group to study women's issues and to advocate changing Wisconsin's property laws.

In the 1977–78 session, the legislature passed a no-fault divorce law and a law providing for equitable division of property at divorce. 1977 Wis. Laws ch. 105.

The first marital property reform bill, 1979 Assembly Bill 1090, was introduced in the Wisconsin Legislature in the 1979–80 session. Assembly Bill 1090 did not pass. In the 1981–82 legislative session, two bills were introduced: a community property bill (1981 Assembly Bill 370) and an alternative bill (1981 Assembly Bill 284). The community property bill was a compilation of what were perceived as the best parts of the community property laws of the existing community property states. The alternative bill would have retained Wisconsin's common law property system in a modified form. Neither bill passed.

In the 1983–84 legislative session, the same two bills (community property and modified common law) were again introduced. The community property proposal was 1983 Assembly Bill 200; the modified common law proposal was 1983 Assembly Bill 376. After its introduction, 1983 Assembly Bill 376 was amended to include a conventional (elective) community property system. The bill containing the conventional system was passed by the Wisconsin Assembly in October 1983 but was defeated in the Wisconsin Senate. In September 1983, the community property proposal, 1983 Assembly Bill 200, was amended to incorporate most of UMPA, which had been promulgated less than two months earlier. Assembly Bill 200 was passed by the state Senate in February 1984 and by the state Assembly in March 1984. It was signed into law on April 4, 1984, with an effective date of January 1, 1986.

A comprehensive trailer bill, clarifying the original law and making some additions, was enacted on October 22, 1985. The Act's original effective date, January 1, 1986, was not changed by the 1985 Trailer Bill. Since 1985, two other trailer bills have been passed, as discussed in section 1.2, *supra.* In addition, as discussed in section 1.2, *supra*, 1997 Wis. Act 188, revising the Probate Code, included revision to the former deferred marital property election against probate assets and the augmented marital property estate election against nonprobate assets, as discussed in section 1.2, *supra*.

II. Basic Principles [§ 1.9]

A. Introduction [§ 1.10]

In the Wisconsin Statutes table of contents, six chapters are labeled "The Family":

Chapter 765	Marriage
Chapter 766	Property Rights of Married Persons; Marital Property
Chapter 767	Actions Affecting the Family
Chapter 768	Actions Abolished
Chapter 769	Uniform Interstate Family Support Act
Chapter 770	Domestic Partnership

Chapters 765, 767, and 768 were left substantially unchanged by the enactment of the Wisconsin Marital Property Act. (Chapters 769 and 770 were created after enactment of the Wisconsin Marital Property Act.) Chapter 766, however, was substantially changed.

Before the Act, chapter 766 was titled "Property Rights of Married Women." It consisted of 12 sections providing that a woman's property was not subject to disposal by her husband, was not liable for his debts, and so forth. This was Wisconsin's version of the Married Women's Property Act. The Wisconsin Marital Property Act repealed and recreated chapter 766 so that, in effect, it is now a "Married Person's Property Act."

Section 1.11, *infra*, sets forth the statutes describing the basic rights and duties of the spouses as created or modified by the Act.

B. Basic Rights and Duties of Spouses [§ 1.11]

The Act created section 52.01(1m) (which was renumbered section 49.90(1m) and amended by 1985 Wisconsin Act 56), which provides the following: "Each spouse has an equal obligation to support the other spouse as provided in this chapter. Each parent has an equal obligation to support his or her minor children as provided in this chapter and chs. 48 and 49."

Also, the Act amended section 765.001(2) by adding four sentences to it. Section 765.001(2) reads (additions are in italics):

> **(2) Intent.** It is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family. *It is the intent of the legislature to recognize the valuable contributions of both spouses during the marriage and at termination of the marriage by dissolution or death*. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned. *Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. 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*.

Sections 49.90(1m), 765.001(2), and 767.501 (actions to compel support), together with the common law doctrine of necessaries, define the spouses' obligation to support each other and the means for enforcing that obligation. The duty of support is discussed in section 5.106, *infra*. The common law doctrine of necessaries is discussed in section 5.107, *infra*.

The Act repealed all sections in chapter 766 except section 766.15 (the equal-rights section originally enacted in 1921). The Act created a new section 766.97. Section 766.97(1) is the old section 766.15 with

slight modifications. Section 766.97(2) restates in shortened form certain provisions of the previous version of chapter 766 that were repealed by the Act. Finally, the Act created section 766.97(3). Thus, section 766.97 as amended by the Act now reads:

> **766.97 Equal rights; common law disabilities. (1)** Women and men have the same rights and privileges under the law in the exercise of suffrage, freedom of contract, choice of residence, jury service, holding office, holding and conveying property, care and custody of children and in all other respects. The various courts and executive and administrative officers shall construe the statutes so that words importing one gender extend and may be applied to either gender consistent with the manifest intent of the legislature. The courts and executive and administrative officers shall make all necessary rules and provisions to carry out the intent and purpose of this subsection.
>
> **(2)** Nothing in this chapter revives the common law disabilities on a woman's right to own, manage, inherit, transfer or receive gifts of property in her own name, to enter into contracts in her own name or to institute civil actions in her own name. Except as otherwise provided in this chapter and in other sections of the statutes controlling marital property or property of spouses that is not marital property, either spouse has the right to own and exclusively manage his or her property that is not marital property, enter into contracts with 3rd parties or with his or her spouse, institute and defend civil actions in his or her name and maintain an action against his or her spouse for damages resulting from that spouse's intentional act or negligence.
>
> **(3)** The common law rights of a spouse to compel the domestic and sexual services of the other spouse are abolished. Nothing in this subsection affects a spouse's common law right to consortium or society and companionship.

The Act also created other sections that describe the basic rights and duties of spouses. Section 766.15 provides:

> **766.15 Responsibility between spouses. (1)** 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.
>
> **(2)** 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 sub. (1).

Section 766.17 provides:

> **766.17 Variation by marital property agreement. (1)** Except as provided in ss. 766.15, 766.55(4m), 766.57(3) and 766.58(2), a marital property agreement may vary the effect of this chapter.

(2) Section 859.18(6) governs the effect of a marital property agreement upon property available for satisfaction of obligations after the death of a spouse.

Section 766.17 grants spouses considerable contractual freedom to vary the effect of the Act.

III. Constitutionality [§ 1.12]

A. Introduction [§ 1.13]

A statute that changes property rights as dramatically as the Act may involve constitutional questions. Two provisions of the Act have generated interest because they affect important property rights that existed before the Act's effective date. The first provision involves income earned or accrued after the Act's effective date on pre–effective date property. The second provision involves deferred marital property rules. As yet there have been no published cases in which a party has challenged the constitutionality of any aspect of the Act. A long-standing acquiescence in the interpretation of a statute as constitutional may itself be given weight as a factor in determining its constitutionality. *See, e.g.*, *Pocket Veto Case*, 279 U.S. 655 (1929); *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 37 N.W.2d 473 (1949).

B. General Statement of the Problem [§ 1.14]

A legislative change in property rights as between spouses may be viewed as a taking from one spouse and a transfer to the other of a vested right to possess, use, enjoy, or dispose of property. If the statute is retroactive in nature, litigation questioning its constitutionality may result. An issue is whether a retroactive taking is either without due process of law or violates the Privileges and Immunities Clause of the 14th Amendment of the U.S. Constitution, or whether it is justified as within the police power of the state to regulate the marital relationship, the distribution of property at divorce, or the devolution of property at death. See, e.g., *Bouquet v. Bouquet*, 546 P.2d 1371 (Cal. 1976), and the discussion in section 1.17, *infra*.

C. Income of Pre–Effective Date Property [§ 1.15]

Under the law that existed before the Act was passed, income accruing on property owned by a spouse was owned in full by that spouse as his or her separate property. The Act provides that income earned or accrued by a spouse during marriage and after the *determination date* (defined by section 766.01(5) as the last to occur of January 1, 1986, the date that both spouses are domiciled in Wisconsin, or the date of marriage) attributable to predetermination date property owned by that spouse (including property received by gift or inheritance during marriage and before the determination date and certain property acquired before marriage) is marital property. Wis. Stat. § 766.31(4). Under the Act, each spouse has a present, undivided one-half interest in marital property. Wis. Stat. § 766.31(3). The constitutional issue is whether the right to receive future income from property that is solely owned at the Act's effective date is a vested property right that the Act unconstitutionally took away. This question is considered generally before considering the impact of a unilateral statement under section 766.59.

➢ ***Comment.*** This discussion is confined to property owned at the Act's effective date. It is unclear whether the same considerations would apply to predetermination date property acquired after the effective date—for example, property acquired after January 1, 1986, and owned by a spouse residing in another jurisdiction who subsequently changes domicile to Wisconsin. *But see Garry v. Creswell (In re Estate of Thornton)*, 33 P.2d 1 (Cal. 1935).

The UMPA section 4 comment clearly anticipated the problem:

> The income rule … 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.

The court in one case, *Willcox v. Penn Mutual Life Insurance Co.*, 55 A.2d 521 (Pa. 1947), used a different analysis. Shippen Lewis owned certain income-producing properties before his marriage to Mary Lewis and was also the recipient of income from a testamentary trust created for his benefit. After the parties' marriage but before enactment of federal legislation permitting joint income tax returns and before enactment of

the marital deduction, Pennsylvania adopted the Community Property Law of 1947, Act No. 550, 48 P.L. § 201, Pa. Laws (1947). The law was designed to give Pennsylvania residents income tax and estate tax benefits similar to those provided to residents of community property states. It provided that property acquired by either husband or wife during marriage and after the effective date of the law was community property, except property defined as separate property. These provisions were interpreted to mean that income generated on separate property and received after the effective date of the law would be community property. *Willcox*, 55 A.2d at 525.

Following enactment of the Pennsylvania Community Property Law, Mr. Lewis used income from his separate property and trust income to pay premiums on a life insurance policy. Mr. Lewis assigned the policy to Willcox. The insurance company refused to recognize the assignment on the ground that since the income used to pay premiums was community in nature, Mrs. Lewis's signature was required because she had an interest in the policy. A friendly lawsuit was commenced to determine whether Mrs. Lewis's signature was required.

Rather than using the analysis in the UMPA section 4 comment, the court held that there was a retroactive taking of one-half of the income involved. The court held that the right to future income was vested and was inherently part of the underlying property: "Of what value is it to an owner to be allowed to retain what would virtually be a mere nominal ownership, if he is compelled to surrender the profits and income therefrom?" *Id.* at 526.

The court then considered whether the taking was justified and elaborated on the legislature's power to regulate the spouses' property during and after termination of the marriage. The court held that the legislature could provide for the distribution of every person's property at death; could provide, to some extent, for the distribution of a married person's property at divorce; could establish an obligation of support during marriage; and could establish a community interest in a spouse's earnings (apparently meaning compensation) during a marriage. The court found it unconstitutional, however, to classify, as community property, income derived from property acquired before marriage and owned before the effective date of the state's community property law. According to the court, the legislature could regulate only those rights that arise wholly out of the marriage relation itself and could not transfer

from one spouse to the other "a property right which existed before, and entirely independently of, the marriage." *Id.* at 527.

Federal legislation permitting joint income tax returns and the marital deduction for federal estate tax purposes, both adopted after passage of the Pennsylvania Community Property Law, obviated the law's purpose. For these and other reasons, the court went on to invalidate the entire law.

The property right involved in *Willcox* existed before the marriage. It is unclear whether the reasoning of the *Willcox* decision would extend to income received by a spouse during marriage from property acquired during marriage by gift or inheritance on the theory that such income is also received "independently of the marriage." Another issue is whether the court in *Willcox* would have reached the same result for income generated during marriage on solely owned property purchased during marriage, but before the effective date of the law, with compensation earned during the marriage on the ground that it arose out of marital effort.

A summary of the arguments and cases cited by the parties and in amicus curiae briefs filed in *Willcox* are found at Annotation, 174 A.L.R. 224 (1948). In addition, several law review articles, many of which are critical of the court's reasoning, analyze the *Willcox* decision. *See, e.g.*, Jack Rowlett Lovell, Case Note, *Community Property—Constitutional Law—Due Process—Constitutionality of Pennsylvania Community Property Act of 1947*, 21 S. Cal. L. Rev. 383 (1948); Mary Stephenson, Note, *Community Property: Constitutionality of Oklahoma-Pennsylvania Community Property Law*, 1 Okla. L. Rev. 57 (1948).

In considering the constitutional propriety of the state's attempt to redistribute ownership rights between spouses during a marriage, California's experience with quasi-community property is also relevant. A review of this experience is found in W.S. McClanahan, *Community Property Law in the United States* 579–83 (1982).

In California, quasi-community property rules were adopted to solve a problem that occurs when spouses change domicile from a common law jurisdiction to a community property law jurisdiction. UMPA § 18 cmt. In a common law jurisdiction, the surviving spouse usually has the right to elect a share of the estate of the predeceasing spouse, often up to one third of that property. By changing domicile to a community

property law jurisdiction, however, the spouse loses the common law elective right because community property law jurisdictions do not provide an election against a predeceasing spouse's estate. McClanahan, *supra*, at 511. Quasi-community property rules provide that when spouses change domicile to a community property state, assets that would have been community property at their acquisition had the spouses then been domiciled in the community property state are treated as community property when the owner spouse dies. *See, e.g.*, Cal. Prob. Code §§ 66, 101, 102 (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).

Unlike the present California statutes, Cal. Fam. Code §§ 125, 2581, 2640 (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), which postpone quasi-community property treatment until the death or divorce of a spouse, the first version of California's quasi-community property law applied those rules immediately upon change of domicile. California Civil Code section 164 (1917) provided that property acquired while the spouses were domiciled elsewhere, which would not have been the separate property of either spouse if acquired while domiciled in California, became community property when the spouses moved to California. The 1917 statute was found unconstitutional under the Due Process and Privileges and Immunities Clauses of the 14th Amendment to the U.S. Constitution because the statute retroactively altered vested property rights upon change of domicile from a common law state to California in both *Garry*, 33 P.2d 1, and *Arms v. Heath (In re Estate of Arms)*, 186 Cal. 554, 199 P. 1053 (1921). In *Garry*, the assets involved were acquired during marriage (presumably with what would have been community property if California's statute had then applied to such assets) in a common law state, Montana, before the parties moved to California; thus, unlike in *Willcox*, the assets involved were apparently not acquired independently of the marriage.

The California Legislature's remedy to the constitutional problem was to revise the statute to postpone the applicability of the quasi-community property rules until the death (an event that involves the state's interest in devolution of property) of the owner (usually the titled) spouse. Cal. Civ. Code § 201.5 (Deering 1935). The California

Supreme Court indicated that this legislative change removed the constitutional problem. The court in *Kuchel v. Miller (In re Miller)*, 187 P.2d 722 (Cal. 1947), all but said that the revised statute was constitutional; in *Addison v. Addison*, 399 P.2d 897 (Cal. 1965), the court said that *Miller* did find the statute constitutional.

Arguably, by providing that postdetermination date income on predetermination date property is marital property, the Wisconsin Act's immediate transfer of ownership rights from one spouse to another at the Act's effective date has the same unconstitutional effect as California's 1917 legislation that transferred ownership rights from one spouse to another immediately upon change of domicile from a common law state to California. However, both the California Supreme Court and several commentators have questioned the reasoning of *Garry*. In *Addison*, a case applying quasi-community property rules at divorce, the court in dicta cited numerous commentators who have criticized the *Garry* decision and concluded by saying that the "correctness of the rule in [*Garry*] is open to challenge." 399 P.2d at 901. Subsequent commentary suggests that *Garry* would be overruled today. Barbara Brudno Gardner, *Marital Property and the Conflict of Laws: The Constitutionality of the Quasi-Community Legislation*, 54 Calif. L. Rev. 252, 266–67 (1966); Stephen M. Tennis, *Retroactive Application of California's Community Property Statutes*, 18 Stan. L. Rev. 514, 520 (1966). See also *Bouquet v. Bouquet*, 546 P.2d 1371 (Cal. 1976), in which the court declared that although *Addison* retroactively impaired vested property rights, it was still a proper exercise of the police power.

In Wisconsin, consideration should be given to whether the unilateral statement permitted by section 766.59 may obviate constitutional objections to this aspect of the Act. The unilateral statement, which classifies income from nonmarital property accruing after the effective date of the statement as individual property, permits a spouse to take affirmative action to avoid the result of the income rule in connection with predetermination date property otherwise mandated by section 766.31(4).

The unilateral statement, however, may not answer all constitutional challenges. An issue is whether a citizen and property owner may be required to take affirmative action, such as signing a unilateral statement, to retain property rights otherwise protected by the Constitution. Assuming that an affirmative action can be required, a constitutional

problem may still exist when a spouse is unable to execute a unilateral statement, perhaps, for example, because of incompetence.

Furthermore, a unilateral statement will not prevent all creditors from reaching the future income of property owned at the effective date of the Act. A creditor is not bound by a unilateral statement unless the creditor had actual knowledge of its provisions or a copy of the statement at or before extending credit. Wis. Stat. §§ 766.55(4m), .56(2)(c). A tort creditor, for instance, would almost never receive such notice, and to the extent that a tort creditor of one spouse could reach income from property owned at the effective date of the Act by the other spouse, a constitutional problem could arguably arise.

➢ ***Comment.*** This discussion need not be limited to tort creditors. An obligation incurred by one spouse after the determination date in the interest of the marriage or family may be satisfied from all marital property including the income stream of the nonincurring spouse. *See infra* ch. 5. If the nonincurring spouse executes a unilateral statement but for some good reason is unable to give notice of the unilateral statement to the creditor (and the creditor does not, in fact, have actual knowledge of the statement's provisions) before the obligation is incurred by the other spouse, postdetermination date income attributable to property of the nonincurring spouse acquired before the effective date of the Act is available to the creditor.

D. Deferred Marital Property [§ 1.16]

1. United States Constitution [§ 1.17]

Under the Act as originally adopted, certain assets owned by one spouse at the determination date constituted deferred marital property at that owner spouse's death if the other spouse survived and if the property would have been marital property if acquired after the determination date. Wis. Stat. § 851.055 (1995–96). As a consequence, that property was subject to elections under former sections 861.02 and 861.03. If, for example, in 1970, while both spouses are married and domiciled in Wisconsin, the husband purchased real estate with his salary, retained the real estate, and died domiciled in Wisconsin survived by his wife after December 31, 1985, deferred marital property concepts applied because at acquisition, the asset would have been marital property had the Act

been in effect. *See infra* ch. 12. Thus, at death the husband could, with certainty, dispose of only one-half of the real estate rather than all of it, since his wife (unless barred) could elect to take a one-half ownership interest in it. This approach was similar to the quasi-community property rules of California applicable to spouses who change domicile from a common law state to California. *See* Cal. Prob. Code §§ 66, 101, 102 (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); *see also* Idaho Code §§ 15-2-201 through -209 (West, WESTLAW current through (2010) Chs. 1-359 and HJR's 4, 5 and 7 that are effective on or before April 12, 2010).

As revised by 1997 Wisconsin Act 188, the deferred marital property election granted to a surviving spouse under chapter 861 is an election to take an *amount* equal to not more than one-half of the augmented deferred marital property estate. This is in contrast to the former probate election of deferred marital property, 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, however, to the possibility that the asset may be required to satisfy the deferred marital property elective share.

In *Addison*, 399 P.2d 897, California's similar quasi-community property rule was held constitutional at the divorce of a couple who had accumulated property in a common law state before changing domicile to California. (As to constitutionality of California's quasi-community property rules at death, see section 1.15, *supra*.) In its opinion, the court distinguished *Garry*, 33 P.2d 1, in which spouses who had acquired assets during their marriage in Montana with what would have been community property in California changed domicile from Montana to California, where one of them died. The *Addison* court said that property rights were not disturbed merely upon crossing the boundary into California; rather, they were being disturbed at a subsequent date—the date of divorce. The state's inherent police power provided the right to interfere with vested property rights in that circumstance because of the state's paramount interest in the equitable distribution of property owned

by spouses at divorce. This is true, said the court, even though *Garry* might be read as holding that legislation is unconstitutional if it impinges on a citizen's right to maintain a domicile in any chosen state without losing valuable property rights.

Arguably, *Addison* may be distinguished in connection with couples already living in a state when the law is changed. There is a voluntary aspect in making the decision to change domicile from one state to another and to subject oneself to a new set of laws. There may be an involuntary aspect for citizens already residing in Wisconsin at the Act's effective date if the only way to maintain existing property rights is to change domicile. (A marital property agreement is not an answer if one spouse refuses to participate.) However, in both instances, application of the law is deferred to a later date marking the occurrence of an event in which the state has an interest.

Various factors are relevant when considering the constitutionality of legislation that may retroactively impair vested property rights. Although it deals with an aspect of community property law that is not relevant here, *Bouquet*, 546 P.2d 1371, provides an excellent description of those factors.

The court in *Bouquet* noted that legislation that retroactively impairs vested property rights is not necessarily unconstitutional. In determining whether a retroactive law contravenes the Due Process Clause of the 14th Amendment of the U.S. Constitution, for example, a court should consider the significance of the state interest served by the law, the importance of retroactively applying the law to effect that interest, the extent of reliance on the former law, the legitimacy of that reliance, the extent of action taken on the basis of that reliance, and the extent to which retroactively applying the new law will disrupt those actions.

Thus, in constitutional litigation over the Act, courts will consider the fact that Wisconsin residents have relied on pre-Act law. Such reliance may involve various irrevocable transactions completed for estate planning purposes such as the making of gifts and the creation of irrevocable trusts. In addition, reliance on prior law may be significant in connection with record keeping. Many spouses, relying on the prior law in Wisconsin that title usually determined ownership, will not have sufficiently documented the source of acquisition of assets to trace assets that would not have been marital property at acquisition if the Act were then in effect. These assets may be reclassified to marital property

because of mixing, Wis. Stat. § 766.63(1), or because of the presumption that all property of spouses is marital property unless proven otherwise, Wis. Stat. § 766.31(2). Moreover, if it can be proved that an asset is not marital property, the asset is still subject to a second presumption that it is deferred marital property. Wis. Stat. § 858.01. Once again, record keeping, or the lack of it, is important.

In addition to describing the factors considered in constitutional litigation, *Bouquet* also puts *Addison* in perspective. In *Bouquet*, the court brushed aside statements in *Addison* that the quasi-community property rules were applied prospectively because they applied at death or divorce. In fact, the *Bouquet* court said that *Addison* retroactively impaired vested property rights but that such impairment was justified as a proper exercise of the police power.

Further support for the constitutionality of the deferred marital property rules may be found in cases in other jurisdictions that have upheld the creation of equitable distribution rules at dissolution of a marriage. Those cases affirm that such rules may affect not only property acquired after those statutes were enacted, but also property acquired before that. *See, e.g.*, *Kujawinski v. Kujawinski*, 376 N.E.2d 1382 (Ill. 1978); *Fournier v. Fournier*, 376 A.2d 100 (Me. 1977); *Bacchetta v. Bacchetta*, 445 A.2d 1194 (Pa. 1982). *Fournier* distinguished *Willcox* on the basis that the equitable-distribution statute did not affect the ownership of property in any way in the absence of a separation or divorce.

A similar analysis may be used in connection with amendments to the Act made by 1993 Wisconsin Act 160, which state that the nonemployee spouse's marital property interest in IRA assets traceable to the rollover of a deferred-employment-benefit plan terminates at the nonemployee spouse's death if he or she predeceases the employee spouse. Arguably there is a taking of the nonemployee spouse's right to dispose at death of a marital property interest in the IRA that he or she previously had if he or she predeceases the employee spouse. The spouses may have made estate plans based on that right of disposition, but in some cases, it may not be possible to change those plans.

On the other hand, taking of the right to will does not injure the nonemployee spouse during his or her lifetime and may arguably be justified under the state's power to regulate marriages and dispositions at death in much the same way that the deferred marital property elections

may be justified. Moreover, the amendments simply extend the policy embodied in section 766.62(5), which provides a terminable interest in connection with deferred-employment-benefit plans so that those benefits are preserved in their entirety for a surviving employee spouse.

2. Wisconsin Constitution [§ 1.18]

Although the Wisconsin Court of Appeals has held that there is no right under the U.S. Constitution to dispose of property by will, *Eisenberg v. Eisenberg (In re Estate of Eisenberg)*, 90 Wis. 2d 620, 280 N.W.2d 359 (Ct. App. 1979) (citing *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944)), a number of Wisconsin decisions hold that Wisconsin residents have that right under the Wisconsin constitution. *Biart v. First Nat'l Bank of Madison (In re Estate of Ogg)*, 262 Wis. 181, 54 N.W.2d 175 (1952); *Boehmer v. Kalk*, 155 Wis. 156, 144 N.W. 182 (1913); *Cowie v. Strohmeyer (In re Will of Rice)*, 150 Wis. 401, 136 N.W. 956 (1912). The holdings are based on article I, section 1 of the Wisconsin Constitution, which provides that "[a]ll people are born equally free and independent, and have certain rights; among these are life, liberty and the pursuit of happiness.…"

The right to will, however, is subject to reasonable regulation by the legislature. Granting an elective right to take a share of a deceased spouse's estate is a reasonable regulation of the inherent right to dispose of property by will. *Eisenberg*, 90 Wis. 2d 620. Arguably, the same is true of the elections provided a surviving spouse under former sections 861.02 and 861.03 and their successor provisions under current chapter 861, which were designed to replace the elective right in sections 861.01–.05 that was repealed by the Act.

It appears likely that a court in this state will hold that the elective rights under chapter 861 reasonably regulate devolution of property at death. Those elective rights protect a surviving spouse and promote "governmental encouragement of the marital relationship" (a phrase used in *Eisenberg*, 90 Wis. 2d at 629, in connection with the elective share only).

The deferred marital property election under chapter 861 is maximized because section 858.01 provides that if the presumption that all property of the spouses is marital property is overcome, a spouse's remaining property at death is presumed to be deferred marital property.

Because previously there was no reason to keep the kinds of records that would be needed to rebut the presumption that nonmarital property of a spouse at death is deferred marital property, substantial property acquired before the determination date may (in the absence of records) fall into that category. Consequently, the elective rights under chapter 861 based on deferred marital property may reach as much as one-half the value of a decedent spouse's predetermination date property subject to administration or of the value of that property in nonprobate arrangements.

The elective right under chapter 861 may apparently be combined with the spousal allowance under section 861.35, which gives a court discretion to provide an allowance for a spouse (and set aside property for that purpose) for an indefinite period. Section 861.35 also allows the court to consider not only the means available for support but also the existing standard of living of the spouse applying for the allowance. But, in combination with elective right under section 861.02, the allowance could significantly diminish the right to will in a particular case and might exceed what would be considered reasonable regulation of that right.

Another constitutional challenge could arise in connection with the date used in the grandfather clause of former section 861.05(4), which exempted certain nonprobate arrangements from being included in the augmented marital property estate subject to election under former section 861.03 if the instruments involved were executed before April 4, 1984, the date the governor signed the original Act. The theory is that persons should have known on April 4, 1984, that deferred marital property rules would extend to nonprobate arrangements. *See* 1985 Trailer Bill Original Nontax Note to section 861.05(4). Actually, there was considerable doubt about that proposition as of April 4, 1984, and many amendments in the 1985 Trailer Bill, including adoption of the augmented estate concepts of the Uniform Probate Code, were required to achieve that result. If challenged, the constitutional issue may turn on whether nonprobate arrangements executed or amended after April 3, 1984 (and, arguably, before a date when notice of extension of deferred marital property rules to nonprobate arrangements was reasonably given), are accorded equal protection with those nonprobate arrangements executed or amended before April 4, 1984. See *Wisconsin Department of Revenue v. Trainer (In re Estate of Trainer)*, 123 Wis. 2d 102, 365 N.W.2d 893 (Ct. App. 1985), for discussion of a similar problem.

E. Other Matters [§ 1.19]

Between 1983 and May 2010, the constitutionality of only two aspects of the Act has been considered. It may be anticipated that other provisions of the Act may be examined for constitutionality by the courts in the future.

IV. Trailer Bills [§ 1.20]

The tables below summarize major changes made by the 1988 Trailer Bill and the 1992 Trailer Bill and indicate, when relevant, additional changes made by subsequent legislation.

TABLE 1

Summary of 1988 Trailer Bill

1. Wis. Stat. § 857.03(2): Created a procedure permitting the surviving spouse and a beneficiary of the predeceasing spouse's estate to exchange interests in marital property. The trailer bill also changed Wisconsin tax statutes so that no gain or loss is recognized as a result of the exchange. Section 857.03(2) has since been amended and renumbered as section 766.31(3)(b)3.

2. Wis. Stat. § 766.01(8): Amended to provide that the Marital Property Act applies when both spouses are domiciled in Wisconsin. The term "marital domicile" was deleted from the Act. Other statutes were modified with respect to this clarification.

3. Wis. Stat. § 71.02(2)(me): Amended with respect to net rents and other net returns for income tax purposes. Section 71.02(2)(me) has since been amended and renumbered as section 71.01(16).

4. Wis. Stat. § 71.09(10m): Amended with respect to the apportionment of tax credits or refunds between spouses and former spouses. Section 71.09(10m) has since been amended and renumbered as section 71.75(8).

5. Wis. Stat. § 766.588: Created a statutory-form terminable marital property agreement (STMPCA) by which spouses may classify their existing and prospective assets as marital property. If there is no

financial disclosure, the agreement's duration is three years. If there is financial disclosure, the agreement's duration is unlimited and nonrenewable. In any event, the surviving spouse may make the deferred marital property and augmented marital property estate elections.

6. Wis. Stat. § 766.589: Created a statutory-form terminable marital property agreement (STIMPCA) by which spouses may classify all their assets as individual property, with certain exceptions.

7. Wis. Stat. § 766.01(9)(c), (d): Created to extend the definition of *held* to uncertificated securities and to a partner's interest in a general partnership.

8. Wis. Stat. § 766.31(10): Amended to provide that spouses may reclassify their property by a conveyance signed by both spouses. Section 766.605 was changed regarding the manner of holding homestead property, and sections 806.10(1) and 806.15(4) were changed regarding when a docketed judgment is a lien on real estate.

9. Wis. Stat. § 766.575: Amended to protect a trustee holding marital property when the trustee follows the instrument's terms in the absence of a notice of claim. The provisions are similar to changes made to section 766.61(2), which apply to issuers of life insurance policies (discussed below in item 11).

10. Wis. Stat. § 857.015: Amended to permit the "holding spouse" to direct in a will or other signed writing that the marital property interest of the "nonholding spouse" and any deferred marital property election be satisfied within one year of the decedent spouse's death from other property that is of equal clear market value at the time of satisfaction.

11. Wis. Stat. § 766.61: Amended to clarify the application of the Marital Property Act to life insurance insuring a spouse. For group insurance, the term *owner* is now defined as the holder of each individual certificate under the group plan. Also, the definition of policy was expanded for purposes of the written consent. Section 766.61(2) was completely rewritten and provides more detail as to when the issuer of a life insurance policy is and is not liable for acting in accordance with the terms of the policy. For group life insurance, the marital property classification rules remain in effect

even though the employer or other sponsor of the group policy changes carriers. Section 766.61(7) provides limitations on the remedy available when the noninsured spouse dies first. Section 766.61(8) clarifies that the life insurance rules do not apply to a life insurance policy held by a deferred-employment-benefit plan; instead, the rules for deferred-employment-benefit plans apply.

TABLE 2

Summary of 1992 Trailer Bill

1. Wis. Stat. ch. 71: Amended.

2. Wis. Stat. § 700.18: Amended to provide that persons who are named as owners in a document of title are tenants in common unless section 700.19 (joint tenancy) or chapter 766 (marital property) applies.

3. Wis. Stat. § 700.19(2): Amended to provide that when persons named as owners in a document of title are spouses who are not subject to the Marital Property Act (e.g., a couple domiciled in Illinois buys a cottage in Wisconsin), such persons are joint tenants in the absence of an expression of intent in the document of title. Generally, when there is no such expression of intent, the owners are tenants in common. Wis. Stat. § 700.18. The amendment applies to acquisitions after 1985. Note that since this change is retroactive, an issue may arise as to its constitutionality.

4. Wis. Stat. § 701.27(2)(bm): Created to provide that the surviving spouse may disclaim the decedent's interest in survivorship marital property. Section 701.27(2)(bm) has since been renumbered as section 701.26(1)(b).

5. Wis. Stat. § 766.31(10): Amended to expand the methods of reclassification to include an instrument that conveys an interest in a security, if the instrument is signed by both spouses.

6. Wis. Stat. §§ 766.58(3)(f), 767.266: Provided that will-substitute provisions in a marital property agreement are revoked upon dissolution of the marriage. Section 767.266 has since been amended and renumbered as section 767.375. Further, the new

provision extends beyond property subject to administration, making it clear that non–pro rata distributions are permissible for assets passing under any governing instrument.

7. Wis. Stat. § 766.58(7): Created to provide that the statutory terminable-interest rule continues to apply to deferred employment benefits classified as marital property by a marital property agreement unless the agreement provides otherwise and that the operation of section 766.61(7) (the *frozen interest rule*) is unaffected by a marital property agreement that classifies as marital property the noninsured spouse's interest in a policy that designates the other spouse as the owner and insured, unless the marital property agreement provides otherwise.

8. Wis. Stat. §§ 766.588(1)(d), .589(1)(c)1.: Created to provide that a statutory terminable marital property classification agreement (STMPCA) and a statutory terminable individual property classification agreement (STIPCA) do not affect the application of chapter 705 to joint accounts and marital accounts.

9. Wis. Stat. § 766.59(6): Created to permit a unilateral statement to be executed by persons intending to marry.

10. Wis. Stat. § 766.60(4)(b)1.: Amended to clarify that a marital property agreement may be used to create a joint tenancy between spouses who are otherwise subject to the Marital Property Act.

11. Wis. Stat. § 766.605: Amended to limit the creation-of-survivorship-marital-property rule to homesteads that are acquired in both spouses' names.

12. Wis. Stat. § 766.61(3)(e): Amended to correct an inconsistency in the definition of *ownership interest* for purposes of written consents regarding life insurance.

13. Wis. Stat. §§ 766.61(7), .70(6)(b): Amended to clarify and retain the frozen interest rule for marital property life insurance when the noninsured spouse dies first.

14. Wis. Stat. § 766.61(8): Amended to provide that a life insurance policy held by a deferred-employment-benefit plan is not life

insurance for purposes of the Marital Property Act. The policy is treated as part of a deferred employment benefit.

15. Wis. Stat. § 766.62(1)(b), (2): Amended to change the fraction applicable to deferred employee benefits so that the denominator is the period of employment giving rise to the benefit rather than the total period of employment.

16. Wis. Stat. § 766.63(1): Amended to provide that the mixing rule applies when marital property is mixed with other than marital property. The statute previously provided that the mixing rule applied when marital property assets were mixed with assets having another classification, which could arguably have been interpreted to exclude predetermination date property from the mixing rule.

17. Wis. Stat. § 806.15(5): Created to provide a procedure for removing a judgment lien that has attached to the real property of a nonobligated spouse acquired after the judgment is docketed.

18. Wis. Stat. § 815.205: Created to provide an exemption from execution in situations in which the docketed judgment becomes a lien on the real property interest of the nonobligated spouse when the interest was acquired after the judgment was docketed.

19. Wis. Stat. § 859.02(2)(a): Created to provide that a claim based on a marital property agreement is subject to the time limitations in section 766.58 (six months after filing of the inventory) and generally is not subject to the three-to-four-month period in the Probate Code.

20. Wis. Stat. § 859.18(6): Amended to clarify that a will-substitute provision does not adversely affect a creditor's rights.

21. Wis. Stat. § 861.02(1): Amended to provide that the surviving spouse's interest in elected deferred marital property in the probate estate is not subject to claims for funeral expenses or federal or Wisconsin estate taxes. This section has been repealed and replaced by section 861.05(3), which provides that the spouse's interest is subject to such claims.

22. Wis. Stat. § 861.02(1m): Created to provide that the surviving spouse may elect an interest in deferred marital property real estate

located in another state. There is a question whether the law of the other state will recognize this. The other state may apply Wisconsin law. This section has since been renumbered as section 861.02(2)(b).

23. Wis. Stat. § 861.05(3), (3)(b): Created new rules for determining the values of the spouses' interests in the augmented marital property estate. These subsections have since been amended and renumbered as subsections 861.05(2) and (2m).

24. Wis. Stat. § 861.07(3)(a): Amended to incorporate the actuarial tables used by the IRS to determine the value of life and term interests. Section 861.07 has since been repealed and recreated and no longer contains this provision.

25. Wis. Stat. §§ 861.31(4), .35(3): Amended to permit the probate court to charge the surviving spouse's allowances to the surviving spouse's shares of deferred marital property and the augmented marital property estate. Section 861.35(3) has since been renumbered as section 861.35(4).

26. Wis. Stat. § 861.33(1)(a)1.: Amended to provide that the surviving spouse's right of selection for wearing apparel and jewelry applies to items held for personal use by the decedent or the surviving spouse.

27. Wis. Stat. § 867.046(1) and (2): Clarified the summary confirmation procedures to remove the question whether they applied to survivorship marital property or will-substitute provisions.

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Classification of Property

I. Scope of Chapter [§ 2.1]

The comment to section 4 of the Uniform Marital Property Act (9A U.L.A. 103 (1998) [hereinafter UMPA], *reprinted in* app. A, *infra*) describes classification as "an essential process in applying" the uniform act. Classification plays the same essential role under the Wisconsin Marital Property Act, 1983 Wisconsin Act 186 (codified as amended at chapter 766 and scattered sections of the Wisconsin Statutes) [hereinafter

the Wisconsin Marital Property Act or the Act]; *see also infra* app. B (major legislation affecting the Act). The most important classification section of the Act is section 766.31. Section 766.31, with some significant exceptions, is based on section 4 of UMPA, which is described as the "heart" of UMPA. *See* UMPA § 4 cmt. Section 766.31 contains a general presumption, classification rules, and transitional rules. Other classification sections and associated rules are also important. This chapter defines and analyzes the basic classifications of property established by the Act, examines the definitions and presumptions on which the classifications are based, and reviews important associated rules.[1]

II. Introduction [§ 2.2]

A. Significance of Classification [§ 2.3]

Under the Wisconsin Act, classification of property has great significance in a variety of contexts. Examples include the following:

1. Classification determines rights of ownership.

2. Classification determines the applicability of the Act's good-faith duty, *see* Wis. Stat. § 766.15. The good-faith duty applies to management and control by a spouse of marital property assets (and management and control by a spouse of the other spouse's nonmarital property assets), but not to management and control by a spouse of his or her individual or predetermination date property.

   > ➢ ***Note.*** With one exception, *see* Wis. Stat. § 766.31(6), predetermination date property is generally acquired before the Act applies to it. *See infra* §§ 2.8 (defining the term determination date), .141 (defining the term predetermination date property).

[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 Internal Revenue Code (I.R.C.) are current through Pub. Law No. 111-154 (excluding Pub. L. Nos. 111-148, 111-152) (Mar. 31, 2010); and all references to the Treasury Regulations are current through 75 Fed. Reg. 17,023 (Apr. 2, 2010). Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

3. Classification may determine which assets are available to creditors, *see* Wis. Stat. § 766.55(2). For example, if an obligation in the interest of the marriage or the family is incurred by one spouse after the determination date, the creditor may reach all assets classified as marital property to satisfy the debt but generally may not reach the assets classified as nonmarital property of the nonincurring spouse.

4. Classification determines the quantum of an asset that may be freely disposed of by gift or at death. For example, only the one-half interest of a spouse in each item of marital property may be freely disposed of by that spouse at death; on the other hand, in most cases, each item of individual property of a spouse may be freely disposed of by that spouse at death.

5. Classification may have tax consequences. All assets classified as marital property, even that interest owned by a surviving spouse, will, as community property, obtain a basis adjustment at death under I.R.C. § 1014(b)(6). By contrast, such a change in basis is not accorded assets classified as nonmarital property of the surviving spouse.

B. Universal Marital Property Not Adopted [§ 2.4]

Theoretically, it would have been possible to adopt a universal marital property regime in which all property possessed by spouses, including property either acquired by gift or inheritance or owned at the marriage, would be classified as marital property. This regime was not adopted in Wisconsin. Instead, a system was established that recognizes various classifications of property similar to those found in other U.S. community property jurisdictions.

Based on Spanish and to some extent French antecedents, the community property systems established in other U.S. community property jurisdictions are thought of as recognizing marriage as an equal partnership between husband and wife. *See* W.S. McClanahan, *Community Property Law in the United States* 331–32 (1982). The eight other community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Puerto Rico is also a community property jurisdiction. Historically, property brought to the marriage remained the separate property of the owning spouse throughout the marriage. In addition, property acquired by either spouse

during marriage by so-called lucrative title, usually defined as property received without consideration, remained that spouse's separate property. Other property acquired during the marriage in exchange for labor, effort, skill, money, or community assets was thought of as property acquired by so-called onerous title, and that property was known as community property. McClanahan, *supra*. Many of the same basic principles pertain in the other community property states today.

C. Reclassification of Property [§ 2.5]

The Act establishes a classification system governing the property of spouses domiciled in Wisconsin. However, the Act also provides spouses with the means to vary the Act's effect. Thus, with certain limited exceptions (relating to the good-faith duty, the protection of certain third parties, and the support of dependent children), spouses may create their own classification system or reclassify their property by marital property agreement. Wis. Stat. § 766.17(1); *see infra* § 2.284, ch. 7. In addition, property of a spouse or spouses may be reclassified in a variety of other circumstances. *See infra* §§ 2.283–.295.

Listed below are some of the ways property of a spouse or spouses may be reclassified, other than by marital property agreement. By its nature, the list is general and cannot give the detail found in sections 2.283–.295, *infra*, and other sections and chapters of this book.

1. A spouse or spouses may reclassify property by gift, *see infra* §§ 2.285–.288, real estate by conveyance, *see infra* §§ 2.285–.288, and life insurance policies and premiums on those policies by written consent, *see infra* § 2.290.

2. A spouse may classify income from nonmarital property by unilateral statement. *See infra* § 2.289.

3. A spouse or spouses may reclassify property by attempting to create a joint tenancy or tenancy in common exclusively between spouses after the determination date, *see infra* § 2.293, or by using property to acquire a homestead exclusively between spouses after the determination date, *see infra* § 2.294.

4. A spouse or spouses may reclassify property by decree, *see infra* § 2.291, and by mixing property of different classifications to such an extent that tracing is of no assistance, *see infra* § 2.292.

III. Overview of Classification System [§ 2.6]

A. In General [§ 2.7]

Before considering property classifications in detail, a key term—*determination date*—must be defined. The definition provided in section 2.8, *infra*, is followed by a brief overview of the classification system and several associated rules.

B. Determination Date and During Marriage Defined [§ 2.8]

Wisconsin was a common law state that converted to a community property (albeit labeled marital property) system. *See* Wis. Stat. § 766.001(2). The Act's effective date was January 1, 1986. The marital property regime applies to married couples at the determination date, a term defined in section 766.01(5) as follows:

> "Determination date" means the last to occur of the following:
> (a) Marriage.
> (b) 12:01 a.m. on the date that both spouses are domiciled in this state.
> (c) 12:01 a.m. on January 1, 1986.

➢ ***Note on Terminology.*** The term *during marriage* as used in this chapter should be understood to mean "during marriage as defined by the Act." On occasion, the Act uses the phrase "during marriage and after the determination date." *See, e.g.*, Wis. Stat. § 766.31(4). In view of the definition of during marriage, the words "and after the determination date" are redundant. Nevertheless, this chapter uses the longer phrase when dealing with sections of the Act that also use it.

Section 766.03 explains when the Act first applies to spouses, when it ceases to apply, and what consequences flow from those events. Thus, chapter 766 first applies to spouses upon their determination date, except as provided in subsections 766.58(5), (11), and (12) and section 766.585

(all dealing with the effect of certain marital property agreements) and except for the application of section 766.97 (dealing with certain civil rights of spouses). After the Act first applies to spouses, it continues to apply during marriage. Section 766.75 applies after dissolution. If at the time of a spouse's death, both spouses are domiciled in Wisconsin, the chapter 766 provisions applicable after the death of a spouse apply.

The Act ceases to apply when one or both of the spouses are no longer domiciled in Wisconsin. *See* Wis. Stat. § 766.03(3) (Act applies to spouses "during marriage"). However, the cessation of the application of chapter 766 because a spouse is no longer domiciled in Wisconsin does not by itself affect any property, right, interest, or remedy acquired under chapter 766 by either spouse or by a third party. Wis. Stat. § 766.03(3). Nor does it affect by itself the satisfaction of any obligation incurred by a spouse under chapter 766 while both spouses were domiciled in Wisconsin. Wis. Stat. § 766.03(5). For a discussion of rights that may have accrued while only one spouse was domiciled in Wisconsin after January 1, 1986, and before the effective date of the 1988 Trailer Bill, see the discussion at section 13.46, *infra*.

January 1, 1986, is the determination date for spouses who were both domiciled in Wisconsin at that time. For spouses who both establish domicile in Wisconsin after January 1, 1986, their determination date is the date that both spouses establish domicile in this state. For persons who are both domiciled in Wisconsin and who marry after January 1, 1986, their determination date is the date of their marriage. Spouses may have more than one determination date.

- ***Example.*** Assume that a married couple is domiciled in Wisconsin on January 1, 1986, but on January 1, 1988, one of the spouses changes domicile to a common law state and then on January 1, 1991, changes domicile back to Wisconsin. The spouses may have accumulated marital property from January 1, 1986, to January 1, 1988, and could again accumulate marital property on and after January 1, 1991. Deferred marital property could have been accumulated from the date of marriage to January 1, 1986, and from January 1, 1988, to January 1, 1991.

The determination date for most spouses will be the date of their marriage. It should be noted that when both spouses are domiciled in Wisconsin at the date of their marriage and their marriage occurs after January 1, 1986, the property owned by a spouse at the date of the

marriage is that spouse's individual property. Wis. Stat. § 766.31(6); *see infra* § 2.12. The Act does not classify property owned by either or both of the spouses at a determination date that is either January 1, 1986, or the date when both spouses first become domiciled in Wisconsin. That unclassified property is referred to in this book as *predetermination date property*. Each item of predetermination date property has its own characteristics determined by predetermination date law as modified by the Act. *See infra* §§ 2.140–.154. Property acquired by spouses after the determination date (from sources other than those traceable to predetermination date property) is marital or individual property, depending on factors considered later in this chapter.

C. Basic Classifications [§ 2.9]

1. Marital Property [§ 2.10]

Generally, marital property consists of wealth created by a spouse's efforts as well as income earned or accrued from a spouse's property during a marriage and after the determination date. Each item of marital property is owned in present undivided one-half interests by the spouses. Wis. Stat. § 766.31(3). All property of spouses is presumed to be marital property and is so classified unless proven to be classified otherwise. Wis. Stat. § 766.31(1), (2); *see infra* § 2.26.

2. Terminable-interest Marital Property [§ 2.11]

The marital property interest of a spouse in the other spouse's deferred-employment-benefit plan may be terminable. Thus, the nonemployee spouse's marital property interest in the employee spouse's deferred-employment-benefit plan terminates if the nonemployee spouse predeceases the employee spouse. Wis. Stat. §§ 766.31(3), .62(5); *see infra* § 2.201. A similar rule applies in connection with the augmented deferred marital property election, *see* § 2.243, *infra*.

Certain personal-injury recoveries have attributes similar to terminable interest property as far as the uninjured spouse is concerned. *See* Wis. Stat. § 766.31(7m); *see infra* § 2.133.

A terminable-interest rule also applies to certain rights under a life insurance policy when the surviving spouse is the owner and the insured. Wis. Stat. § 766.61(7); *see infra* § 2.178.

Assets in an individual retirement account (IRA) traceable to the marital property component of a rollover of a deferred-employment-benefit plan are terminable-interest marital property. Wis. Stat. § 766.62(5)(b), .31(3); *see infra* § 2.202.

3. Individual Property [§ 2.12]

After the determination date, individual property assets may exist along with marital property assets. The comment to UMPA section 4 says that an item of individual property, except for its income, is analogous to an item of solely owned property in the common law system. Individual property consists primarily of:

1. Assets owned by a spouse at a marriage taking place after January 1, 1986, if both spouses, at the date of marriage, have a Wisconsin domicile, Wis. Stat. § 766.31(6);

2. Assets acquired by a spouse during marriage and after the determination date by gift or inheritance or that become the spouse's individual property by being classified as such by a marital property agreement, Wis. Stat. § 766.31(7)(a), (d); and

3. Assets acquired by a court decree that classifies the assets as a spouse's individual property, Wis. Stat. § 766.31(7)(d).

Appreciation of an individual property asset after the determination date and during marriage is also classified as individual property unless the appreciation is substantial and results from a spouse's substantial undercompensated efforts. *See* Wis. Stat. § 766.63(2). However, income earned or accrued by a spouse during marriage and after the determination date and attributable to individual property is classified as marital property unless such income is (1) classified as individual property by a unilateral statement under section 766.59, (2) reclassified by a marital property agreement or court decree, or (3) received as a gift from the other spouse. Wis. Stat. § 766.31(4), (10); *see infra* §§ 2.106–.121. As to income distributed to one spouse from a trust created by a third party, see section 766.31(7)(a) and section 2.84, *infra*.

4. Predetermination Date Property [§ 2.13]

Property owned by spouses at a determination date that is either January 1, 1986, or the date when both spouses first are domiciled in Wisconsin is referred to in this book as predetermination date property, although the Act does not use this term. Such property is sometimes referred to as *unclassified property*. Note that property owned by a spouse at a marriage occurring on or after January 1, 1986, when at the date of the marriage both spouses are domiciled in Wisconsin, is individual property, not predetermination date property. *See supra* § 2.12. Each item of predetermination date property has its own characteristics determined under predetermination date law as modified by the Act. *See infra* §§ 2.140–.154.

The conclusions expressed in this section are confirmed by clarifying amendments to subparts 766.31(6)(a) and (b) in sections 46 and 47 of 2005 Wisconsin Act 216. The amendments state that if the date of the marriage is the same as the determination date, the property owned by a spouse at the determination date is that spouse's individual property. On the other hand, if the date of marriage precedes the determination date (as for example, a marriage in a common law state before both spouses change domicile to Wisconsin), the property owned by a spouse at the determination date is unclassified property (or what this chapter refers to as predetermination date property).

5. Mixed Property [§ 2.14]

On occasion, marital property assets may be mixed with nonmarital property assets (for example, if marital property cash and individual property cash are both used to purchase an asset), which produces a mixed asset. An important rule associated with the classification process is that if the nonmarital component can be traced, it remains nonmarital property; if the nonmarital component cannot be traced, the entire asset becomes marital property. Wis. Stat. § 766.63(1); *see infra* ch. 3 (especially chapter 3, part III). Mixing and tracing rules may also be important in connection with the deferred marital property election. *See infra* § 3.4. Life insurance policies and deferred-employment-benefit plans are often special types of mixed property and are given special treatment under the Act. *See* Wis. Stat. §§ 766.61, .62; *see also infra* §§ 2.156–.219.

6. Deferred Marital Property [§ 2.15]

Predetermination date property is also deferred marital property if it would have been marital property under chapter 766 if acquired while the Act was in effect. Wis. Stat. § 851.055. Whether deferred marital property exists is considered only at death, and then only in the context of the deferred marital property election provided a surviving spouse. *See* Wis. Stat. §§ 861.02, .03.

The deferred marital property election is available to the surviving spouse only. It is not available to the estate of the first spouse to die. Thus, if a spouse owning or retaining certain interests in deferred marital property assets dies survived by the other spouse, the surviving spouse may have a right of election with respect to the assets' value. The election pertains to deferred marital property assets that make up the augmented deferred marital property estate. *See* Wis. Stat. §§ 861.02, .03; *see also infra* §§ 2.220–.246, ch. 12.

➢ ***Note.*** A grandfather provision in connection with certain arrangements made before April 4, 1984, was *repealed by* 1997 Wisconsin Act 188. *See* Wis. Stat. § 861.05(4) (1995–96), repealed by 1997 Wis. Act 188, § 194.

An exception to the above occurs if the deceased spouse was murdered by the surviving spouse. *See* § 2.226, *infra*.

A deceased spouse's assets are presumed to be deferred marital property to the extent the presumption that all property of spouses is marital property is rebutted. *See* Wis. Stat. § 861.02(2)(a); *see also infra* §§ 2.220–.246, 12.136–.147 (more detailed discussion of deferred marital property).

IV. Marital Property [§ 2.16]

A. Definition [§ 2.17]

Generally, marital property consists of (1) property accumulated during marriage and after the determination date by either or both of the spouses through a spouse's efforts, (2) income earned or accrued from a spouse's property during marriage and after the determination date, or

(3) property reclassified from nonmarital property to marital property by some means provided by the Act. Exceptions to this definition will be noted.

B. Attributes [§ 2.18]

1. Necessity of Property [§ 2.19]

Only property of spouses can be marital property; thus, marital property must first be property. A mere expectancy is not property. *See infra* § 5.23. Similarly, property titled in a trustee spouse who holds the property for a beneficiary of a trust created by a third person does not constitute property of the trustee spouse. *Leslie v. Midgate Ctr., Inc.*, 436 P.2d 201 (Wash. 1967); *see also* William A. Reppy Jr. & Cynthia A. Samuel, *Community Property in the United States* 202 (2d ed. 1982). The Act broadly defines the word *property* to include "an interest present or future, legal or equitable, vested or contingent, in real or personal property." Wis. Stat. § 766.01(15). This broad definition includes contract rights, *see infra* §§ 2.274–.277, and beneficial interests such as interests in trusts, *see infra* §§ 2.272, 2.100.

2. Necessity of Marriage [§ 2.20]

Because marital property assets may be owned only by spouses, *see* Wis. Stat. § 766.31(1), an asset may not be classified as marital property unless there is first a marriage between a man and a woman. *See* Wis. Stat. § 765.001(2). The Act is concerned with the property of married persons, and if a man and a woman are not married, the property they own is not marital property. UMPA § 1(8) cmt. In support of this concept (and that of the determination date), the term during marriage is defined in section 766.01(8) to mean a period in which both spouses are domiciled in this state, beginning at their determination date and ending at dissolution or at the death of a spouse. Section 766.03 establishes that the Act ceases to apply on the date only one spouse is domiciled in this state. Because the period when certain property is marital property is during marriage, and because the Act's provisions addressed to "spouses" only apply for that period, UMPA § 1(8) cmt., the definition of marriage is important.

➢ ***Note.*** Section 765.001(2), which applies to chapters 765 to 768 (the Family Code), states: "Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support." This language precludes the creation of marital property between persons who cohabit and precludes marriages of persons of the same sex. *See also* Wis. Const. art. XIII, § 13 (stating that only marriage between one man and one woman is considered valid or recognized as marriage by state of Wisconsin).

If a marriage is invalidated by a decree, section 766.73 authorizes a court to apply as much of chapter 766 to the property of the parties to the invalid marriage as is necessary to avoid an inequitable result. Section 766.73 by its terms does not apply if section 767.61 applies to the action to invalidate the marriage and divide the property.

➢ ***Comment.*** A subject for speculation is whether Wisconsin courts will follow the rules developed in some community property states, such as Washington, dealing with invalid marriages when one or both of the spouses have acted in bad faith. *See* Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. L. Rev. 13, 21–27 (1986); *see also infra* ch. 11 (putative spouses and definitions of marriage).

3. Present Undivided One-half Interest [§ 2.21]

Section 766.31(3) provides that "[e]ach spouse has a present undivided one-half interest in each item of marital property." A spouse's interest vests on acquisition, in contrast to an expectancy that ripens into a vested property interest on some later occurrence such as death or dissolution.

The comment to UMPA section 4 states that marital property "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 exchange for or rollover of existing marital property." The incidents and attributes of marital property, including the creation of a present legal interest, attach when the property is acquired. An item's classification as marital property persists until the marriage terminates by dissolution or death, or

until the property is reclassified by one of the methods provided in the Act.

4. Item-by-item System [§ 2.22]

The present undivided one-half interest that each spouse has in marital property, *see supra* § 2.21, means that each spouse owns one-half of *each* item of marital property, rather than one-half of the aggregate of all marital property. Wis. Stat. § 766.31(3). Upon either spouse's death, the surviving spouse retains his or her undivided one-half interest in each item of marital property. Wis. Stat. § 861.01(1). If a third party then succeeds to all or part of the decedent's one-half interest in an asset classified as marital property, that party becomes a tenant in common with the surviving spouse. Wis. Stat. § 861.01(2). For a discussion of the estate planning consequences of an item-by-item system, see chapter 10, *infra*.

➢ ***Note.*** The item-by-item rule apparently applies in all community property states. Arizona is perhaps the only state that applies the aggregate rule at death. Reppy & Samuel, *supra* § 2.19, at 314.

After dissolution, each former spouse owns an undivided one-half interest in each former marital property asset as a tenant in common, unless the decree or an agreement entered into by the spouses specifies otherwise. Wis. Stat. § 766.75. However, the item-by-item system is not relevant at dissolution. Thus, a decree could award marital property asset *A* to the wife and marital property asset *B* to the husband, consistent with equitable distribution under section 767.61.

The rules of management and control set forth in section 766.51 and described in chapter 4, *infra*, may in certain cases limit a spouse's right to claim an individual interest in a specific item of marital property. Thus, a spouse with sole management and control may subject assets to buy-sell arrangements. *See infra* § 4.81. In addition, sections 766.51(10), 857.015, and 861.015 permit a spouse who holds a marital property business interest described in subsection 766.70(3)(a), (b), or (d), which is not also held by the other spouse, to direct in a will or other signed writing that the nonholding spouse's marital property interest may be satisfied from other property at death. For further discussion of this aspect of management and control, see sections 4.83 and 12.36, *infra*.

During marriage, each spouse owns a one-half interest in each item of marital property. However, the right to manage and control an asset classified as marital property is an important matter requiring separate discussion. *See* Wis. Stat. § 766.51; *see also infra* ch. 4. Spouses must observe certain duties in connection with assets classified as marital property. *See infra* ch. 8. There are also rules and remedies (provided in certain cases) in connection with gifts of assets classified as marital property. *See* Wis. Stat. § 766.53; *see also infra* chs. 8 (remedies), 5 (credit), 6 (collection).

➢ ***Note.*** The Real Property, Probate and Trust Law section of the State Bar of Wisconsin formed a Probate Code "Trailer Bill" Drafting Committee that published "Notes to 2005 Wis. Act 216," *available at* http://www.wisbar.org/AM/Template.cfm?Template=/CM/ContentDisplay.cfm&ContentID=57842. References in this chapter to "Committee Note(s)" are references to this document.

The item-by-item system can also be altered by agreement. 2005 Wisconsin Act 216 created subsection 766.31(3)(b), which permits spouses to provide in a marital property agreement that, upon the death of one spouse, some or all of their marital property may be divided between them based on aggregate value rather than item by item. In addition, a surviving spouse and the successor in interest to the decedent's share of the marital property may enter into an agreement providing that some or all of the marital property in which each has an interest will be divided based on aggregate value rather than item by item. A *successor in interest* includes any person or entity that succeeds to the marital property interest of the deceased spouse, such as a personal representative, a trustee, or the beneficiary of a nonprobate transfer. Committee Note to section 42. The definition does not include a beneficiary under a will or trust. If the surviving spouse dies before the estate of the first spouse to die is fully administered, an agreement may be reached by the two successors in interest. In the absence of an agreement like any of those described above, the item-by-item system applies.

Former section 857.03(2) is now amended and renumbered as section 766.31(3)(b)3. and (intro.). *See* 2005 Wis. Act 216, § 169. The renumbered and amended section essentially coordinates with the amendments described above. Thus, it provides that a surviving spouse and a distributee who is a successor in interest to all or part of a deceased spouse's interest in marital property may petition the court to approve an

exchange of interests in the marital property authorized by an agreement described above, but court approval of the exchange is not required for the agreement to be effective. If the court approves the exchange, the surviving spouse and the distributee must exchange their respective interests in two or more items of marital property. The exchange must occur before final distribution of assets under the governing instrument.

A court is allowed to approve the division of both nonprobate property and probate property. Committee Note to section 169. It appears that court approval of the division of nonprobate property is not required but may be sought if it is desirable.

➢ ***Note.*** The right to make exchanges may be a postmortem planning tool in some cases. *See infra* ch. 10.

5. Prohibition of Unilateral Severance [§ 2.23]

Under a marital property regime, a spouse may not unilaterally alienate his or her interest in any assets classified as marital property, receive the proceeds as his or her individual property, and then substitute the purchaser as a tenant in common with his or her spouse. The Act does not specifically address this matter, but one authority states that in community property jurisdictions, such a transaction is prohibited by either statute or case law. *See* Reppy & Samuel, *supra* § 2.19, at 20.

A spouse's unilateral attempt to sever his or her marital property interest in a marital property asset is, in effect, an attempt to reclassify the interest. Such an attempt will fail. The only means of reclassification available to spouses are the means provided by the Act, examples being interspousal gifts and marital property agreements; no provision is made for unilateral severance of a marital property interest in an asset. *See infra* §§ 2.283–.295 (reclassification methods). Unless the spouses reclassify their property by a means provided by the Act, all their property (including sale proceeds) is marital property except that which is classified otherwise under chapter 766. Wis. Stat. § 766.31(1).

Thus, even though a spouse may have management and control rights and could sell or exchange all or a portion of a marital property asset, each spouse has a marital property interest in the proceeds received from the sale or the property received in the exchange, as well as in any portion of the asset retained.

Courts have analogized community property to various common law property arrangements. For example, community property is sometimes thought of as partnership property, and analogies are made to partnership law. *See, e.g.*, *Fink v. United States*, 454 F.2d 1387 (Ct. Cl. 1972). The UMPA prefatory note speaks of a "sharing ideal" in which "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." Despite these analogies, marriage is not a partnership in the technical legal sense of either chapter 178 or the Internal Revenue Code, and marital property is unlike anything in the common law system. Marital property interests are present undivided one-half interests without regard to the actual monetary value of a spouse's contribution or any intent to make a profit. Moreover, a partner may convey his or her interest in a partnership to a third party, whereas a spouse may not convey his or her interest in a marital property asset as a separate interest. *See also* Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 Baylor L. Rev. 20, 28 (1967).

C. Basic Rule and Basic Presumptions [§ 2.24]

1. Basic Rule [§ 2.25]

Section 766.31(1) states that "[a]ll property of spouses is marital property except that which is classified otherwise by this chapter and that which is described in sub. (8)." The reference to section 766.31(8) specifically picks up predetermination date property. This broad rule is typical of most community property states. McClanahan, *supra* § 2.4, at 333. It is important to understand that the rule is not stated in terms of property acquired during marriage. Instead, *all property of spouses* is marital property, regardless of the time, method, or source of acquisition, unless it can be proven that the property is classified otherwise by chapter 766. (Thus, marital property can include assets wrongfully acquired by conversion or illegal contract. *See* McClanahan, *supra* § 2.4, at 334.)

2. Basic Presumptions [§ 2.26]

Supporting the general rule in section 766.31(1), *see supra* § 2.25, is the basic presumption stated in section 766.31(2) that "[a]ll property of spouses is presumed to be marital property." The presumption assumes

the existence of property and the appropriate marital relationship. *See supra* §§ 2.19, .20. If property and the appropriate marital relationship exist, then the presumption acts in a very broad manner. Making no reference to time, method, or source of acquisition, the presumption applies to "all property of spouses." For example, an asset might have been inherited by a spouse during marriage and after the determination date. Such an asset is individual property if proof to that effect is sufficient to rebut the presumption favorable to marital property. Absent that proof, the presumption prevails, and the asset is marital property. Along these same lines, the comment to UMPA section 4 states that "[t]he 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" (emphasis added).

➢ ***Note.*** Four types of presumptions with similar purposes have been identified in community property states, some more favorable to the community than others. The Wisconsin presumption, which has been characterized as the *possession formula*, is quite favorable to the community (marital property) and is closest to the presumption in Arizona, Louisiana Texas, and Washington. *See* Reppy & Samuel, *supra* § 2.19, at 53–54.

The Act also establishes that if the presumption in section 766.31(2) is overcome, the property is presumed to be deferred marital property at death. Wis. Stat. § 861.02(2)(a). If at the death of a spouse the presumptions under sections 766.31(2) and 861.02(2)(a) are both overcome, the property is classified as nonmarital property that is not deferred marital property.

D. Rebutting Presumptions [§ 2.27]

1. In General [§ 2.28]

A spouse may rebut the basic presumption under section 766.31(2) favorable to the classification as marital property by proving that the nonexistence of such a classification is more probable than its existence. *See* Wis. Stat. § 903.01. The burden of persuasion is on the proponent of nonmarital property classification. If adequate proof is presented to overcome the general presumption, the proponent of a nonmarital property classification prevails. UMPA § 4 cmt.; *see Malnar v. Stimac*

(In re Estate of Malnar), 73 Wis. 2d 192, 243 N.W.2d 435 (1976) (application of section 903.01 in different context).

The presumption under section 861.02(2)(a) can be rebutted in the same fashion. Evidence sufficient to rebut the first presumption may be sufficient to rebut the second. Wis. Stat. Ann. § 858.01(2) Legis. Council Notes—1985 Act 37, § 166 (West 2002) (current version of statute at 861.02(2)(a)).

- ***Note.*** In the other community property states, the evidence needed to rebut the presumption favoring the community usually must meet one of two tests: the "clear and convincing" test (Arizona and Texas) or the "mere preponderance of the evidence" test (New Mexico). *See* Reppy & Samuel, *supra* § 2.19, at 55. Decisions in some of the other community property states are in conflict over which of the two tests should apply. *Id.*

For two cases that apply the presumptions and the rules of burden of proof, see *Estate of Kobylski v. Hellstern (In re Estate of Kobylski)*, 178 Wis. 2d 158, 503 N.W.2d 369 (Ct. App. 1993), and *Lloyd v. Lloyd (In re Estate of Lloyd)*, 170 Wis. 2d 240, 487 N.W.2d 647 (Ct. App. 1992). *See also infra* § 3.48.

2. Effect of Title and Management and Control [§ 2.29]

When dealing with common law property, lawyers are accustomed to looking at title as the equivalent of ownership. Under a marital property regime, however, title is not synonymous with ownership, and proof that title to an asset is in one spouse or the other will not rebut the basic presumption that a spouse's property is marital property.

Assume, for example, that a husband after the determination date purchases real estate with his salary (a marital property asset) and takes title in his name. Unless there is a marital property agreement or sufficient evidence of a gift by the wife, the asset is marital property. In the classification process, "[t]itle is *not* an answer since title functions … principally to establish management and control rights." UMPA § 4 cmt.; *see also infra* ch. 4. Consistent with this principle, the right to

manage and control property neither determines classification nor rebuts the presumption favorable to marital property. Wis. Stat. § 766.51(5).

Some caveats must be noted. First, title may establish classification in a limited number of situations. If, for example, a document of title, instrument of transfer, or bill of sale expresses an intent to establish a joint tenancy or tenancy in common exclusively between spouses after the determination date, the property is survivorship marital property or marital property, respectively. Wis. Stat. § 766.60(4)(b)1.a., b. In addition, a homestead acquired after the determination date exclusively between spouses is survivorship marital property if no contrary intent is expressed on the instrument of transfer. Wis. Stat. § 766.605.

Second, although title may not be an index to classification under the Act in other cases, a change in title may be relevant in a proceeding involving a classification issue. In some community property jurisdictions, for example, if a spouse with management and control rights changes title to an asset from his or her name to that of the other spouse, the change in title may indicate that the first spouse intended a gift of the asset to the other spouse as his or her separate property. *See Neely v. Neely*, 563 P.2d 302 (Ariz. Ct. App. 1977). On the other hand, in Wisconsin, it can be argued that shifting title proves nothing because it may simply be a device to transfer management and control from one spouse to the other.

How, then, may the basic presumption that all assets of spouses are classified as marital property be rebutted? The presumption is rebutted by proving that property is classified as other than marital property. Such proof will focus primarily on the time, method, or source of acquisition. The same factors are relevant if the presumption favorable to marital property classification is rebutted and an attempt is made to rebut the presumption favorable to deferred marital property. Note that when the presumption favorable to marital property classification is rebutted, the second presumption favorable to deferred marital property might still prevail. This could occur, for example, if the only proof available revealed an acquisition while the spouses were married but before the determination date. Sections 2.30–.33, *infra*, focus on proof required to rebut the presumption favorable to marital property classification. That discussion assumes that the spouses do not have a marital property agreement.

3. Time of Acquisition [§ 2.30]

The basic presumption favoring marital property classification may be rebutted by demonstrating that the time the asset was acquired (e.g., before marriage or after dissolution) establishes the asset's classification as predetermination date or individual property.

The time of acquisition may also be relevant in determining whether predetermination date property is subject to a deferred marital property election. A predetermination date asset acquired by a spouse while married—even an asset that clearly would have been classified as marital property had the Act applied when it was acquired—is not subject to disposition by the other spouse if the other spouse dies first after the determination date.

➢ ***Example.*** Assume that while married but before the determination date, a wife acquires and fully pays for real estate with her salary and that her husband predeceases her in 1990. The real estate clearly would have been classified as marital property upon the date of acquisition had the Act applied. Nonetheless, the deferred marital property election does not apply, *see infra* § 2.226, and the husband has no right to dispose of one-half of the real estate by his will. Proof that the date of acquisition was before the determination date may be needed to support that conclusion, however.

4. Method of Acquisition [§ 2.31]

The basic presumption in favor of marital property classification may be rebutted by demonstrating that a spouse acquired an asset either by gift or inheritance. Wis. Stat. § 766.31(7). Such assets are either individual property or predetermination date property and are not subject to the deferred marital property election. Other methods of acquiring individual or predetermination date property include court decrees so classifying the property, *see infra* § 2.119; certain payments in connection with a personal injury, *see infra* §§ 2.127–.134; unilateral statements, *see infra* §§ 2.70–.82; written consents (in the case of life insurance policies and assets used to pay premiums for such policies), *see infra* § 2.177; marital property agreements, *see infra* § 2.119; and certain recoveries under section 766.70, *see infra* § 2.120.

5. Source of Acquisition [§ 2.32]

The basic presumption favoring marital property classification may be rebutted by demonstrating that the source of payment for an acquisition was nonmarital property—a basic tracing concept.

➢ ***Example.*** If a wife demonstrates that during her marriage and after the determination date she sold an individual property asset and used the proceeds to purchase another asset in her name, that asset is successfully "traced" to the prior individual property and is classified as her individual property. *See* Wis. Stat. § 766.31(7)(b). On the other hand, if the wife had mixed the proceeds from the sale of the individual property asset in a bank account with her wages, and payments were made from the account and marital property funds deposited into it, the subsequent purchase of an asset in her name from that account might be classified as marital property because she might not be able to trace the acquisition to individual property. *See* Wis. Stat. § 766.63(1); *see infra* § 3.23.

6. Third Parties [§ 2.33]

Third parties may wish to rebut the presumption favorable to marital property classification. The IRS may attempt to rebut the presumption for tax purposes because a marital property asset receives an adjustment in basis in its entirety for income tax purposes at the death of a spouse regardless of the order of the spouses' deaths. I.R.C. § 1014(a), (b)(6). The beneficiaries of the deceased spouse's estate, however, may continue to treat the asset as former marital property. Indeed, if a court decree, such as a decree of a probate court, requires it, the beneficiaries might have to continue to so treat the asset. One commentator states that the strength of the presumption favorable to community property may reasonably vary with the length of the marriage, *see* McClanahan, *supra* § 2.4, at 335; thus, the strength of the presumption favorable to marital property in Wisconsin may similarly vary with the length of time elapsed after the determination date.

➢ ***Example.*** Assume that an untitled spouse with a Wisconsin domicile died on January 2, 1986, and that the surviving spouse was also then domiciled in Wisconsin. Assume that the spouses did not enter into a marital property agreement reclassifying their property as

marital property. (If an agreement had been entered into and death occurred within one year, the discussion in section 9.32, *infra*, would apply.) Should the property of the surviving titled spouse receive an adjustment in basis because of the presumption favorable to marital property classification? It is unlikely that in the absence of marital property agreements or gifts there will be much marital property owned by spouses with Wisconsin domiciles who die shortly after January 1, 1986, or another determination date. Thus, in most of these cases, there should be few assets classified as marital property that would be subject to the full adjustment in basis, because the presumption in favor of marital property classification can be easily rebutted.

E. Judicially Created Presumptions [§ 2.34]

1. In General [§ 2.35]

The presumptions regarding marital property classification and deferred marital property, *see supra* § 2.26, are the only presumptions the Act establishes for classification of property. Nevertheless, courts may fashion other presumptions to assist them in the classification process. *See infra* §§ 2.36–.37.

2. Proper Fund for Expenses [§ 2.36]

A judicial presumption in some community property states is that expenditures for obligations that benefit the family and are made from a mixture of community and separate assets are made first from community assets. *See* McClanahan, *supra* § 2.4, at 341; *see also infra* § 3.20. A companion presumption is that an expenditure for a separate obligation is made from separate assets. *See* McClanahan, *supra* § 2.4, at 341. Generally used in tracing contexts, these two presumptions are based on the principle that the proper fund should be used to discharge obligations. *Id.*

3. Gift Presumptions [§ 2.37]

Some community property states have developed presumptions in connection with interspousal gifts. *See infra* §§ 2.285–.288.

V. Kinds of Marital Property [§ 2.38]

A. Income Earned or Accrued During Marriage and After Determination Date [§ 2.39]

1. In General [§ 2.40]

Section 766.31(4) provides that "[e]xcept as provided under subs. (7)(a), (7p) and (10), income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property." Thus, as a general matter, marital property includes (1) income from personal services of a spouse earned or accrued during marriage and after the determination date and (2) income attributable to a spouse's property earned or accrued during marriage and after the determination date. The three exceptions noted in section 766.31(4) are:

1. Income distributed to a spouse from a trust created by a third party, *see* Wis. Stat. § 766.31(7)(a); *see also infra* § 2.84;

2. Income attributable to nonmarital property subject to a unilateral statement under section 766.59, *see* Wis. Stat. § 766.31(7p); *see also infra* §§ 2.70–.82; and

3. Income attributable to property given by one spouse to the other unless it can be proven that the donor spouse had a contrary intent, *see* Wis. Stat. § 766.31(10); *see also infra* §§ 2.285–.288.

Other than these three exceptions and the exceptions for marital property agreements and court decrees providing otherwise, income earned or accrued by a spouse from *all* sources during marriage and after the determination date is marital property. Thus, income attributable to individual or predetermination date property, if earned or accrued by a spouse during marriage and after the determination date and if not subject to an exception, is marital property.

➢ ***Note.*** On this point, Wisconsin aligns itself with three other community property states—Idaho, Louisiana, and Texas—and the territory of Puerto Rico, which all follow the "civil law" rule on income. In the five other community property states—Arizona, California, Nevada, New Mexico, and Washington—income on

separate property remains separate, pursuant to the so-called American rule.

Understanding the scope of section 766.31(4) requires, first, a definition of the word *income*, *see infra* §§ 2.41–.55; second, an exploration of the concept of "income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date," *see infra* §§ 2.56–.61; and third, a consideration of the various sources of income, *see infra* §§ 2.62–.89.

2. Definition [§ 2.41]

Section 766.01(10) defines *income* as follows:

> "Income" means wages, salaries, commissions, bonuses, gratuities, payments in kind, deferred employment benefits, proceeds, other than death benefits, of any health, accident or disability insurance policy or of any plan, fund, program or other arrangement providing benefits similar to those forms of insurance, other economic benefits having value attributable to the effort of a spouse, dividends, dividends on life insurance and annuity contracts to the extent that the aggregate of the dividends exceeds the aggregate premiums paid, interest, income distributed from trusts and estates, 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.

3. What Definition Includes [§ 2.42]

The definition of income is intentionally broad and is intended to include all forms of income and earnings. *See* UMPA § 1(10) cmt. The definition takes on more form, however, when one considers what it does not include. *See infra* §§ 2.43–.55.

4. What Definition Excludes [§ 2.43]

a. Return of Capital [§ 2.44]

(1) In General [§ 2.45]

The definition of income expressly excludes a return of capital. Wis. Stat. § 766.01(10); UMPA § 1(10) cmt. The phrase "unless attributable to a return of capital" at the end of section 766.01(10) modifies all parts of the definition of income preceding it. UMPA § 1(10) cmt.; *see* Wis. Stat. Ann. § 766.01(10) Legis. Council Notes—1985 Act 37, §§ 69 to 73 (West 2009).

➢ ***Example.*** Assume that a husband invests $200,000 of his individual property in a parcel of real estate that he holds for investment. The asset does not change in value, and he sells it during his marriage for $200,000. Since he received only a return of his original capital, none of the return is income. Therefore, in the absence of tracing problems, a gift, or a marital property agreement or court decree to the contrary, none of the return is marital property.

The return-of-capital concept seems straightforward, but complex issues may arise for certain assets, as explained in sections 2.46–.48, *infra*.

(2) Wasting Assets [§ 2.46]

The Act does not deal specifically with the classification of wasting assets or proceeds received from such assets. A *wasting asset* is "[a]n asset exhausted through use or the loss of value, such as an oil well or a coal deposit." *Black's Law Dictionary* 135 (9th ed. 2009). Generally, the issue involved is whether as the asset is developed the proceeds received are considered to be either income or a return of capital. Consider, for example, a mineral deposit owned by a spouse as individual property. If proceeds received by the spouse as the mineral interest is developed are considered income, then eventually the entire asset is reclassified as marital property because unless one of the exceptions set forth in section 2.69, *infra*, applies, income earned or accrued by a spouse after the determination date is marital property.

Wis. Stat. § 766.31(4). If, on the other hand, the mineral proceeds are considered a return of capital, the proceeds are individual property.

As noted in section 3.27, *infra*, the issue is further complicated if the spouses use marital property funds to develop the asset or if a spouse performs substantial labor in connection with the development. Issues of mixing may then arise. The alternatives are either to allocate "all or nothing" to the individual interest based on the preponderance of value contributed or make an equitable apportionment between the individual and the marital property interests. The all-or-nothing rule provides certainty but may produce arbitrary results. The equitable apportionment approach (really a question of mixing) is difficult because the portions are not known when received, and thus subsequent mixing of funds is unavoidable.

The all-or-nothing approach was used in *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953). In that case, a husband owned undivided interests in various gas wells before marriage as his separate property. Pursuant to contracts entered into before the marriage, the wells produced gas during the marriage. Noting that the husband's interest as lessee would last only so long as the gas was produced, the court held that the production and sale of the natural gas were equivalent to a piecemeal sale of the separate corpus, and that funds acquired through a sale of the separate corpus, if traced, would remain the husband's separate property. The court applied the same rule to royalties paid for production of gas from separate property. The court distinguished the case from cases in which separate property was transformed into a new and more valuable state, such as by making clay into bricks or finished lumber from sawed timber. *See White v. Hugh Lynch & Co.*, 26 Tex. 195 (1862); *Craxton, Wood & Co. v. Ryan*, 3 Willson 439 (Tex. Ct. App. 1888). In these cases, said the *Norris* court, a great deal of community effort was required to effect the transformation. *Norris*, 260 S.W.2d at 680. It was, presumably, the effort involved rather than the fact that the property was transformed into a different state that required a different result.

For further discussion, see section 3.27, *infra*, Reppy & Samuel, *supra* § 2.19, at 155, and McClanahan, *supra* § 2.4, at 345.

(3) Stock Dividends [§ 2.47]

Income as defined in section 766.01(10) includes dividends but excludes stock dividends and stock splits involving additional shares of the same company, since they simply spread the same value over more shares. *See* Reppy & Samuel, *supra* § 2.19, at 155–56; *accord Ludwig v. Geise (In re Geise)*, 132 B.R. 908 (Bankr. E.D. Wis. 1991).

(4) Dividends on Life Insurance Policies and Annuities [§ 2.48]

The definition of income in section 766.01(10) includes "dividends on life insurance and annuity contracts to the extent that the aggregate of the dividends exceeds the aggregate premiums paid." This language is similar to that of I.R.C. § 72(e)(1)(B) and Treasury Regulation § 1.72-11(b)(1), which state that dividends used to reduce premiums are considered a return of premium and a reduction in the cost basis of the insurance contract, but that when aggregate dividends exceed the gross premiums paid, the excess is income. For more detail on this concept, see section 2.183, *infra*.

b. Appreciation [§ 2.49]

(1) In General [§ 2.50]

Income as defined by the Act does not include appreciation. *See* UMPA § 1(10) cmt. The phrase "unless attributable to … appreciation" at the end of section 766.01(10) modifies all parts of the definition of income preceding it. *See* Wis. Stat. Ann. § 766.01(10) Legis. Council Notes—1985 Act 37, §§ 69 to 73 (West 2009); UMPA § 1(10) cmt. Section 766.01(2) defines the term *appreciation* as a "realized or unrealized increase in the value of property."

➢ ***Example.*** Assume a spouse purchased real estate after the determination date with inherited cash for $100,000 and a year later sold it for $200,000. None of the proceeds is income. Whether the appreciation element is classified as marital property, however, depends on the nature of the appreciation. *See infra* §§ 2.90–.95, 3.27.

(2) Business Entities [§ 2.51]

Classification questions may arise when one spouse owns a controlling interest in a business entity such as a corporation or partnership as his or her nonmarital property and may withdraw the income from the entity but instead permits the income to be used for the purchase of inventory or other assets or simply allows it to accumulate. If the income is withdrawn by the spouse during the marriage and after the determination date, it is marital property. Wis. Stat. § 766.31(4).

If a partnership, as opposed to a corporation, is involved, there may be an issue whether retained income maintains its status as income (or reclassifies a portion of the underlying partnership interest). For a discussion of this point, see section 3.45, *infra*. See also *Swope v. Swope*, 739 P.2d 273 (Idaho 1987) (superseded by statute, *see Marmon v. Marmon*, 825 P.2d 1136 (Idaho Ct. App. 1992)), in which the court, applying Idaho law, held that earnings of a separate property partnership, whether retained or distributed, are community property. The *Swope* court distinguished retained earnings of a corporation, holding that they do not constitute income and therefore community property unless they are distributed. A partnership, said the court, simply consists of the total of the interests owned by the partners and is directly controlled by the partners, whereas a corporation is a separate legal entity and is controlled only on a limited and indirect basis by the stockholders. The court also observed that under Idaho law a partner may direct payment of earnings and, if other partners disagree, dissolve the partnership and obtain the earnings. Stockholders have no equivalent rights.

➢ ***Comment.*** Whether the reasoning in *Swope* is persuasive in Wisconsin will depend, in part, on the nature of the partnership interest involved and on a comparison of Idaho and Wisconsin partnership law. A limited partnership interest, for example, is quite different from the interest described in *Swope* because, in the absence of an agreement to the contrary, a limited partner does not have the unilateral right to direct earnings, withdraw from a partnership, or dissolve a partnership. *See* Wis. Stat. ch. 179. The rights described in *Swope* appear to be those of a general partner. In Wisconsin, in the absence of an agreement to the contrary, the rights of general partners are described in chapters 178 and 179.

Income retained by a corporation is property of the corporation and is not marital property of the spouse. *See infra* § 3.45. However, the retained income may result in appreciation in the value of the shares of stock. The appreciation might or might not be marital property under rules set forth in section 766.63(2). Absent labor mixing that meets the tests of section 766.63(2), and absent fraud, it appears that no portion of the individual property corporate stock, including that attributable to retained income, is marital property. *See infra* § 3.45

It must be noted that there are no cases under the Act dealing with classification of appreciation of nonmarital property stock that is attributable to earnings retained by a corporation, and that the above analysis under the Act differs from that found in several dissolution cases when applying section 767.61. The differences are highlighted below. Section 767.61 provides that inherited property and property directly acquired with inherited property are not subject to property division in the absence of hardship. Section 767.61 has no counterpart under the Act. Rather, the Act has its own provisions dealing with appreciation; thus, the precedential value of these dissolution cases in the context of the Act must be approached with caution. Results on this issue may differ, therefore, depending on whether a marriage ends by dissolution or by death.

Two dissolution cases, *Lendman v. Lendman*, 157 Wis. 2d 606, 460 N.W.2d 781 (Ct. App. 1990), and *Metz v. Keener*, 215 Wis. 2d 626, 573 N.W.2d 865 (Ct. App. 1997), dealt with retained income in corporations, the stock of which was inherited property in the hands of a spouse. In *Lendman*, the income, stipulated to be a result of the husband-shareholder's labor, was used to retire debt. *Metz* involved an S corporation. Retained earnings were used to purchase new businesses. In addition, the wife-shareholder paid income tax on the retained earnings by reason of the pass-through nature of an S corporation.

Both decisions, relying on *Arneson v. Arneson*, 120 Wis. 2d 236, 244, 355 N.W.2d 16 (Ct. App. 1984), emphasized that income generated by an inherited asset is distinct from the asset itself. Thus, appreciation attributable to such income is not "directly acquired" by inheritance under section 767.61. Appreciation that results from market conditions, on the other hand, is inherently part of the asset and is directly acquired by inheritance. The court in *Lendman* noted that the income was a result of the husband's labor. The court in *Metz*, however, made no mention of

spousal labor and referred instead to the wife's full access, control, and right to the undistributed income.

Both courts agreed that retained earnings are not necessarily available to provide maintenance because they may be needed by the corporation for business purposes. Retained earnings are part of the marital estate for property division purposes, however. This is true, said the court in *Metz*, even though the wife-shareholder received compensation for her services to the corporation. The court relied on *Schorer v. Schorer*, 177 Wis. 2d 387, 407, 501 N.W.2d 916 (Ct. App. 1993), which said that the proposition that appreciation of a separate asset remains separate if the owning spouse has been compensated fairly for his or her efforts has not been given legal status in Wisconsin.

➢ ***Comment.*** The outcome may well be different under the Act. Generally, income retained by a corporation is not a marital property asset until it is distributed. *See infra* § 3.45. Section 766.01(10) defines income under the Act as items actually paid such as dividends, interest, wages, or net return resulting from use of property, but not return of capital or appreciation. The only type of appreciation of individual property (including inherited property) specifically mentioned in the Act that can be marital property is appreciation that the proponent can prove is substantial and was caused by substantial labor of either spouse that was not reasonably compensated. Wis. Stat. § 766.63(2). Thus, the conclusion described above in *Schorer* cannot be reached under the Act because reasonable compensation precludes the creation of marital property in connection with a spouse's application of efforts to nonmarital property. Appreciation resulting from causes other than labor of a spouse is likewise outside the ambit of section 766.63(2).

There is also authority, *see, e.g.*, *Humphrey v. Humphrey*, 593 S.W.2d 824 (Tex. Civ. App. 1980); Reppy & Samuel, *supra* § 2.19, at 56, for the proposition that a spouse may not set up and use a corporate entity to defraud the other spouse.

(3) Livestock [§ 2.52]

Issues involving livestock and farm animals have significance in Wisconsin. Are the proceeds received from the sale of livestock income,

appreciation, or (to some extent) return of capital? A review of a Wisconsin dissolution case and several cases from Texas may be helpful.

In *Preuss v. Preuss*, 195 Wis. 2d 95, 536 N.W.2d 101 (Ct. App. 1995), a Wisconsin case involving a dissolution, the wife brought to the marriage 17 head of cattle she had inherited. She claimed that the offspring of these cattle should be treated as inherited property as well and excluded from the marital estate. The court disagreed, saying that animal offspring are "akin to dividends paid on gifted stock which are treated as income and are included in the marital estate." *Id.* at 102.

➢ ***Comment.*** The *Preuss* decision has interesting economic consequences, and analogies to other types of assets can be imagined. Cattle will eventually die. Thus, the offspring might be thought of as a return of capital and therefore individual property. Otherwise, over time the individual property is inevitably converted into marital property without recompense to the owner of the individual property. *See supra* § 2.46, *infra* § 3.27 (discussing wasting assets). On the other hand, cattle can produce more offspring than needed to replace themselves. In this sense, the cattle and the offspring might be treated like marital property inventory, particularly if the spouse is in the business of buying and selling cattle. *See Moss v. Gibbs*, 370 S.W.2d 452 (Tex. 1963). Nevertheless, a court might hold that a reserve equal to the value of the inherited cattle should be set aside as individual property of the initial owner.

One early Texas case, *Stringfellow v. Sorrells*, 18 S.W. 689 (Tex. 1891), concerned a situation in which community labor was devoted to raising and fattening several mules separately owned by one spouse. The mules were subsequently sold. The court treated the sale proceeds as the owner spouse's separate property. The court was unwilling to speculate about whether the appreciation in the mules' value was a result of the owner spouse's efforts or natural causes.

Stringfellow should be compared to a more recent Texas case, *Moss v. Gibbs*, 370 S.W.2d 452 (Tex. 1963). *Moss* concerned a wife who inherited cattle and several horses, then sold them, bought more, sold them, and so on. The court held that the wife was in the business of raising and selling livestock and that the sale proceeds were therefore income and community property. *Accord Ripatti v. Ripatti*, 494 P.2d 1025 (Idaho 1972).

➢ ***Query.*** What about proceeds from the sale of milk from dairy cows, wool from sheep, and the like? These proceeds will probably be considered income because they are regularly recurring items, somewhat like interest paid on a bond. A Texas case, *United States Fidelity & Guaranty Co. v. Milk Producers Ass'n*, 383 S.W.2d 181 (Tex. Civ. App. 1964), held that revenue from the sale of milk from a dairy herd is community property income even if the dairy cows are a spouse's separate property. On the question of whether the separate interest should be compensated, see the discussion in section 2.53, *infra*.

The holdings in the more recent Texas cases are also consistent with section 766.01(10), which provides that economic benefit having value attributable to a spouse's effort is included in the definition of income.

(4) Farming Operations [§ 2.53]

Generally, farm income attributable to spousal efforts during marriage is community property even if the land or farming machinery involved is one spouse's separate property. *See, e.g.*, *Riggers v. Riggers*, 347 P.2d 762 (Idaho 1959); *Cleveland v. Cole*, 65 Tex. 402 (1886). California follows the American rule that income from separate property is separate. *See supra* § 2.40. Nonetheless, in that state, income produced by a farming operation owned as separate property and attributable to one spouse's efforts is community property. *See Mayhood v. La Rosa*, 374 P.2d 805 (Cal. 1962). Under this approach, no recompense is given to the owner for the use of the owner's separate property, land, or machinery even though that land and machinery may depreciate in value as the result of such use.

Whether Wisconsin will adopt an apportionment approach (in effect providing some return for the owner of the individual property) is a matter for speculation. If a spouse executes a unilateral statement in connection with nonmarital property land or machinery, the apportionment issue may arise—namely, how much of the income is subject to the unilateral statement because it is attributable to the nonmarital capital assets employed, and how much is attributable to spousal effort (and is therefore classified as marital property)? *See infra* § 2.76.

c. Certain Death Benefits and Policies [§ 2.54]

Income as defined by the Act does not include death benefits under any health, accident, or disability insurance policy or under any plan, fund, or other arrangement providing benefits similar to those forms of insurance. Wis. Stat. § 766.01(10).

Thus, under section 766.01(10), health, accident, and disability insurance proceeds, other than death benefits, are income. Consequently, the proceeds from disability policies (other than death benefits) are income whether the proceeds are paid from disability policies constituting a benefit of employment or from policies purchased by a spouse as other than a benefit of employment. As to classification of such benefits, see sections 2.136 and 2.196–.199, *infra*.

d. Certain Expenses [§ 2.55]

Income as defined by the Act includes "net rents and other net returns attributable to investment, rental, licensing or other use of property." Wis. Stat. § 766.01(10). Thus, income earned but used to pay expenses attributable to investment, rental, licensing, or other use of property is not included in the definition of income.

This rule is similar to the net-income rule in Idaho. In *Martsch v. Martsch*, 645 P.2d 882 (Idaho 1982), the court permitted payment of property taxes on separate property from rents earned by that property. The court reasoned that a contrary rule would require those amounts to be reimbursed to the community and would ultimately dissipate the separate property.

➢ ***Comment.*** The terms *net rents* and *net returns* in section 766.01(10) presumably take into account a reasonable allowance for depreciation and replacement (e.g., by the use of straight-line depreciation over the reasonable life of an asset), although the matter is not clear. This interpretation would permit a reserve from income for recurring replacements of such major items as roofs and furnaces, which are subject to wear and tear but are not covered by annual expenditures for ordinary repairs. If such a reserve is permitted, it is unclear whether a segregated reserve account must actually be

established. At the least, creation of such an account minimizes mixing and tracing problems.

B. Meaning of Earned or Accrued [§ 2.56]

1. In General [§ 2.57]

Income is marital property only if it is "earned or accrued … during marriage and after the determination date." Wis. Stat. § 766.31(4). Section 766.01(8) defines the term during marriage to include periods when both spouses are domiciled in Wisconsin and to exclude periods when either or both of the spouses are not domiciled in Wisconsin. It follows that income earned or accrued before or after the period defined by the Act as during marriage is not marital property.

Although the Act does not define *earned or accrued*, it is clear that a purpose behind the phrase is to solve certain "front-end" and "tail-end" problems. Regarding the front-end problem, the comment to section 4 of UMPA states that the difficulty "pertains to income received shortly after the determination date from effort or accrual of rights before the determination date. Actual ownership of such property became fixed before the determination date and it should not be and is not classified as marital property." (Emphasis added.)

The potential tail-end problem pertains to disintegrating marriages (although a change of domicile by either or both spouses to or from another state poses a similar problem). Here, the concern is that a cash-basis or actual-receipt rule might permit a former spouse (or a spouse changing domicile) to delay receipt of income under his or her management and control until after dissolution (or the change of domicile), thereby prejudicing the former spouse. The "accrual or constructive receipt system" is used to solve that problem. UMPA § 4 cmt. (Equitable division principles applicable at a dissolution, *see infra* ch. 11, also have considerable importance, but those principles are not referred to in the comment to section 4 of UMPA.)

2. Work Performed on Same Job Before and After Determination Date [§ 2.58]

Under section 766.31(4), income is marital property if "earned or accrued by a spouse … during marriage and after the determination date." As noted in section 2.57, *supra*, this rule leaves a front-end problem relating to income earned by a spouse on the same job both before and after the determination date. Is such income marital property, nonmarital property, or both? At issue is whether the words "earned or accrued" apportion income or mean that income does not accrue until the right to receive it is fixed as a matter of contract law.

➢ ***Comment.*** It is a precondition that the item must actually be income as opposed to a gift. In one case, *Holby v. Holby*, 638 P.2d 1359 (Ariz. Ct. App. 1981), the wife's employer gave her shares of Procter & Gamble stock for several years. Each year, the wife was given a choice of receiving either cash or the stock, and she chose the stock. The trial court found the stock to be gifts and therefore the wife's separate property. The appellate court reversed, saying that even though it was received at Christmas and labeled a gift, the stock was, in fact, a bonus for services rendered.

➢ ***Example.*** Assume that a married artist will receive a commission after completing and delivering a painting; half the painting is completed before the determination date, but the painting is finished during marriage and delivered after the determination date. On the one hand, because the right to the commission became "fixed" during marriage and after the determination date, the entire commission might be treated as marital property and none of it apportioned in accordance with the time when labor was expended. On the other hand, a court might find that half the commission was earned before the determination date and should be treated as the artist's nonmarital property.

Support for apportionment may be found in two cases involving attorney fees owed to an attorney spouse, *Waters v. Waters*, 170 P.2d 494 (Cal. Ct. App. 1946), and *Due v. Due*, 342 So. 2d 161 (La. 1977). In each case, the court awarded the nonattorney spouse an interest in contingent fees earned by but not yet paid to the attorney spouse by the date of the divorce. The apportionment approach not only seems more equitable but should also resolve the companion issue involving

allocation of expenses incurred. In the example, the artist spent money for paint, canvas, and the like before the determination date. However, if the test is when income becomes fixed, those expenses may not be matched against the income ultimately received, unless the artist is entitled to reimbursement for them from marital property.

Under an apportionment approach, the commission for the painting may be a mixed asset. However, if the services rendered before the determination date cannot be adequately traced (perhaps because accurate work records were not kept), the asset may be deemed entirely marital property under section 766.63.

3. Work Performed on Same Job During Marriage and After Termination of Period Defined as During Marriage [§ 2.59]

A problem similar to that discussed in section 2.58, *supra*, arises, for example, with an artist who paints half a picture during marriage and after the determination date, is then divorced, and completes and delivers the painting after the dissolution of the marriage. Because of the Act's definition of the term during marriage, a similar problem also arises if before completion of the painting either (1) the artist or his or her spouse changes domicile to another state or (2) the artist's spouse dies. The artist's commission is not fixed at dissolution, and there may be no property interest to divide. On the other hand, a divorce court has substantial equitable powers and might assign a value to the contract and divide it at dissolution, much as divorce courts do with unvested pension plans.

Such a division occurred in *Skaden v. Skaden*, 566 P.2d 249 (Cal. 1977). In that case, an insurance agent executed an agreement during the course of his marriage that conditioned his right to receive renewal commissions after his termination from service on his refraining from competitive activities. In the divorce judgment, the court equated his right to the commissions to vested but unmatured pension benefits. The court then assigned a value to the commissions and divided them.

4. All Work Performed Either Before or During Marriage; Income Received Either During Marriage or After Period Defined as During Marriage [§ 2.60]

➢ ***Example.*** Assume that a woman writes a book and enters into a royalty agreement with her publisher while she is single, then marries and subsequently receives royalties during marriage. Are any of the royalties received during marriage marital property? It would appear the answer is no, even though the royalties probably constitute income under section 766.01(10), because the contractual rights and performance that yielded the income were established before the marriage. Compare this result with *In re Marriage of Gillespie*, 948 P.2d 1338 (Wash. Ct. App. 1997), which involved payments received by a spouse during marriage with respect to a covenant not to compete, which was signed by the spouse before marriage in connection with stock that the spouse acquired before the marriage but sold during the marriage. The court held those payments were the spouse's separate property, although it explicitly noted that the spouse's earnings through new employment after marriage actually increased, leaving the question whether the court would have reached a different result if the spouse's earnings had decreased.

See also the discussion of *In re Marriage of Gillespie* at section 2.277, *infra*.

An issue involving work performed during marriage but royalties received after marriage arose in *Worth v. Worth*, 241 Cal. Rptr. 135 (Ct. App. 1987), which involved a dissolution proceeding in California. While an author was married, he wrote two books, copyrighted them, and entered into an agreement with his publisher. The court first rejected an argument based on federal preemption that a protected work is the author's separate property. (Accord *Rodrique v. Rodrique*, 218 F.3d 432 (5th Cir. 2000), on the issue of preemption.) The court went on to hold that because all the effort was performed during the marriage, all benefits flowing from that effort (including damages that might be received as a result of a copyright-infringement action commenced during the marriage) were community property subject to division at dissolution.

5. Awards Made After Period Defined as During Marriage [§ 2.61]

Questions can arise as to the classification of awards made after the termination of the period defined as during marriage. These questions may focus on the purpose of the award, i.e., is it designed to compensate for past services during marriage, or is the right to an award created after marriage simply the result of an employer's beneficence?

Many of these questions are considered in *Frahm v. Frahm*, 53 Cal. Rptr. 2d 31 (Ct. App. 1996), which involved a severance package received by the husband after the dissolution of the parties' marriage. The wife contended that a portion of the severance should be awarded to her as community property. The severance payments were made as an incentive to employees voluntarily to separate themselves from the employer. The court found that the right to the benefits resulted from the employer's beneficence and accrued after the marriage was dissolved; therefore, the severance payment was the husband's separate property.

The decision includes a good summary of cases in this area and concludes as follows:

> [T]he results are inconsistent. For example, the *Horn* court [*Horn v. Horn*, 226 Cal. Rptr. 666 (Ct. App. 1986)], found the payment's contractual basis rather than its purpose determinative of its character; in *Bane* [*Bane v. State*, 256 Cal. Rptr. 468 (Ct. App. 1989)], the court discounted the absence of a contract and focused instead on the benefit's purpose, and in *Lawson* [*Lawson v. Lawson*, 256 Cal. Rptr. 283 (Ct. App. 1989)], the court ignored the tie between the benefit and length of employment, because the right to the benefit resulted from conditions beyond the husband's control and accrued after the marriage ended.

53 Cal. Rptr. 2d at 36.

C. Sources of Income Classified as Marital Property [§ 2.62]

1. In General [§ 2.63]

The general rule at section 766.31(4) is that income earned or accrued by a spouse during marriage and after the determination date is classified as marital property. The principal exceptions include:

1. Income classified as other than marital property by a marital property agreement, *see infra* § 2.284, or by court decree, Wis. Stat. § 766.31(10); *see infra* §§ 2.105, .119;

2. Distributions to a spouse from a trust created by a third person (unless the trust provides otherwise), Wis. Stat. § 766.31(7)(a); *see infra* § 2.84;

3. Income attributable to nonmarital property subject to an effective unilateral statement under section 766.59, Wis. Stat. § 766.31(7p); *see infra* §§ 2.70–.82; and

4. Income generated by property given by one spouse to the other unless a contrary intent of the donor spouse can be established regarding such income, *see* Wis. Stat. § 766.31(10); *see also infra* §§ 2.86–.88.

Thus, the general rule is that all income earned or accrued by a spouse during marriage and after the determination date is marital property, whether the income is attributable to (1) a spouse's efforts during marriage and after the determination date or (2) a spouse's property. These two broad categories contain within them the many sources of marital property income discussed in sections 2.64–.89, *infra*.

2. Compensation [§ 2.64]

The most common source of income is the compensation and other remuneration a spouse earns or accrues during marriage and after the determination date for his or her services rendered after the determination date. This includes compensation in all its various forms: salary, wages, tips, stock options, commissions, bonuses, partnership

compensation, and payments in kind for services. Wis. Stat. § 766.01(10).

➢ ***Note.*** A unilateral statement does not apply to compensation income. *See infra* §§ 2.70–.82.

Certain benefits of employment such as club memberships and use of automobiles may be considered compensation. If such benefits are not compensation, they constitute income if they have value because they constitute economic benefits having value attributable to a spouse's effort. *See* Wis. Stat. § 766.01(10); *see also infra* § 2.66. Consequently, such benefits are income and therefore marital property if they have monetary value and are earned or accrued by a spouse during marriage and after the determination date.

3. Deferred-employment-benefit Plans [§ 2.65]

The definition of income in section 766.01(10) specifically refers to deferred-employment-benefit proceeds. Since compensation earned or accrued by a spouse during marriage and after the determination date is clearly marital property, so are benefits under deferred-employment-benefit plans based on the time of employment giving rise to the benefit during marriage and after the determination date. Wis. Stat. § 766.62.

Deferred-employment-benefit plans are given unique treatment under the Act in a number of respects that are covered in sections 2.184–.219, *infra*. Two characteristics are noted here, however. First, under sections 766.31(3) and 766.62(5), the nonemployee spouse's marital property interest in a deferred-employment-benefit plan terminates at that spouse's death if he or she predeceases the employee spouse. *See infra* § 2.201. Second, section 766.62 provides special rules for classifying deferred employment benefits. *See infra* §§ 2.186–.199.

Regarding the applicability of a unilateral statement to deferred-employment-benefit plans, see sections 2.70–.82, *infra*.

4. Economic Benefit Attributable to Effort [§ 2.66]

Section 766.01(10) includes in the definition of income "economic benefits having value attributable to the effort of a spouse." How

broadly this definition will be interpreted is unclear. It would seem to include proceeds received from management of a rental property or from activities in connection with a sole proprietorship, an unincorporated farm, and the like. See the discussion of livestock and farming operations, for example, at sections 2.52 and 2.53, *supra*. Regarding income accumulated inside an entity, see section 3.29, *infra*, and for the impact of a unilateral statement, see sections 2.70–.82, *infra*.

If not considered compensation, certain benefits of employment (club memberships, use of automobiles, etc.) constitute income if they have value, because they are economic benefits having value attributable to a spouse's effort. *See supra* § 2.64. Consequently, if the benefits have value they are marital property to the extent earned or accrued by a spouse during marriage and after the determination date. Wis. Stat. § 766.31(4).

5. Income Attributable to Certain Business Enterprises [§ 2.67]

Income earned or accrued by a spouse during marriage and after the determination date and attributable to a sole proprietorship is marital property whether or not the spouse's efforts are involved. Section 766.31(4) is broadly worded and (unless one of the exceptions in section 2.69, *infra*, applies) classifies as marital property the income earned or accrued by a spouse during marriage and after the determination date from any source, without reference to whether the income is attributable to a spouse's efforts. Whether income results from efforts or from the underlying investment may be relevant if a spouse owns a sole proprietorship as nonmarital property and executes an effective unilateral statement. Questions of apportionment of the income may then arise. *See infra* §§ 2.70–.82. Generally, income distributed by partnerships and dividends paid on corporate stock to a spouse during marriage and after the determination date are marital property. Regarding income retained by an entity, see section 2.51, *supra*, and section 3.46, *infra*; for the impact of a unilateral statement, see sections 2.70–.82, *infra*; and for the rule in connection with interspousal gifts, see section 766.31(10).

6. Income Attributable to Marital Property [§ 2.68]

The income earned or accrued by a spouse during marriage and after the determination date attributable to assets classified as marital property is likewise classified as marital property. Wis. Stat. § 766.31(4); UMPA § 4 cmt.

7. Income Attributable to Individual and Predetermination Date Property [§ 2.69]

Generally, income earned or accrued during marriage and after the determination date and attributable to assets classified as a spouse's individual property is marital property. *See* UMPA prefatory note; Wis. Stat. § 766.31(4); *see supra* § 2.8 (statutory definition of during marriage). Exceptions include:

1. Income from individual property received as a gift from the other spouse, unless a contrary intent with respect to the income can be established, *see* Wis. Stat. § 766.31(10); *see infra* §§ 2.86–.88.

2. Income from individual property subject to a unilateral statement, Wis. Stat. § 766.31(7p); *see infra* §§ 2.70–.82;

3. Income from individual property subject to a marital property agreement or court decree classifying income as other than marital property, Wis. Stat. § 766.31(7)(d); and

4. Income and principal distributed to a spouse after the determination date from a trust created by a third party, unless the trust provides otherwise, Wis. Stat. § 766.31(7)(a); *see infra* § 2.84.

   ➢ ***Example 1.*** Assume that a wife inherits stock from her father during marriage and after the determination date. The stock is her individual property. However, the cash dividends (other than as a return of capital) she receives that are attributable to the stock during marriage and after the determination date are classified as marital property unless one of the above exceptions applies.

The same analysis applies to income attributable to predetermination date property. Thus, subject to the same exceptions for income from

individual property, income earned or accrued during marriage and after the determination date attributable to a spouse's predetermination date property is marital property. Wis. Stat. § 766.31(4); UMPA § 2 cmt.

➢ ***Example 2.*** If the wife in Example 1 acquired stock by inheritance or gift from a person other than her husband while married and before the determination date, that stock is predetermination date property. However, the cash dividends (other than a return of capital) she receives on the stock during marriage and after the determination date are marital property unless one of the above exceptions applies.

8. Exception for Income Attributable to Nonmarital Property and Subject to Unilateral Statement [§ 2.70]

a. In General [§ 2.71]

In Wisconsin, a spouse may classify income attributable to his or her nonmarital property as individual property if the spouse properly implements a unilateral statement to that effect. The unilateral statement concept is not part of UMPA but is based on the so-called Louisiana fruits rule, *see* La. Civ. Code Ann. art. 2339 (West, WESTLAW current through the 2009 regular session).

The full statutory scheme involving the unilateral statement consists of provisions of sections 766.31(4), 766.31(7p), 766.31(10), and 766.59. Section 766.31(4) states the basic rule that income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property. *See supra* § 2.8 (statutory definition of during marriage). The section's introductory clause creates exceptions to the rule, however, including two described in subsections 766.31(7p) and (10). Section 766.31(7p) states that income attributable to all or specified property other than marital property with respect to which a spouse has executed a unilateral statement is individual property. Section 766.31(10) states, in part, that spouses may reclassify their property not only by gift or marital property agreement but also by a unilateral statement under section 766.59. Section 766.59 is the operative section in this statutory scheme. Subsection (1) states the general rule governing the execution of unilateral statements; subsections

(2) to (4) give the basic administrative and mechanical aspects of the statement; and subsection (5) describes the impact a unilateral statement has on third parties.

Section 766.59(1) states: "A spouse may unilaterally execute a written statement which classifies the income attributable to all or certain of that spouse's property other than marital property as individual property." Clearly, the statement may be executed unilaterally and without the other spouse's consent or participation.

➢ ***Example.*** Assume that a wife inherits IBM stock from her mother during marriage and after the determination date. That stock is her individual property, but the dividends attributable to that stock during marriage and after the determination date are marital property unless she executes a unilateral statement (or unless another of the exceptions described in section 2.69, *supra*, applies). If she executes a unilateral statement, the dividends accruing after the statement's effective date are her individual property. The unilateral statement is not executed unless signed by the wife and acknowledged by a notary. *See* Wis. Stat. § 766.59(2)(a). If the wife executed the unilateral statement before January 1, 1986, it was effective on January 1, 1986, or at such later time as provided in the statement. If she executed the unilateral statement on or after January 1, 1986, it was effective when executed or at such later time as provided in the statement. *Id.*

A unilateral statement may be executed before marriage. Wis. Stat. § 766.59(6). Within five days after a unilateral statement is signed, the "executing spouse" (or person intending to be married) must notify the person whom the executing spouse intends to marry or has married by either personally delivering a copy to the person the executing spouse intends to marry (or has married) or sending a copy by certified mail to the address of the person the "executing spouse" intends to marry (or has married). Wis. Stat. § 766.59(2)(b), (6). Failure to give notice apparently does not render the unilateral statement ineffective; rather, it gives rise to a breach of the duty of good faith imposed by section 766.15. *See* Wis. Stat. § 766.59(2)(b), (6). The unilateral statement is effective when executed, not when the other spouse receives notice of the statement. Wis. Stat. § 766.59(2)(a). A unilateral statement (and its revocation) may be recorded in the county register of deeds office under section 59.43(1)(r), Wis. Stat. § 766.59(2)(c), (4), and in connection with real estate under chapter 706.

b. Scope of Unilateral Statement [§ 2.72]

(1) Applicable Only to Income Attributable to Other Than Marital Property [§ 2.73]

A unilateral statement may apply only to income attributable to assets classified as other than marital property. Wis. Stat. § 766.59(1). A unilateral statement may not apply to income attributable to assets classified as marital property. If nonmarital and marital property assets are mixed but the various components can be identified, a unilateral statement applies only to the income that accrues after the statement's effective date and that is attributable to the nonmarital portion. A unilateral statement applies to income attributable to nonmarital property assets of all types; thus, it applies to income attributable to individual property and to income attributable to predetermination date property, even income that may be deferred marital property subject to the deferred marital property election by a surviving spouse.

(2) Income Attributable to Designated and After-acquired Nonmarital Property [§ 2.74]

Section 766.59(3) refers to income from "property designated in the statement," and section 766.31(7p) refers to a unilateral statement that may apply to all or specified property other than marital property. The language in these two sections should permit the terms of a unilateral statement to apply to the income that accrues after the statement's effective date and that is attributable to assets other than marital property owned at the statement's effective date. It is also apparent that a unilateral statement may designate certain items of nonmarital property, rather than all items of nonmarital property, the income of which is classified as individual property.

Unilateral statements are superfluous in at least three situations:

1. A unilateral statement is not necessary in connection with an interspousal gift. If the gift is intended to be the donee spouse's individual property, the income is also the donee spouse's individual

property unless a contrary intent of the donor is established. Wis. Stat. § 766.31(10); *see infra* §§ 2.86–.88, .285–.288.

2. A unilateral statement is not necessary to classify distributions of income (and principal) to a spouse from a trust created by a third party as that spouse's individual property. Wis. Stat. § 766.31(7)(a); *see infra* § 2.84.

3. A unilateral statement is not necessary if a marital property agreement classifies income as individual property. Wis. Stat. § 766.17(1); *see infra* ch. 7.

(3) Before or During Marriage and Prospective Only [§ 2.75]

All income that is attributable to the nonmarital property designated in the unilateral statement, and that accrues on or after the statement's effective date and before any revocation, is the individual property of the spouse who owns the property and executed the statement. Wis. Stat. § 766.59(3). A unilateral statement acts prospectively only; a unilateral statement may not apply to income that accrued on nonmarital property before the statement's effective date and may not reclassify such income, contrary to a possible implication of section 766.31(10), *see infra* § 2.289. Since it is prospective, a unilateral statement does not have any impact on income of predetermination date property that accrues while spouses are married and before the determination date; in short, the statement affects neither the characterization of such income as deferred marital property nor any mixing that occurred before the statement's effective date. *See* Wis. Stat. Ann. § 766.59 Legis. Council Committee Supplemental Notes Relating to 1985 Act 37 (West 2009). However, if income of predetermination date property that accrues while spouses are married and before the determination date is reinvested in nonmarital property, the income accruing from that reinvestment during marriage and after a statement's effective date is subject to the statement.

➢ ***Note.*** Section 766.59(3) uses the word "accrues." There may be cases in which (1) income accrues before a statement is effective but is actually received after the effective date or (2) income accrues before a statement is revoked or terminated but is actually received

after the revocation or termination. *See supra* § 2.57 (analysis of similar problem).

A unilateral statement executed during the marriage applies only to income accruing during the marriage after the statement's effective date. Wis. Stat. § 766.59(3). Thus, a unilateral statement is not effective for a subsequent marriage; a new statement is needed. A person intending to marry may execute a unilateral statement as if married. Wis. Stat. § 766.59(6). The statement is effective upon the marriage or at a later time, if so provided in the statement.

(4) Income Attributable to Efforts [§ 2.76]

A unilateral statement may apply only to income attributable to nonmarital property. A unilateral statement may not apply to income attributable to services or efforts. *See* Wis. Stat. Ann. § 766.59 Legis. Council Committee Supplemental Notes Relating to 1985 Act 37 (West 2009). If either spouse expends effort on nonmarital property that is subject to a unilateral statement, a question of apportionment arises. How much of the income is attributable to nonmarital property subject to the unilateral statement, and how much is marital property because it is an economic benefit having value attributable to a spouse's effort during marriage and after the determination date? *See* Wis. Stat. §§ 766.01(10), .31(4); *see also supra* § 2.8 (statutory definition of during marriage). Assume, for example, that a spouse devotes effort to managing a rental property that is his or her individual property and that he or she executes a unilateral statement. How much of the rent is subject to the statement and how much is marital property? As the Nevada Supreme Court put it in *Cord v. Neuhoff*, 573 P.2d 1170, 1173 (Nev. 1978), "It is evident that these concepts come into conflict when a spouse devotes his time, labor, and skill to the production of income from separate property."

➢ ***Comment.*** Nevada employs the American rule that income on separate property remains separate, *see supra* § 2.40. Therefore, in Nevada a unilateral statement is irrelevant. Nevertheless, when unilateral statements and spousal efforts come together in Wisconsin, cases from American-rule jurisdictions may be useful. The court in *Cord* explained that in each American-rule jurisdiction there must be apportionment of any increment in value between the owner's separate estate (individual property) and the community (marital property) and that all jurisdictions require an apportionment between

the separate estate and the community. *Cord*, 573 P.2d at 1173. However, the result in *Cord* must be compared with the all-or-nothing approach described in sections 2.46 and 2.53, *supra*. For further discussion of the mixing problem, see section 3.48, *infra*.

(5) Income Attributable to Invested Compensation and Deferred-employment-benefit Plans [§ 2.77]

A unilateral statement may not apply to a spouse's compensation for services rendered after the determination date because a unilateral statement applies only to income attributable to nonmarital property. What about income resulting from compensation that was earned before the determination date and is traceably invested in stock, real estate, and the like? A unilateral statement could apply to income from the investment accruing after the statement's effective date. Similarly, a unilateral statement may extend to earnings inside deferred-employment-benefit plans attributable to predetermination date employment. However, the impact of a statement on such earnings is minimized in any event because of section 766.62, which in effect apportions earnings in a plan, as well as contributions, pursuant to a formula based on time of employment before and after the determination date. *See infra* § 2.197. Moreover, the definition of income in section 766.01(10) does not apply to trust income until it is distributed. Wis. Stat. Ann. § 766.01(10) Legis. Council Notes—1985 Act 37, §§ 69 to 73 (West 2009). Thus, for plans involving trusts, it is not clear whether a unilateral statement applies to the income while it is accumulated. *But see infra* § 2.78.

(6) Income Inside Entities [§ 2.78]

Generally, income inside entities is not income for purposes of the Act and therefore is not subject to a unilateral statement. Income retained by a corporation, for example, may result in appreciation of the interest in the entity (such as the stock), but it is not income as defined under the Act. Generally, income exists only when it is distributed to a shareholder. As to these points and for treatment of partnerships, see section 2.51, *supra*, and section 3.29, *infra*.

Income accumulated by a trust should be carefully examined, however. Section 766.01(10) provides that until it is distributed, income generated by a trust or estate is not income for purposes of the Act. Wis. Stat. Ann. § 766.01(10) Legis. Council Notes—1985 Act 37, §§ 69 to 73 (West 2009). The impact of this rule may differ depending on the type of trust at issue.

In the case of a trust created by a third party for a spouse's benefit, the rule's impact is academic because income distributed to the spouse from the trust after the determination date is the spouse's individual property even if a unilateral statement is not executed. Wis. Stat. § 766.31(7)(a); *see infra* § 2.84.

In the case of a revocable trust created by a spouse and funded with that spouse's nonmarital property, a literal reading of section 766.01(10) would suggest that a unilateral statement will not apply to income accumulated by the trust after the statement's effective date. *See also* Wis. Stat. Ann. § 766.01(10) Legis. Council Notes—1985 Act 37, §§ 69 to 73 (West 2009). However, a strong argument can be made that the existence of the revocable trust should be ignored. The settlor spouse with management and control rights merely changed the form of ownership. Although management and control of the asset now shift to the trustee, the settlor may regain full management and control on demand. A revocable trust differs from a trust created for a spouse's benefit by a third person, in which the beneficial interests in the trust are determined by the third person and are gifts by the third person to a spouse. Thus, income accumulating after the determination date in a revocable trust created by a spouse should be treated as income (i.e., as "earned or accrued") under section 766.01(10) and should be susceptible to classification as individual property by a unilateral statement to the extent the income accrues after the statement's effective date.

(7) Income Attributable to Joint-tenancy or Tenancy-in-common Property [§ 2.79]

A joint tenancy or tenancy in common created before the determination date between spouses only or between a spouse or spouses and a third party may exist at the determination date, or such a tenancy may be created by a spouse or spouses with a third party after the determination date. *See* Wis. Stat. § 766.60(4)(a). There appears to be no reason why a unilateral statement could not apply to a spouse's

interest in the income accruing after the statement's effective date and attributable to nonmarital property in the tenancy. *See infra* § 2.83.

c. Revocation of Unilateral Statement [§ 2.80]

Section 766.59(4) provides that a unilateral statement may be revoked in writing by the executing spouse. After revocation, the Act's general classification rules apply to income attributable to the property and accruing after the revocation. It appears (although it is not expressly stated) that a revocation does not retroactively reclassify income that accrued while the statement was in effect. A revoking spouse must notify the other spouse of the revocation by personally delivering a copy to the other spouse or by sending a copy by certified mail to the other spouse's last-known address. The revocation may be recorded in the county register of deeds office under section 59.43(1)(r). Wis. Stat. § 766.59(4).

The formalities needed to revoke a unilateral statement should be compared with the formalities needed to make the execution of a unilateral statement effective. Both a statement and a revocation must be in writing. However, the requirements for notice to the other spouse differ for a statement and a revocation. A spouse (or person intending to marry) executing a unilateral statement must notify the other spouse (or the person he or she intends to marry) of the statement's contents within five days after the statement is signed by personally delivering a copy to the other spouse (or the person he or she intends to marry) or by sending a copy by certified mail to that other person's last-known address. A failure to give the notice is a breach of the duty of good faith. Wis. Stat. § 766.59(2)(b), (6). In contrast, section 766.59(4) specifies no time limit for delivery of a notice of revocation to the other spouse (or the person intended to be married), nor does it state that a failure to give a notice of revocation is a breach of the duty of good faith. It is arguable that a revocation is a declaration against interest and that therefore no delivery should be required. Nonetheless, it appears that delivery of a revocation may be a requirement to make the revocation effective. On the other hand, the effectiveness of the execution of the statement itself does not depend on delivery. *See supra* § 2.71.

d. Effect of Unilateral Statement on Third Parties [§ 2.81]

With respect to its effect on third parties, a unilateral statement or its revocation is treated as if it were a marital property agreement. Wis. Stat. § 766.59(5). For example, unless a creditor has actual knowledge of a unilateral statement or its revocation before the spouses incur an obligation or enter into an open-end plan, the unilateral statement or its revocation cannot adversely affect the creditor's interest. Wis. Stat. §§ 766.55(4m), .56(2)(c). The recording of a unilateral statement or its revocation under section 59.43(1)(r) does not constitute notice to third parties. Wis. Stat. § 766.56(2)(a). A unilateral statement or its revocation, like a marital property agreement, may be recorded in the chain of title under chapter 706 and constitutes notice to third parties in connection with the real estate involved. *See id.*

e. Planning Considerations [§ 2.82]

A unilateral statement may be used to increase assets classified as individual property. A statement may also be used to avoid or minimize certain mixing problems, especially when no income from spousal efforts is involved. Income earned or accrued by a spouse during marriage and after the determination date from nonmarital property is marital property if the spouse does not have a unilateral statement or some other applicable exception noted in section 2.69, *supra*; if, for example, such income is reinvested along with nonmarital property or used to reduce principal on mortgages on nonmarital property, mixing or reimbursement problems will occur. Wis. Stat. § 766.63(1). Although these problems may be avoided or minimized by using a unilateral statement, a mixing problem may nevertheless result if a spouse's efforts are applied to the underlying property subject to the statement. Wis. Stat. § 766.63(2); *see also supra* § 2.76, *infra* § 3.48. Furthermore, if the individual income is later mixed with assets classified as marital property and cannot be traced, it is reclassified. Wis. Stat. § 766.63(1). If the individual income is mixed with property that is deferred marital property and cannot be traced, it is subject to the deferred marital property election. Wis. Stat. §§ 766.63(1), 861.02(2)(a); *see also*, *infra* ch. 10. Finally, it should be noted that a unilateral statement does not remove the income involved from the assets otherwise available for division in a dissolution proceeding.

9. Income Attributable to Joint-tenancy Property and Tenancy-in-common Property [§ 2.83]

If the spouses do not have a marital property agreement, a document of title, instrument of transfer, or bill of sale used in an attempt to create a joint tenancy or tenancy in common exclusively between spouses after the determination date results in survivorship marital property or marital property, respectively. Wis. Stat. § 766.60(4)(b)1.a., b. If withdrawn, the income earned or accrued by a spouse during marriage and after the determination date and attributable to such an asset is marital property. Wis. Stat. § 766.31(4). Income attributable to the asset and not withdrawn is presumably survivorship marital property or marital property, respectively. Wis. Stat. § 766.60(4)(b)1.a., b.; *see infra* §§ 2.257, .258.

If a third party gives property in joint tenancy or tenancy in common to both spouses after the determination date, the property is survivorship marital property or marital property, respectively, unless the donor provides otherwise. Wis. Stat. § 766.60(4)(b)2. Assuming that the donor does not provide otherwise, the treatment of income withdrawn or not withdrawn should be the same as that described in the immediately preceding paragraph in connection with survivorship marital property or marital property, respectively.

If, however, after the determination date, the donor provides for a traditional joint tenancy or tenancy in common for both spouses, the income earned and withdrawn is marital property in the absence of a unilateral statement, interspousal gift, or marital property agreement or court decree to the contrary. *See* Wis. Stat. § 766.31(4). Reinvested income has the incidents of traditional joint-tenancy or tenancy-in-common property, as the case may be. *See* Wis. Stat. § 766.60(4)(b)2.

A joint tenancy or tenancy in common may have been either created exclusively between spouses before the determination date or given by a third party to spouses exclusively before the determination date. The traditional incidents of ownership of such tenancies control to the extent they conflict with incidents of property classification under chapter 766. Wis. Stat. § 766.60(4)(a). Income earned and withdrawn from such tenancies after the determination date is marital property unless one of the exceptions noted in section 2.69, *supra*, applies. Wis. Stat. § 766.31(4). Income that is not withdrawn, however, will probably be

given traditional joint-tenancy or tenancy-in-common treatment, as appropriate. *See infra* § 2.255.

A joint tenancy or tenancy in common may have been created between a spouse or spouses and a third party before the determination date. Such tenancies are recognized with all their traditional incidents of ownership to the extent they conflict with incidents of property classification under chapter 766. Wis. Stat. § 766.60(4)(a). Income earned and withdrawn by a spouse from such a tenancy after the determination date is marital property under section 766.31(4), unless one of the exceptions noted in section 2.69, *supra*, applies.

With regard to unwithdrawn income earned during marriage and before the determination date in connection with a joint tenancy created by a spouse and a third party, the decedent's fractional share is potentially part of the augmented marital property estate subject to election. *See* Wis. Stat. §§ 861.02, .03(2). Whether unwithdrawn income earned after the determination date is treated as a gift from the tenant spouse to the third party subject to the nontenant spouse's right of reimbursement under section 766.70(6)(c) is considered in section 8.57, *infra*.

A joint tenancy or tenancy in common may be created between a spouse and a third party after the determination date. If the spouse uses marital property cash to fund the arrangement, the cash is a gift to the third party subject to the nontenant spouse's right of reimbursement under section 766.70(6)(c). Whether the right of reimbursement extends to unwithdrawn income attributable to the property is considered in section 8.57, *infra*. Income withdrawn by a spouse is marital property under section 766.31(4) unless one of the exceptions noted in section 2.69, *supra*, applies. What if nonmarital property is used to fund the tenancy? Whether unwithdrawn income earned after the determination date is subject to the nontenant spouse's right of reimbursement under section 766.70(6)(c) is considered in section 8.57, *infra*.

10. Exception for Distributions to Spouse from Trust Created by Third Party [§ 2.84]

An important exception to the income rule of section 766.31(4) concerns postdetermination date distributions to a spouse from a trust created by a third party. A distribution of income from a trust is included

in the definition of income in section 766.01(10). However, section 766.31(7)(a) provides that income distributed during marriage and after the determination date from a trust created by a third person is the individual property of the spouse to whom it is distributed unless the trust provides otherwise. Section 766.31(7)(a) has no counterpart in UMPA.

Thus, in the absence of a marital property agreement or court decree to the contrary, an interspousal gift, or a unilateral statement, income generated by assets received by a spouse as an outright gift from a third person is treated quite differently from income received by that same spouse from a trust created by the same third-party donor. In the first case, the income is marital property; in the second, it is individual property, unless the trust provides otherwise. Consequently, a donor who does not wish a donee's spouse to have a marital property interest in the income of donated assets should consider using a trust.

If a trust is created by the third party for the benefit of both spouses, a distribution made to only one spouse should be treated as that spouse's individual property (unless the trust provides otherwise or one of the other exceptions noted in the preceding paragraph applies) because (1) the language of section 766.31(7)(a) focuses on whether a distribution is made to one spouse as opposed to both spouses and (2) it is consistent with the policy behind the provision to treat such a distribution as a gift at the time of distribution. A postdetermination date distribution to both spouses as joint tenants or as tenants in common is presumably survivorship marital property or marital property of the spouses unless the trust provides otherwise. Wis. Stat. § 766.60(4)(b)2.

Section 766.31(7)(a) does not apply to income distributed from a trust created by a spouse for the benefit of that spouse or the other spouse. *See infra* §§ 2.98–.104. As to income accumulated inside a revocable trust created by a spouse, see section 2.78, *supra*, and sections 2.101, .103, *infra*.

11. Net Probate Income [§ 2.85]

How will the net probate income accumulating during marriage and after the determination date in an estate of a third party, the beneficiary of which is a spouse, be classified? Net probate income remaining in an estate is not within the definition of income in section 766.01(10).

However, when the net probate income is distributed from the estate, it becomes income for purposes of section 766.01(10). *See* Wis. Stat. Ann. § 766.01(10) Legis. Council Notes—1985 Act 37, §§ 69 to 73 (West 2009). Therefore, in the absence of an effective unilateral statement or other applicable exception noted in section 2.69, *supra*, the income is marital property. (By contrast, income distributed to a spouse from a trust created by a third party is individual property unless the trust provides otherwise. Wis. Stat. § 766.31(7)(a); *see supra* § 2.84.) It may be advantageous to issue a separate check representing the net probate income to the beneficiary entitled to the income. *See infra* § 12.177.

In the absence of an effective unilateral statement or other applicable exception noted in section 2.69, *supra*, the income attributable to a specific bequest or devise and distributed to a spouse after the determination date should be marital property because it is income earned or accrued by the spouse during marriage and after the determination date on a gift from a third party. *See* Wis. Stat. § 766.31(7)(a). If the beneficiary of an estate is a trust, all net probate income flowing from the estate to the trust and from the trust to a trust beneficiary pursuant to section 701.20 should be individual property (unless the trust provides otherwise) because it is trust income distributed to a spouse during marriage and after the determination date from a trust created by a third party. *See id.*

12. Exception for Income on Interspousal Gifts [§ 2.86]

a. After Determination Date [§ 2.87]

A completed gift of property from one spouse to the other after the determination date that is intended to be the donee's individual property reclassifies the property as the donee's individual property. Wis. Stat. § 766.31(10). It may be necessary to show donative intent so that no other interpretation can be attached to the transfer. It is probably safest to show donative intent with a signed writing. Is the income from the property also classified as the donee's individual property? Section 766.31(10) answers that question in the affirmative by stating that if a spouse gives property to the other spouse and intends when the gift is made that the property be the donee's individual property, the income from the property is also the donee's individual property unless a

contrary intent of the donor regarding the classification of income is established. The burden of proving that the income is not individual property should be on the donor or persons claiming through the donor. *Cf.* Tex. Const. art. XVI, § 15 (creating presumption that income from property given by one spouse to other spouse is donee's separate property); *see also* La. Civ. Code Ann. art. 2343 (West, WESTLAW current through the 2009 regular session) (providing that income from community asset donated by one spouse to other spouse is donee's separate property unless otherwise provided in act of donation). For planning aspects, see chapter 10, *infra*.

b. Before Determination Date [§ 2.88]

Assume that before the determination date, one spouse gave income-producing property to the other spouse while the two were married and intended the property to be the donee spouse's solely owned property. How would predetermination date and postdetermination date income from that gift be treated? The question reveals a gap in the Act—namely, the lack of any specific provision dealing with interspousal gifts of predetermination date property made before the determination date.

Section 766.31(4) specifically states that, subject to certain exceptions, all income from property earned or accrued by a spouse during marriage and after the determination date is marital property. *See supra* § 2.8 (statutory definition of during marriage). Moreover, the Act's general scheme is that all property of spouses is marital property unless classified otherwise. Wis. Stat. § 766.31(1). Section 766.31(10) refers only to gifts that are intended to be the donee spouse's *individual* property, *see supra* § 2.87, and predetermination date property by definition is not individual property, *see* UMPA § 4 cmt.

Arguably, the policy of section 766.31(10) should be extended to the income from interspousal gifts of predetermination date property made before the determination date. Pursuant to that policy, income earned or accrued by a spouse before the determination date attributable to an interspousal gift completed before the determination date would be treated as the donee spouse's solely owned property (solely owned because technically it cannot be individual property) unless it could be established that the donor spouse intended otherwise. Assuming that the income was intended to be the donee spouse's solely owned property, such income would not be deferred marital property subject to election of

the surviving spouse under section 861.02 because if the Act had been in effect when the gift was made, the income from the gift would have been the donee spouse's individual property. Similarly, income from such a gift earned or accrued by the donee spouse during marriage and after the determination date would be that spouse's individual property.

The result in *Poindexter v. Poindexter*, 142 Wis. 2d 517, 419 N.W.2d 223 (1988), is inconsistent with the immediately preceding analysis. In *Poindexter*, the Wisconsin Supreme Court considered whether income from a gift of rental property made by a husband to his second wife before the determination date was to be considered by the court in setting maintenance payments to the husband's former spouse; the classification issues are relevant here. The court held that the rental property acquired by the second wife was predetermination date property because the gift was made to her before January 1, 1986, the couple's determination date. Noting that under section 766.31(9), property acquired before the determination date is treated "as if it were individual property" and that income from a spouse's individual property accruing during marriage and after the determination date is marital property, the court held that the rental income was marital property and that the husband owned a one-half interest. *Id.* at 539–40. The decision makes no reference to section 766.31(10), which states that when property is given by one spouse to the other and the donor spouse intends that the property be the donee spouse's individual property, the income from the gift is the donee spouse's individual property unless the donor spouse indicates an intent to the contrary. Thus, the court did not discuss why the classification rules for the income from predetermination date property acquired by interspousal gift should differ from the rules applicable to income from postdetermination date property acquired by interspousal gift.

13. Income Substitutes and Personal-injury Awards [§ 2.89]

A spouse's income may be lost as a result of injury or disability. The characterization of personal-injury awards and income substitutes is considered in sections 2.127–.139, *infra*.

D. Appreciation [§ 2.90]

1. In General [§ 2.91]

The drafters of the Act made major decisions concerning classification of the appreciation of marital, individual, and predetermination date property. Sections 2.92–.95, *infra*, deal with appreciation other than an increase in value as a result of additional investment.

2. Appreciation of Marital Property [§ 2.92]

All appreciation of a marital property asset is marital property because no other classification is provided for it. UMPA § 4 cmt.; Wis. Stat. § 766.31(1).

3. Appreciation of Individual Property [§ 2.93]

Appreciation of individual property may have to be apportioned between individual and marital property classifications. Under section 766.63(2), substantial appreciation of individual property that results from the substantial undercompensated labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity of either spouse is marital property. All other appreciation of individual property (such as that resulting from market conditions or that failing to meet the tests set forth in section 766.63(2), even if spousal efforts are involved) is individual property. Wis. Stat. §§ 766.31(7)(c), .63(2); *see also infra* ch. 3 (particularly sections 3.44–.48).

The court cited section 766.63(2) and applied similar reasoning in *Haldemann v. Haldemann*, 145 Wis. 2d 296, 426 N.W.2d 107 (Ct. App. 1988), a dissolution proceeding. The court held that appreciation (without indication that it must be substantial) of a spouse's nondivisible property that resulted from the other spouse's uncompensated effort beyond that normally required by the marital relationship was divisible at dissolution. *See infra* § 11.16.

Kobylski v. Hellstern (In re Estate of Kobylski), 178 Wis. 2d 158, 503 N.W.2d 369 (Ct. App. 1993), involved a wife's personal residence that

was classified as individual property. Improvements to the residence were paid for from marital property funds. The husband performed labor on the residence, thereby allegedly increasing its value. The court distinguished improvements and appreciation attributable to cash payments from improvements and appreciation resulting from the husband's labor. As to whether the cash payments created a marital property interest in the home or simply a right of reimbursement, the court held that the improvements take the classification of the underlying property (in this case, individual property) and that the "marital estate" has a right of reimbursement equal to the enhanced value attributable to the improvements (as opposed to a right of reimbursement under a dollar-for-dollar-expenditure reimbursement theory). Expenditures that relate merely to the maintenance of property or that do not enhance the property's value are not to be considered. *Id.* at 176–80. On the other hand, labor mixing that meets the tests under section 766.63(2) creates an ownership interest measured by the appreciation attributable to that labor. *Id.* at 185; *see infra* § 3.42.

Issues involving spousal efforts resulting in appreciation of individual property closely held stock are considered in section 2.51, *supra*.

4. Appreciation of Predetermination Date Property [§ 2.94]

Appreciation of predetermination date property is considered at sections 2.149–.153, *infra*.

5. Appreciation of Mixed Property [§ 2.95]

If an asset has individual and marital property components and the individual property component can be traced, the asset is mixed property. Wis. Stat. § 766.63(1); *see infra* ch. 3. As to whether the appreciation of such an asset is apportioned between the individual and marital property components or whether there is simply a claim for reimbursement, see sections 3.11 and .42, *infra*.

E. Property Reclassified Through Mixing When Tracing Is Impossible [§ 2.96]

Section 766.63(1), an extremely important statutory provision, states that except as provided in connection with life insurance policies and deferred-employment-benefit plans, mixing marital property with property having any other classification reclassifies the other property to marital property unless the nonmarital component of the mixed property can be traced. If, for example, marital property wages are deposited in an account containing inherited cash, and subsequent activity in the account causes mixing to the point that tracing the nonmarital component is impossible, the entire account balance becomes marital property. Similar mixing reclassification occurs when the proceeds from the sale of nonmarital property are mixed with marital property. *See infra* ch. 3. Treatment as deferred marital property may occur in some instances. *See infra* §§ 2.235–.237, .238, 3.4.

F. Third-party Gifts to Both Spouses [§ 2.97]

A postdetermination date gift made during lifetime or at death by a third party to both spouses is marital property, survivorship marital property, joint-tenancy property, or tenancy-in-common property, depending on the donor's intent. Section 766.60(4)(b)2. provides that if, after the determination date, a third party gives property to both spouses titled in joint tenancy exclusively between the spouses, it is survivorship marital property unless the donor provides otherwise. If a third party gives property in the form of a tenancy in common exclusively between spouses after the determination date, the property is marital property unless the donor provides otherwise. Thus, under this statute, use of the words *joint tenancy* or *tenancy in common* without more is not sufficient to create a joint tenancy or tenancy in common. *See id.* Of course, a donor could give property to both spouses as marital property or as survivorship marital property.

➢ ***Comment.*** The inclusion of section 766.60(4)(b)2. in the Act establishes that a third-party donor's expression of the intent to create a joint tenancy or a tenancy in common exclusively between spouses after the determination date is recognized in Wisconsin, despite any implications to the contrary based on UMPA. Section 4 of UMPA, on which section 766.31(7)(a) is based, provides that a gift made

during lifetime or at death by a third person to only one spouse during marriage and after the determination date is individual property. A gift made to both spouses, on the other hand, is marital property, states the comment to UMPA section 4, and this rule applies to gifts to both spouses in any form, including transfers to the spouses as joint tenants or tenants in common. UMPA § 4 cmt. Clearly, the inclusion in the Marital Property Act of section 766.60(4)(b)2., for which there is no corresponding provision in UMPA, represents a change from UMPA and is intended to override the comment to UMPA section 4 and any implication based on that comment in section 766.31(7)(a).

The rule set forth in section 766.60(4)(b)2. is similar to the holding in *In re Marriage of Martin*, 645 P.2d 1148 (Wash. Ct. App. 1982). In *Martin*, the court approved a suggestion made by Professor Harry Cross in *The Community Property Law in Washington*, 49 Wash. L. Rev. 729, 750 (1974), that a gift to both spouses by a third party should be presumptively community property in the absence of proof of the donor's different intent.

As to gifts made to both spouses by a third party before the determination date, see section 2.255, *infra*.

G. Marital Property Transferred to Trust by Spouse or Spouses [§ 2.98]

1. Living Trusts [§ 2.99]

a. In General [§ 2.100]

Section 766.31(5) provides: "The transfer of property to a trust does not by itself change the classification of the property." This language replaced language in the Act as originally enacted providing that "marital property transferred to a trust remains marital property." Wis. Stat. Ann. § 766.31(5) Legis. Council Notes—1985 Act 37, §§ 76 to 83 (West 2009). The replacement was made because the latter provision "raised many questions." *Id.* Under the revised language, the mere transfer of a marital property asset to a trust does not change the classification of the property transferred. *Id.*

b. Revocable Trusts [§ 2.101]

The revised language of section 766.31(5), *see supra* § 2.100, applies to revocable trusts. Indeed, the comment to section 4 of UMPA, on which the originally enacted language was based, states that the "principal enabling function" of former section 766.31(5) was to permit the creation of revocable living trusts by one or both spouses without any automatic reclassification of the property committed to the trust. Revocable trusts holding marital property assets should avoid probate as to the transferor, *see* Steven L. Nelson, *The Community Property Agreement: A Probate Cure with Side Effects*, 11 Comm. Prop. J. 185 (1984), but may be reached by creditors under such provisions as sections 701.06(6) and 701.07(3).

➢ ***Example.*** Assume that a wife unilaterally creates a revocable trust and that she transfers to it a marital property asset over which she has management and control. The transfer does not by itself reclassify the asset, and a completed gift has not been made until the wife can no longer revoke the trust. Thus, depending on the terms of the revocable trust, the trust may hold assets classified as marital property.

If the revocable trust holds assets classified as marital property and the wife dies survived by her husband, the husband has a claim under section 766.70(6)(b)1. to recover his interest in the former marital property assets held by the trust or distributed to a third-party beneficiary. The spouses, by documentation, could change that result. *See infra* ch. 10. The assets are "former marital property" because marital property cannot exist after one spouse dies. *See* UMPA § 4 cmt. The wife's share of the former-marital-property assets passes under the terms of the trust. There may be gift tax consequences for the husband if he does not claim his share of the former-marital-property assets at his wife's death when the trust becomes irrevocable. *See infra* § 9.91.

If, on the other hand, the husband dies first, his will or the laws of intestacy dispose of his interest in the former-marital-property assets transferred to the trust; the wife's interest in the former-marital-property assets remains in the trust. *See infra* §§ 10.36, .62; *see also infra* § 10.61 (sample form).

If both spouses act together in creating a revocable trust, the transfer of marital property assets to the trust does not by itself reclassify the property. However, the trust's terms could direct a reclassification. *See infra* ch. 10. It may also be possible that spouses acting together could inadvertently reclassify marital property assets by putting terms into a revocable trust that are inherently inconsistent with the nature of marital property. *See, e.g., infra* § 10.36.

c. Irrevocable Trusts [§ 2.102]

Section 766.31(5) states that a transfer of property to a trust does not "by itself" change the classification of the property. If something is added to the transfer, the clear implication is that marital property interests in the property are reclassified (or divested) to the extent no interests are retained. (Transfers with retained interests and interests provided for the other spouse are discussed later in this section.) In the case of an irrevocable trust, the fact of the trust's irrevocability (a necessary element of a completed gift) should, by itself, supply the additional element needed to reclassify the property from the moment of transfer, even if one spouse unilaterally transfers a marital property asset to an irrevocable trust. Such a transfer should result in a completed gift and thus should be subject to remedies provided to the other spouse.

If the trust's irrevocability by itself does not suffice to reclassify the property (and neither section 766.31(5) nor the Legislative Council notes on the section specifically state that it does, *see* Wis. Stat. Ann. § 766.31(5) Legis. Council Notes—1985 Act 37, §§ 76 to 83 (West 2009)), the act of both spouses transferring a marital property asset to an irrevocable trust for a third person's benefit should provide the additional element needed to reclassify the property and to divest both spouses of any marital property interest in the property. If such a transfer is made directly to an individual, it is a completed gift; the result should be the same if a trust is involved. In short, in the situation posed, a completed gift is made.

But what if a spouse with management and control unilaterally transfers marital property to an irrevocable trust solely for a third party's benefit and the other spouse does not assert his or her rights to recover the gift property within the time prescribed by section 766.70(6)(a)? Does the property remain marital property, or is the transfer a completed gift when the time expires for the nonparticipating spouse to reclaim the

property transferred to the trust? It is fair to conclude that at the moment that a spouse unilaterally transfers marital property to an irrevocable trust for a third person's sole benefit, all marital property interests are reclassified and the transfer is a completed gift subject to the remedies provided to the other spouse, including those under section 766.70(6)(a), if the dollar amounts of section 766.53 are exceeded.

The result should be the same if a spouse with management and control creates and funds an irrevocable trust with a marital property asset and retains an income interest in the trust but provides a remainder interest for a third person. The transfer "by itself" does not reclassify the property. But the fact of irrevocability should divest and reclassify marital property interests, at least in the remainder interest, from the moment of transfer. This should be true even though the settlor spouse retained a valuable property right (the life-income interest) and the designation of a third person as remainder beneficiary denies the nonparticipating spouse the right to dispose of his or her interest in the remainder at death if remedies are not asserted under section 766.70(6)(a). For purposes of sections 766.53 and 766.70(6)(a), the retained interest is ignored in valuing the gift to the trust; the full value of the property is the value of the gift, and that value determines whether the nonparticipating spouse has a remedy under section 766.70(6)(a). Thus, from the nonparticipating spouse's point of view, the valuation of the gift and the maximum amount that may be recovered in connection with a transfer to a trust when the donor spouse retains an interest do not differ from the remedy provided in connection with an outright gift of the entire asset.

That the nonparticipating spouse loses the right to dispose of his or her marital property interest at death does not alter this conclusion. That is the consequence of a completed gift to an individual when the other spouse fails to assert available remedies within the time prescribed in section 766.70(6)(a), and the same rules should apply when irrevocable trusts are involved.

If the settlor spouse unilaterally creates a trust, funds it with assets classified as marital property, and provides an income interest for the other spouse with the remainder to a third person, a similar set of problems and answers may arise for the nonsettlor spouse. But there are some differences, too. For purposes of determining the relevant dollar values, section 766.53 refers to an interest donated to a spouse, but it does so only in the context of an income interest retained by the donor

spouse. Section 766.53 does not specifically deal with a case in which the donor spouse does not retain an interest but instead provides an income interest for the other spouse. The nonsettlor spouse's income interest may or may not be his or her individual property as a gift from the settlor spouse pursuant to section 766.31(10). The answer could turn on the trust's terms or the settlor's intent. If the nonsettlor spouse does not acquiesce in this arrangement, then for purposes of sections 766.53 and 766.70(6)(a) the income interest given the other spouse presumably should be ignored so that the full value of the property is the value for gift and recovery purposes.

➢ ***Practice Tip.*** The planner can eliminate any uncertainty about the classification of the property committed to an irrevocable trust by having both spouses act together in transferring the property to the trust. An alternative is to ensure that no asset classified as marital property is transferred to the trust. A marital property agreement, for example, could reclassify marital property assets as the settlor spouse's individual property assets before the transfer to the trust is made.

For analysis of the powers of trustees in connection with trusts holding assets classified as marital property, see section 4.61, *infra*.

d. Accumulated Income [§ 2.103]

Income may be accumulated by a revocable trust created by a spouse unilaterally and funded with marital property assets. The transfer to the trust is not a completed gift, and thus the property transferred should retain its character as marital property under section 766.31(5). The proper analysis is that the accumulated income is also marital property. This should be true despite the implication of section 766.01(10) that trust income is not income for purposes of the Act until distributed. *See* Wis. Stat. Ann. § 766.01(10) Legis. Council Notes—1985 Act 37, §§ 69 to 73 (West 2009). That implication is inappropriate for revocable trusts. Although there is no specific language in the Act supporting it, a strong argument can be made that income accumulated during marriage and after the determination date in a revocable trust created by a spouse should be included in the definition of income for purposes of the Act. The trust was created by a spouse with management and control over the assets, and simply changing the form of holding to a revocable trust should not alter the nature of the income accumulated or the spouses'

rights with respect to it. Thus, if a settlor spouse unilaterally commits marital property assets to a revocable trust and income is accumulated by the trust during marriage and after the determination date, and if the nonsettlor spouse dies first, sound policy dictates that the deceased spouse's estate has an interest in the income.

If a spouse creates a revocable trust and commits his or her nonmarital property assets to the trust, income accumulated during marriage and after the determination date is marital property; however, a unilateral statement executed by the settlor spouse should apply to the income accumulated by the trust after the statement's effective date. *See supra* § 2.78. If the income retained by the revocable trust is income for purposes of the Act (and there is no unilateral statement), section 766.63(1) appears to apply: that is, if nonmarital property assets committed to the trust cannot be traced because the income is reinvested in the trust, the assets fluctuate in value, and withdrawals are made from time to time, all the trust assets may, as a result of mixing, be reclassified as marital property.

Income may be accumulated in an irrevocable trust created unilaterally by a spouse for a third person's sole benefit. Even if assets classified as marital property are transferred to the trust, all marital property interests in the donated property should be reclassified because the transfer is a completed gift. However, the nonsettlor spouse has remedies including that under section 766.70(6)(a) if the dollar amounts of section 766.53 are exceeded. *See infra* § 8.45.

- ***Example.*** Assume a spouse establishes an irrevocable trust with marital property assets and retains a mandatory income interest, with the remainder made payable to a third person. Income distributed to the settlor spouse after the determination date is marital property under subsection 766.31(4) or (1). How is the income classified if it is allowed to accumulate? Assume that the time for invoking a remedy under section 766.70(6)(a) has passed.

Before considering the classification of the income interest in the above example, it should be noted that the remainder interest in the example is reclassified because it is a completed gift. The other spouse's failure to assert a remedy under section 766.70(6)(a) means that the assets committed to the trust may not be reclaimed as marital property.

Nevertheless, the failure to assert a remedy should not mean that the retained income interest is also reclassified. The retained interest is an interest in property under the broad definition of property in section 766.01(15), which includes equitable interests. That interest has not been transferred, and the accumulated income is the settlor's upon demand.

Consideration must also be given to section 766.01(10), which implies that income retained in a trust is not income for purposes of the Act. The analysis used in the preceding paragraphs for revocable trusts should apply. The trust was created by a spouse with management and control over the assets. Simply changing the form of holding the income to that of a trust over whose income the settlor retains full control should not alter classification of the income. The accumulated income should remain marital property. A gift of that income, therefore, is not complete until the settlor dies, at which time the right to demand the income expires and a remedy under section 766.70(6)(b) may be invoked by the nonsettlor spouse with respect to it.

If the above analysis is incorrect and the income interest is reclassified along with the remainder interest when the assets are transferred to the trust, then the nonsettlor spouse must assert his or her remedy under section 766.70(6)(a), which applies regardless of the interest retained by the settlor spouse.

➢ ***Practice Tip.*** Until the issue discussed above is fully resolved, a nonsettlor spouse may wish to assert the remedy under section 766.70(6)(a) within the time prescribed.

What if the irrevocable trust provides only a discretionary interest in income (not subject to ascertainable standards) for the settlor spouse? The income is marital property under subsection 766.31(4) or (1) if it is distributed to the spouse during marriage and after the determination date. What if the income is accumulated? A settlor spouse has no enforceable right to the income, the equitable interest in the income interest expires at the settlor's death, and there appears to be no transfer at that time. Of course, the nonsettlor spouse has remedies, including that under section 766.70(6)(a). It would appear that the time within which to assert such a remedy begins upon the transfer to the trust.

2. Testamentary Trusts [§ 2.104]

When a spouse dies leaving a will that creates a testamentary trust, the trust cannot be funded with marital property assets because marital property can be owned only by living spouses. UMPA § 4 cmt. Rather, the trust is funded with the decedent's share of former marital property and nonmarital property.

With respect to forced and unforced elections in connection with trusts, see chapter 10, *infra*.

H. Marital Property Acquired by Decree [§ 2.105]

Section 766.31(7)(d) states that individual property may be acquired during marriage and after the determination date by court decree. *See supra* § 2.8 (statutory definition of during marriage). There is no similar language in section 766.31 referring to acquisition of marital property by decree, and none is needed because all property of spouses is marital property, except that which is classified otherwise by chapter 766. At dissolution, the parties own former marital property assets as equal tenants in common unless the decree or an agreement entered into by the former spouses after dissolution provides otherwise. Wis. Stat. § 766.75. Section 766.70(2) permits a court to order an accounting; determine rights of ownership in, beneficial enjoyment of, or access to marital property; and determine the classification of all property of the spouses. *See infra* §§ 8.20–.22. On the other hand, if marital property assets have been or are likely to be substantially injured by a spouse's gross mismanagement, waste, or absence, section 766.70(4) permits a court to order a change in the classification of marital property. *See infra* § 8.31. A spouse's recovery during marriage and after the determination date for damage to property under section 766.70 is individual property, except as specifically provided otherwise in a decree or marital property agreement. Wis. Stat. § 766.31(7)(e); *see infra* § 8.38. After a spouse's death, a probate court may determine the classification of property. Wis. Stat. § 857.01. As to personal-injury awards, see sections 2.127–.134, *infra*.

Recoveries for damage to marital property are discussed in section 2.125, *infra*.

VI. Individual Property [§ 2.106]

A. Definition [§ 2.107]

Individual property is a creation of the Act. With one exception, it can be acquired only after the determination date by a spouse. The exception (not found in UMPA) involves property owned by a spouse at a marriage occurring after January 1, 1986, if both spouses have a Wisconsin domicile when they marry. Wis. Stat. § 766.31(6). Other than this exception, all property acquired before the determination date is not individual property and is referred to in this chapter as predetermination date property. Predetermination date property, by definition, is not a type of individual property. The comment to UMPA section 4 states: "Property in existence prior to adoption [of UMPA] is not individual property, by definition, since the classification of individual property is a creation of [UMPA]. Property in existence prior to adoption of [UMPA] is whatever it is without [UMPA]."

B. Attributes [§ 2.108]

The comment to section 4 of UMPA explains that except for the income attributable to individual property earned or accrued by a spouse during marriage and after the determination date (which income is generally marital property), individual property is analogous to solely owned property in common law jurisdictions.

➢ ***Note.*** Individual property differs from solely owned property in common law jurisdictions in two important respects. Unlike solely owned property of a deceased spouse in a common law jurisdiction, individual property of a deceased spouse with a Wisconsin domicile is not subject to a surviving spouse's elective rights. Further, although income attributable to individual property is generally classified as marital property, it may be classified as individual property if it is subject to one of the exceptions noted in section 2.69, *supra*.

During marriage, a spouse may manage and control his or her individual property and regulate its income, even though the income may be marital property, *see* Wis. Stat. §§ 766.51(1)(a), (am), .15(2). The owner of individual property may unilaterally make gifts of the property,

sell the property, pledge the property, and otherwise manage and control the property free of limitations (other than those described in sections 861.17 and 767.61, noted below, and in connection with a homestead, *see* Wis. Stat. § 706.02(1)(f)). For a full explanation of the rules of management and control, see chapter 3, *infra*.

At death, unless section 861.17(1) (pertaining to property transferred in fraud of a surviving spouse) applies, and subject to the right to allowances under chapter 861, the owner may dispose of his or her individual property without limitation. As noted above, individual property owned by a deceased spouse with a Wisconsin domicile is not subject to a surviving spouse's elective rights, unlike solely owned property in a common law jurisdiction.

Individual property retains that status at all times unless reclassified by mixing, marital property agreement, or other means of reclassification provided by the Act. *See infra* §§ 2.283–.295. Proof is necessary, however, to rebut the general presumption that all spouses' property is marital property, or at death, to rebut the secondary presumption that it is deferred marital property. *See* Wis. Stat. §§ 766.31(2), 861.02(2)(a).

Rights over individual property are not unlimited, however. A court in an equitable proceeding may subject individual property to a surviving spouse's rights if arrangements are made in fraud of that spouse's rights under chapter 852 (intestacy) and chapter 861 (allowances). Wis. Stat. § 861.17(1); *see infra* § 12.168 (discussing section 861.17(1) reference to intestacy and allowances). In addition, individual property is subject to property division under section 767.61 in dissolution proceedings.

VII. Kinds of Individual Property [§ 2.109]

A. Property Owned at Marriage Taking Place After January 1, 1986 [§ 2.110]

Section 766.31(6) states that "[p]roperty owned at a marriage which occurs after 12:01 a.m. on January 1, 1986, is individual property of the owning spouse if, at the marriage, both spouses are domiciled in this state."

➢ ***Example.*** Assume that a marriage occurs on January 10, 1990, the wife owns property at the marriage, and both spouses are domiciled in Wisconsin at the time of marriage. Whether acquired before or after January 1, 1986, by purchase, gift, inheritance, or other means, the wife's property is her individual property. It retains that status during her marriage as long as it is not reclassified by mixing, marital property agreement, or other means provided by the Act. *See infra* part XIII.

The Act does not classify property owned by a spouse at a marriage that occurs after January 1, 1986, if either spouse, at marriage, has a marital domicile in another state but later both spouses establish a Wisconsin domicile. Such property is neither individual nor marital property. *See* Wis. Stat. Ann. § 766.31(6) Legis. Council Notes—1985 Act 37, §§ 76 to 83 (West 2009). In the absence of subsequent mixing, a marital property agreement, or other means of reclassification provided by the Act, such property must be predetermination date property that would have been individual property if the Act had then applied. Similarly, the Act does not classify property owned by a spouse at a marriage occurring before January 1, 1986, even if both spouses are domiciled in Wisconsin when they marry. Again, without subsequent mixing, a marital property agreement, or other means of reclassification under the Act, this property is a type of predetermination date property that would have been individual property if the Act had then applied. In each case, the property is not deferred marital property subject to a surviving spouse's election because the property was acquired before marriage. *See* Wis. Stat. § 851.055.

Assets acquired before a marriage but paid for during a marriage present a potential mixing problem. *See infra* ch. 3.

B. Certain Property Acquired During Marriage and After Determination Date [§ 2.111]

1. In General [§ 2.112]

Certain acquisitions during marriage and after the determination date are individual property if acquired in certain ways. Wis. Stat. § 766.31(7); *see supra* § 2.8 (statutory definition of during marriage). These acquisitions are discussed in sections 2.113–.121, *infra*.

2. Gift or Disposition at Death Made to One Spouse by Third Person [§ 2.113]

a. In General [§ 2.114]

A gift during lifetime or a disposition at death made by a third person to only one spouse during that spouse's marriage and after the determination date is individual property. Wis. Stat. § 766.31(7)(a). Similarly, a distribution of principal or income to one spouse during marriage and after the determination date from a trust created by a third person is the recipient's individual property unless the trust provides otherwise. *Id.* A gift made by a third person to both spouses exclusively as joint tenants or tenants in common during marriage and after the determination date is survivorship marital property or marital property, respectively, unless the donor provides otherwise. *See supra* § 2.97 (discussing section 766.60(4)(b)2.).

➢ ***Note.*** The definition of during marriage in section 766.01(8) does not include periods when either or both of the spouses are not domiciled in Wisconsin. Distributions and gifts like those described in this section are not subject to the Act if they occur while either or both of the spouses are not domiciled in Wisconsin. If both spouses are domiciled in Wisconsin after receiving a gift from a third party, the property could be reclassified by marital property agreement or other means provided by the Act.

b. Outright Gift [§ 2.115]

An outright gift is individual property within the terms of section 766.31(7)(a) if it is made by a third person to only one spouse during marriage and after the determination date. *See supra* § 2.8 (statutory definition of during marriage). Section 766.31(7)(a) does not refer to gifts made by one spouse to the other. Section 766.31(10), however, permits spouses to reclassify their property by gift. *See infra* §§ 2.286–.288.

Of course, a gift must in fact have been made. For example, what may appear to be a testamentary gift may actually be the fulfillment of a contractual obligation. In *Andrews v. Andrews*, 199 P. 981 (Wash. 1921), the court determined that a testamentary devise was, in reality,

given in exchange for services to the decedent and thus was community property rather than the separate property of the purported devisee. To further illustrate, an inter vivos transfer from a third person to a spouse for less than adequate consideration may be part gift and part sale; whether the sale portion is marital property or individual property turns on the source of the payment made by the recipient. *See, e.g.*, *Stanger v. Stanger*, 571 P.2d 1126 (Idaho 1977). As a third example, amounts received pursuant to rights compromised in a will contest probably take the same character as the rights compromised. *See, e.g.*, *In re Estate of Clark*, 271 P. 542 (Cal. Ct. App. 1928).

c. Distributions from Trust [§ 2.116]

UMPA has no provisions regarding the classification of distributions from a trust. By contrast, section 766.31(7)(a) provides that a distribution during marriage and after the determination date to one spouse from a trust created by a third party is the individual property of that spouse unless the trust provides otherwise. *See supra* § 2.8 (statutory definition of during marriage).

- ***Comment.*** The scope of section 766.31(7)(a) is not limited to trusts for one spouse only; it also includes trusts created by third parties that could distribute income or principal to either or both of the spouses. However, a distribution from such a trust is the recipient's individual property (unless the trust provides otherwise) if made only in that spouse's name. The policy here is to treat a distribution to one spouse as a gift from a third person to that spouse at the time of distribution. By contrast, a postdetermination date distribution to both spouses jointly or as tenants in common presumably is survivorship marital property or marital property unless the trust provides otherwise. *See* Wis. Stat. § 766.60(4)(b)2.

The word *distribution* includes distributions of both income and principal. *See* Wis. Stat. § 766.31(7)(a). It should make no difference whether a distribution is mandatory or discretionary or whether the recipient spouse is also the sole trustee or a cotrustee of the trust making the distribution. It is probably irrelevant whether an amount received through the exercise of a power of withdrawal is a distribution; receipt of such an amount is virtually the same as receipt of a direct gift from a third person and should therefore be considered the recipient's individual property unless the trust provides otherwise.

➢ ***Note.*** Income accumulated inside a trust created by a third party is not income within the definition of section 766.01(10) while it remains in the trust; this should be true even of income subject to a power of withdrawal. Section 766.01(10) (defining *income*) applies to trusts created for a spouse by a third party. A different result appears to be required in connection with certain trusts created by a spouse for his or her own benefit. *See supra* §§ 2.98–.104.

3. Property Received in Exchange for or with Proceeds of Individual Property: Tracing to Individual Property [§ 2.117]

If the source of payment for an asset acquired by a spouse during marriage and after the determination date can be traced to assets classified as individual property, the asset acquired is individual property. Wis. Stat. § 766.31(7)(b); *see supra* § 2.8 (statutory definition of during marriage). Similarly, if an asset is mixed, tracing to the individual property component preserves that component's individual property character. Wis. Stat. § 766.63(1); *see also infra* ch. 3 (tracing); *Wierman v. Wierman*, 130 Wis. 2d 425, 387 N.W.2d 744 (1986) (tracing used in dissolution context).

4. Appreciation of Individual Property [§ 2.118]

Appreciation of a spouse's individual property asset during marriage and after the determination date is individual property except to the extent that the appreciation is classified as marital property under section 766.63 (pertaining to mixed property). Wis. Stat. § 766.31(7)(c); *see supra* § 2.8 (statutory definition of during marriage). Substantial appreciation of either spouse's property other than marital property attributable to the substantial undercompensated labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity (hereinafter often referred to as *efforts*) of *either* spouse in connection with that property is marital property resulting in a mixed asset. Wis. Stat. § 766.63(2); *see infra* §§ 3.45–.48. All other appreciation is individual property, however, including appreciation resulting from market conditions and spousal efforts when all the tests of section 766.63(2) are not met, *see infra* § 3.45. UMPA § 4 cmt.

➢ ***Example.*** Suppose that during marriage and after the determination date a wife inherits a parcel of vacant real estate (individual property). If neither the wife nor her husband applies substantial efforts to the property but the property quadruples in value during marriage, the appreciation is the wife's individual property. *Id.*

5. Property Acquired by Gift, Unilateral Statement, Marital Property Agreement, Decree, or Written Consent Classifying Property as Individual [§ 2.119]

Section 766.31(7)(d) provides that individual property assets may be acquired by a reclassification by interspousal gift under section 766.31(10). *See infra* §§ 2.286–.288. The income from the property is the donee spouse's individual property unless a contrary intent of the donor is established. Wis. Stat. § 766.31(10). Income attributable to a spouse's nonmarital property may be classified as that spouse's individual property assets if he or she executes a unilateral statement. *Id.*; *see supra* § 2.71. Individual property assets may also be acquired by a marital property agreement. Wis. Stat. § 766.31(7)(d).

Section 766.31(7)(d) further provides that individual property assets may be acquired during marriage and after the determination date "by a decree." *See* Wis. Stat. § 766.01(3) (defining *decree*); *see also supra* § 2.8 (statutory definition of during marriage). Section 766.31(7)(d) does not identify or define the types of court decrees that are included. However, other provisions of the Act authorize a number of different types of decrees, including the following:

1. If marital property has been or is likely to be substantially injured by a spouse's gross mismanagement, waste, or absence, a court may order that the classification of an existing marital property asset be changed, Wis. Stat. § 766.70(4)(a)2., or that property acquired by either spouse after the court order is the acquiring spouse's individual property, Wis. Stat. § 766.70(4)(a)5.; *see infra* § 8.31.

2. A court may order that a spouse's recovery for damage to property under section 766.70 be classified as other than individual property. *See* Wis. Stat. § 766.31(7)(e); *see also infra* § 8.38.

3. A court may issue a decree determining the classification of previously acquired property as part of a probate proceeding, Wis. Stat. § 857.01, or during marriage, Wis. Stat. § 766.70(2).

4. A decree itemizing a personal-injury recovery acquired during marriage and after the determination date may allocate a portion to pain and suffering (which is individual property) and a portion to earnings lost during marriage (which is marital property). *See* Wis. Stat. § 766.31(7)(f); *see also infra* § 4.52 (whether uninjured spouse must be party). (If the recovery is not classified, it may be classified entirely as marital property because of the presumption under section 766.31(2).)

Spouses may use a written consent to reclassify life insurance policies and property used to pay premiums on such policies, or both, under section 766.61(3)(e). Wis. Stat. § 766.31(10); *see infra* § 2.177.

➢ ***Historical Note.*** Section 766.31(7)(d) originally provided that individual property assets could be acquired by written consent. This provision was eliminated by the 1985 Trailer Bill. The elimination of written consent as a means by which spouses could reclassify property other than certain insurance policies and property used to pay premiums on those policies reflected concern that a written consent could act as a substitute for a marital property agreement, without the disclosure and other requirements of a marital property agreement. *See* Wis. Stat. Ann. § 766.31(7)(d) Legis. Council Notes—1985 Act 37, §§ 76 to 83 (West 2009). Subsequently, the 1988 Trailer Bill expanded the scope of written consents so that they may be used to reclassify all life insurance policies and proceeds and assets used to pay premiums on those policies. *See* Wis. Stat. § 766.61(3)(e).

For planning purposes, written consents are useful for designating beneficiaries of life insurance policies and relinquishing or reclassifying interests in life insurance policies and assets used to pay premiums on those policies. *See infra* §§ 2.177, 10.187, .188. Consents, written or oral, may also be useful in connection with gifts to third parties. Although the Act does not so state, a consent satisfies the "acting together" requirement of section 766.53: that is, a spouse could give marital property to a third party, and the other spouse could subsequently give consent. The consent is deemed effective as of the date of the transfer. *See* Wis. Stat. Ann. § 766.53 Legis. Council Committee

Supplemental Notes Relating to 1985 Act 37 (West 2009); *see also infra* § 4.35.

6. Individual Recoveries Under Section 766.70 [§ 2.120]

The general rule is that a recovery to a spouse under section 766.70 during marriage and after the determination date for damages to that spouse's property is that spouse's individual property except as specifically provided otherwise in a decree or marital property agreement. Wis. Stat. § 766.31(7)(e). Section 766.70 creates various interspousal and other remedies, *see infra* ch. 8, some of which redress damage to one spouse's property caused by the other spouse's wrongful conduct. That the recovery is individual property is apparently a manifestation of the rule that a tortfeasor spouse should not profit from his or her wrong. *See infra* § 2.134. But cases are envisioned under section 766.70 that would give rise to recoveries that are marital property, and thus each remedy for damages (as opposed to other remedies) in section 766.70 should be examined.

Under section 766.70(1), a spouse may recover for damages to his or her property (of any classification) caused by the other spouse's breach of the good-faith duty set forth in section 766.15(1). An important issue is whether one spouse's negligent conduct resulting in damages to the other spouse's property is a breach of the good-faith duty and, if not, whether the rule that tortfeasors should not profit from their wrongs would be applied in any event. *See infra* §§ 2.134, 8.18.

Under section 766.70(5), when marital property is used to satisfy obligations other than support or family-purpose obligations, the nonobligated spouse may request a court to order that he or she receive as individual property the amount of marital property needed to equal in value the marital property used to satisfy the obligation, subject to certain third-party rights and equitable considerations. *See infra* § 8.36.

For discussion of rights of recovery one spouse has against the other and classification of recoveries in connection with certain gifts to third parties, see sections 8.44–.59, *infra*.

7. Recoveries for Personal Injury [§ 2.121]

Recoveries for personal injury, amounts attributable to expenses paid or otherwise satisfied from marital property funds, and amounts attributable to loss of income during marriage and before and after the period defined by the Act as during marriage are considered in sections 2.127–.134, *infra*.

VIII. Certain Recoveries and Income Substitutes [§ 2.122]

A. In General [§ 2.123]

To complete the categories of marital and individual property, it is useful to group various types of recoveries and income substitutes.

B. Insurance Recoveries and Recoveries for Damage to Property [§ 2.124]

1. Damages Caused by Third Party; Judgments and Insurance [§ 2.125]

Damages received for injury to property caused by third parties have the same classification as the damaged property. *See* Reppy & Samuel, *supra* § 2.19, at 166. Thus, damages for injury to marital property assets are marital property because that result is consistent with the nature of the property and tracing rules. Damages received for injury to assets classified as individual property are individual property because that result is consistent with the nature of the property and the tracing rules in sections 766.31(7)(b) and 766.63(1). Consistent with the nature of the property and section 766.63(1), which provides for tracing to nonmarital property, and section 766.31(8), which provides for tracing to predetermination date property, damages received for injury to predetermination date property should take the same character as the predetermination date asset.

In the other community property states, most courts have held that an insurance recovery takes the character of the underlying property interest protected. Reppy & Samuel, *supra* § 2.19, at 166. Thus, an insurance recovery received for damage to a marital property asset is marital

property; an insurance recovery received for damage to an individual property asset is individual property; an insurance recovery received for damage to predetermination date property is predetermination date property.

➢ ***Comment.*** Occasionally, a court will trace the funds used to purchase the insurance and classify the recovery accordingly. *See, e.g.*, *Russell v. Williams*, 374 P.2d 827 (Cal. 1962). Care should be exercised before that rule is adopted in Wisconsin because it undercuts the purpose of the insurance policy and may produce a windfall to the marital, individual, or predetermination date "estate" that paid the premium. A right of reimbursement for premiums paid may be sufficient. *See Trahan v. Trahan*, 387 So. 2d 35 (La. Ct. App. 1980); *see also infra* § 3.29.

2. Damages Caused by Spouse [§ 2.126]

For a discussion of damages received for injury to property caused by a spouse, see section 2.120, *supra*, and section 2.134, *infra*.

C. Personal-injury Recoveries [§ 2.127]

1. In General [§ 2.128]

Awards for personal injury often involve damages for pain and suffering, reimbursement for expenses paid, and compensation for lost income. Section 766.31(7)(intro.) and subsection (f) are relevant and must be read together as follows:

> (7) Property acquired by a spouse during marriage and after the determination date is individual property if acquired by any of the following means:
>
> ….
>
> (f) As a recovery for personal injury except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property and except for the amount attributable to loss of income during marriage.

A recovery by a spouse for pain and suffering during marriage and after the determination date, therefore, is always individual property.

Income earned on that kind of recovery is marital property unless subject to a unilateral statement or other applicable exception described in section 2.69, *supra*.

A recovery for expenses paid or otherwise satisfied from marital property is marital property. It may be inferred that a recovery for expenses paid or otherwise satisfied from nonmarital property (even predetermination date property) is individual property because of the interrelationship between the introductory portion of section 766.31(7) and subsection (f). On the other hand, it is arguable that a recovery of an expenditure should be of the same classification as the source that paid it. *See infra* § 3.29.

A recovery for loss of income requires examination. Before undertaking that examination, it is necessary to understand the significance of the term during marriage under the Act. Subsection (f) of section 766.31(7) indicates that an amount recovered that is attributable to loss of income "during marriage" is not individual property (and therefore is marital property). Subsection (f) makes no reference to the determination date; that is not a matter of significance. The term during marriage as defined in section 766.01(8) means a period in which both spouses are domiciled in Wisconsin, which begins at the determination date and ends at dissolution or at the death of a spouse. Implicit in the definition is that the period during marriage ends if one or both of the spouses are no longer domiciled in the state. During such a period, the Act does not apply.

➢ ***Note on Terminology.*** The term during marriage as used in this chapter should be understood to mean "during marriage as defined by the Act." The statutory phrase "during marriage and after the determination date" is used throughout sections 2.129–.134, *infra*, but it should be noted that, in view of the definition of during marriage, the words "and after the determination date" are redundant.

Consistent with section 766.31(4) and the definition of during marriage, a recovery for loss of income should be marital property only if it replaces income that would have been earned or accrued by a spouse during marriage and after the determination date; otherwise, it is not marital property. In addition, the implication in section 766.31(7)(f) is that a recovery for lost income must be apportioned between the amount lost during marriage and the amount lost before or after the period defined as during marriage.

➢ ***Note.*** Unlike statutes in at least two community property states, section 766.31(7)(f) refers to a "recovery" rather than to the accrual of a cause of action, *see* La. Civ. Code Ann. art. 2344 (West, WESTLAW current through the 2009 Regular Session); Cal. Fam. Code § 781 (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. 19 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot); *see also infra* § 4.49. Moreover, it refers to a "recovery" acquired "during" marriage; nothing in the Act expressly refers to recoveries acquired before or after the period defined as during marriage. Section 766.31 also differs from UMPA's "wait-and-see" rule. *See infra* § 2.133.

For a discussion of punitive damages recovered by a spouse from a third party, see Scott A. Hennis, *Punitive Damages: Community Property, Separate Property or Both*, Community Prop. J., Apr. 1987, at 51.

2. Injury and Recovery Before Period Defined as During Marriage [§ 2.129]

➢ ***Example.*** Suppose that in 1990, a man is injured and acquires a recovery for personal injury, including a sum for future lost wages. The man subsequently marries. Both spouses are domiciled in Wisconsin at the date of their marriage. Can his wife successfully claim that some portion of the award her husband obtained while he was single was designed to compensate for loss of income during marriage and after the determination date and that, therefore, she is entitled to a portion of the recovery? It appears that the answer is no. The recovery was not obtained during marriage, and so section 766.31(7) does not apply; rather, the recovery was property the husband brought to the marriage. It should, therefore, be his individual property under section 766.31(6). On the other hand, a policy argument could be made that earnings replacements should be classified as marital or individual property, based on the earnings they are intended to replace, so that to the extent a recovery compensates for future wages lost during marriage, it should be classified as marital property.

3. Injury Before Period Defined as During Marriage; Recovery During Marriage [§ 2.130]

➢ ***Example 1.*** Assume that a man is injured before January 1, 1986, marries after January 1, 1986, and acquires a recovery during marriage for pain and suffering and loss of income from the injury. Assume that a portion of the recovery is attributable to loss of income during marriage, and a portion to loss of income before the man married. Section 766.31(7)(f) applies because the recovery was acquired during marriage and after the determination date. The portion of the award attributable to income lost before the marriage is the husband's individual property because it is not attributable to loss of income during marriage and after the determination date. The portion for pain and suffering is likewise the husband's individual property. However, that portion of the recovery attributable to income lost during marriage and after the determination date is marital property pursuant to the last clause of section 766.31(7)(f) and the basic rule of section 766.31(1) that all property of spouses is marital property unless classified otherwise.

➢ ***Example 2.*** Assume the facts in Example 1 above are changed so that the man is injured after his marriage but while either he or his wife is domiciled in a state other than Wisconsin and that the man acquires a recovery when both spouses are domiciled in Wisconsin. In this example, the injury occurs during a period preceding that defined as during marriage in section 766.01(8). Recovery, however, is acquired during marriage (as that term is defined in section 766.01(8)) and after the determination date. Presumably, the recovery that replaces income attributable to income lost while either the husband or the wife was domiciled in a state other than Wisconsin is the husband's nonmarital property because it is not attributable to loss of income during marriage. However, the recovery is deferred marital property subject to election under section 861.02 if the wife survives her husband and the husband is domiciled in Wisconsin at the time of his death still owning that income or assets traceable to it. The portion for pain and suffering is the husband's individual property. The portion of the recovery attributable to income lost during the period after the determination date while both spouses were domiciled in Wisconsin (that is to say, during marriage and after the determination date) is marital property pursuant to the last clause

of section 766.31(7)(f) and the basic rule of section 766.31(1) that all property of spouses is marital property unless classified otherwise.

4. Injury and Recovery During Marriage [§ 2.131]

➢ ***Example.*** Assume that a spouse is injured and acquires a recovery during marriage. Only the portion of the recovery attributable to loss of income during marriage and after the determination date and to expenses paid or otherwise satisfied from marital property funds is marital property. Wis. Stat. § 766.31(7)(f).

After a recovery is acquired, the period defined as during marriage may end because of death or dissolution or because one or both of the spouses are not domiciled in Wisconsin. Section 766.31(7)(f) implies that the portion of a recovery attributable to loss of income after the end of the period defined as during marriage is not marital property. This notion is consistent with the worker's compensation cases cited in section 2.132, *infra*, in the event of a dissolution. Division of such a recovery at dissolution is a chapter 767 issue. See also the rules of section 766.31(7m), applicable when the uninjured spouse predeceases the injured spouse, and the discussion in section 2.133, *infra*.

Section 766.31(7)(f) does not distinguish between lump-sum awards and awards payable over time. Although payments over time are easier to apportion after the period defined as during marriage has ended, it is certainly possible that a portion of an installment payment, even that received after the period during marriage has ended, was designed to compensate for loss of income during marriage. Moreover, a lump-sum award might very well be designed to compensate for income lost in the future, as well as that lost in the past.

The experience in Louisiana may be of interest. In *Hall v. Hall*, 349 So. 2d 1349 (La. Ct. App. 1977), a husband acquired a judgment for personal injury during marriage. The settlement was paid in full to the husband 10 days before the dissolution of the marriage. The judgment was designed to compensate, in part, for future lost wages. The husband claimed that the judgment for lost wages after dissolution should be his separate property. The court disagreed, saying it could find no positive statement in the Louisiana statutes providing an exception for that kind of property from the general rule that property acquired during marriage is community property.

Referring to *Hall*, a commentator states:

> The legislature responded in 1980 with a proviso that "[i]f the community regime is terminated otherwise than by death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after the termination of the community property regime is the separate property of the injured spouse."

Reppy & Samuel, *supra* § 2.19, at 175; *see* La. Civ. Code Ann. art. 2344 (West, WESTLAW current through the 2009 Regular Session).

A lump-sum award acquired during marriage is individual property except to the extent of the last clause in section 766.31(7)(f), which creates an exception for an amount attributable to loss of income during marriage. This last clause implies that a settlement must be apportioned on an annual basis to determine which portion represents loss of income during marriage and which does not. Of course, it is helpful to set forth in a court decree or settlement document the period of time involved in any recovery of lost income so that it might be more easily apportioned, if necessary, after the recovery is acquired. Unless the award itself spells out a computation method applicable to such an eventuality, a court, striving for simplicity and applying the general presumption that property of a spouse is marital property, might treat a lump-sum award acquired during marriage and after the determination date as entirely marital property.

Two examples comparing an award payable in installments with a lump-sum award may be helpful.

- ***Example 1.*** Assume that a settlement specifies that $200,000 of a particular award, payable in equal annual installments, is to compensate for income that will be lost over the next 20 years and that the award is payable in full regardless of the injured spouse's death or the dissolution of the marriage. As each year elapses during marriage, 1/20 of the award is marital property; it will not be known what classification attaches to future installments of the award until they are paid. If the spouses divorce after 15 years of payments have been received, the $150,000 of the award already received is marital property, and the $50,000 yet to be paid is the injured spouse's nonmarital property because it represents loss of future income that will not be received during marriage. However, the nonmarital portion is subject to division at dissolution if equitable principles

require. *See infra* § 2.132. If the uninjured spouse dies after 15 years of payments have been received, that spouse's marital property interest in the remaining $50,000 of the award terminates. Wis. Stat. § 766.31(7m); *see infra* § 2.133.

If the injured spouse dies after 15 years of payments survived by the uninjured spouse, a question arises. On the one hand, the $50,000 yet to be paid was designed to replace lost income regardless of the date of death. That income would have been lost during marriage but for the injured spouse's death, and, thus the surviving spouse should have a marital property interest in it. On the other hand, under a literal reading of section 766.31(7)(f), it is arguable that the $50,000 yet to be paid cannot represent income lost during marriage and must be the deceased spouse's solely owned property.

➢ ***Example 2.*** Assume the same facts as in Example 1 above, but assume that the award is a lump sum. To the extent that the $50,000 representing the income for the final five years can be traced, it is arguable that the analysis should be the same as in Example 1. For simplicity's sake, however, it is arguable that marital status (and the spouses' domicile) on the date of recovery of the award should be determinative (although that argument conflicts with a literal analysis), when the time period in connection with lost income is not specified.

Awards are susceptible to mixing problems after receipt, but tracing should be available. *See Devlin v. Devlin*, 189 Cal. Rptr. 1 (Ct. App. 1982).

5. Injury During Marriage; Recovery After Period Defined as During Marriage [§ 2.132]

➢ ***Example 1.*** Assume that a husband is injured during marriage, but he (or his estate) recovers damages after the termination of the period defined as during marriage. A portion of the award is attributable to income lost during marriage and after the determination date. In that case, although the cause of action accrues during marriage, the recovery is not obtained at that time. Therefore, section 766.31(7)(f), which refers only to recoveries acquired during marriage, does not apply.

The Act does not expressly deal with the situation in the above example. Two cases, one decided in Washington and the other by the Wisconsin Supreme Court under pre-Act law, may offer some guidance. It should be noted that both cases hold that a personal-injury claim that has not been reduced to settlement or judgment before a dissolution is nevertheless property subject to division.

A sensible approach was adopted in *Brown v. Brown*, 675 P.2d 1207 (Wash. 1984), in which the Washington Supreme Court first overruled prior cases holding that personal-injury awards were community property under Washington statutes. The court held that when an injury occurs before commencement of a dissolution action but recovery has not yet occurred at dissolution, the divorce court should analyze the elements of the potential recovery and categorize them as follows:

1. Damages for physical injury and pain and suffering should be the spouse's separate property.

2. Damages for injury-related expenses should be community or separate property, depending on which fund incurs the expense.

3. Damages for lost wages and diminished earning capacity should have the same community or separate character as the wages and earning capacity they are intended to reimburse.

Following those principles, the court held that compensation for lost wages and diminished earning capacity is community property to the extent the recovery replaces income that would have been earned during the marriage but for the injury; and the portion of a recovery that compensates the injured spouse for wages that would have been earned after separation is that spouse's separate property. Although Washington treats the community as terminated at the date of separation rather than at dissolution, whereas Wisconsin treats marital property as continuing to accrue until dissolution, *Brown* nevertheless provides a useful analysis. *Brown* also provides a review of the treatment of personal-injury recoveries in the various community property states.

In *Richardson v. Richardson*, 139 Wis. 2d 778, 407 N.W.2d 231 (1987), the wife brought a claim for medical malpractice before the commencement of dissolution proceedings. The Wisconsin Supreme Court affirmed the holding of the court of appeals that a personal-injury claim is property subject to division at dissolution under section 767.61.

The claim, said the court, should be divided into its various elements when determining whether the presumption of equal distribution established in section 767.61 applies. The court concluded that a circuit court should presume the following:

1. The injured spouse is entitled to (a) the amount recovered for loss of bodily function and pain and suffering and (b) the entire amount recovered for loss of future earnings after the date of dissolution.

2. The uninjured spouse is entitled to the entire amount recovered for loss of consortium.

3. Amounts recovered for medical and other expenses incurred during marriage and amounts recovered for loss of earnings during marriage are to be distributed equally.

The court in *Krebs v. Krebs*, 148 Wis. 2d 51, 435 N.W.2d 240 (1989), followed the logic of *Richardson* to a similar conclusion. *Richardson* and *Krebs* were dissolution proceedings. Neither dealt with classification issues under the Act; thus, equitable principles applicable to dissolution are not relevant to an analysis under the Act. However, the division of the award into its elements could be relevant for future cases dealing with classification of personal-injury claims under the Act.

Two cases from other jurisdictions involving worker's compensation recoveries that occurred during marriage but were to be paid in part after dissolution came to conclusions similar to those in *Richardson* and *Krebs*. They treated the portion of the award attributable to earnings lost during marriage as community property but the portion attributable to earnings after dissolution as the recipient's separate property. *See Bugh v. Bugh*, 608 P.2d 329 (Ariz. Ct. App. 1980); *Cook v. Cook*, 637 P.2d 799 (Idaho 1981).

➢ ***Example 2.*** Assume that Example 1 above is changed so that the husband acquires the recovery while the spouses are married but at a time when one of them is not domiciled in Wisconsin. Subsequently, both are domiciled in this state, and then the husband dies survived by his wife. The recovery was not acquired during marriage as defined by the Act; thus, section 766.31(7)(f) does not apply. Is the recovery deferred marital property if the husband dies domiciled in Wisconsin still owning assets traceable to the recovery that compensated for income lost while the spouses were married? The answer should be

yes, because the amount that replaces income lost while spouses are married to each other but during a period when one or both of the spouses are not domiciled in Wisconsin meets the definition of deferred marital property. *See* Wis. Stat. § 851.055; *see also infra* § 2.221.

As previously stated, recovery after dissolution is a property right subject to division. Therefore, if the decree does not deal with the recovery, the parties may own the former marital property portion of the recovery as equal tenants in common. Wis. Stat. § 766.75.

6. Terminable Interest [§ 2.133]

The uninjured spouse's marital property interest in a recovery for loss of income is similar to a terminable marital property interest in a deferred-employment-benefit plan. *See infra* § 2.201.

➢ ***Example.*** Assume that a spouse is injured during marriage and acquires a recovery for loss of income during marriage and after the determination date. Assume that the uninjured spouse predeceases the spouse who acquired the recovery. Section 766.31(7m) provides that insofar as marital property includes damages for loss of future income arising from the surviving spouse's personal-injury claim, the surviving spouse is entitled to receive as his or her individual property that portion of the award that represents an income substitute after the uninjured spouse's death. The portion of the award that represents income lost before the uninjured spouse's death during marriage and after the determination date is marital property.

Because section 766.31(7m) refers to damages, the section may not apply to disability insurance payments from a policy owned by a spouse. However, results similar to those required by section 766.31(7m) may obtain in any event. *See infra* § 2.136.

➢ ***Note.*** The Act did not adopt UMPA's wait-and-see provisions on personal injuries in the context of deferred marital property. Section 4(g)(6) of UMPA classifies all personal-injury recoveries as individual property, except portions allocable to expenses paid from marital property funds. At death or dissolution, UMPA's deferred marital property provisions treat any portion of a personal-injury

recovery that can be traced to a loss of earning capacity during marriage as if it were marital property. *See* UMPA §§ 17(2), 18(b).

7. Recovery from Tortfeasor Spouse [§ 2.134]

Wisconsin does not recognize interspousal immunity. Wis. Stat. § 766.97(2). How is a recovery of one spouse from the other classified? The Act provides no explicit guidance.

➢ ***Example.*** A husband and wife are traveling in an automobile. The husband is negligent, resulting in an accident that injures the wife, and she recovers an award from the husband's insurance company. A portion of the award is allocated to the loss of income that she otherwise would have earned from employment during marriage.

In *Freehe v. Freehe*, 500 P.2d 771 (Wash. 1972), *overruled on other grounds by Brown v. Brown*, 675 P.2d 1207 (Wash. 1984), *Flores v. Flores*, 506 P.2d 345 (N.M. Ct. App. 1973), and *Rogers v. Yellowstone Park Co.*, 539 P.2d 566 (Idaho 1975), which involved situations similar to that in the above example, the rule was adopted that the victim spouse could recover as his or her separate property one-half the general damages for loss of earnings that would otherwise have been community property, on the theory that a tortfeasor should not profit from his or her wrongful conduct. Section 766.31(7)(e), dealing with damages to a spouse's property by the other spouse, may suggest a similar result. *See infra* § 8.38.

Smith v. State Farm & Casualty Co., 192 Wis. 2d 322, 531 N.W.2d 376 (Ct. App. 1995), may be of interest. That case involved the death of the spouses' son, which resulted in part from the husband's contributory negligence. The issue was whether the husband's negligence could be imputed to the wife, thereby reducing her award under the Wisconsin wrongful-death statute. The defendant argued that the recovery was marital property and that a recovery would therefore benefit the husband in part. The court rejected this argument, saying that the Act does not limit an innocent spouse's recovery in a wrongful-death action.

The *Smith* court relied on *Chang v. State Farm Mutual Automobile Insurance Co.*, 182 Wis. 2d 549, 514 N.W.2d 399 (1994), which made no reference to the Act, and which held that a nonnegligent parent is

entitled to a full recovery despite a spouse's negligence. The decision in *Smith* did not analyze whether the recovery is marital property, nor did it focus on the rule that a tortfeasor should not benefit from his or her own wrong. Rather, the court felt that the recent decision in *Chang* set a powerful precedent that should be followed. *Smith*, 193 Wis. 2d at 336. In fact, if the recovery is not marital property, the issue whether a tortfeasor can benefit from his or her own wrong drops out of the case. The recovery in *Smith* may well have been individual property because an award under a wrongful-death statute is individual property except for reimbursement of expenses paid from marital property, *see infra* § 2.137. A recovery for personal injury is also individual property except to the extent the recovery is for loss of income during marriage or reimbursement of expenses paid from marital property. *See supra* § 2.128.

D. Other Recoveries [§ 2.135]

1. Disability Payments [§ 2.136]

Disability payments fall into two general categories: those that are connected with deferred-employment-benefit plans and those that are not. Payments made from a deferred-employment-benefit plan representing a right to compensation for loss of income during disability are included within the definition of a deferred-employment-benefit plan, Wis. Stat. § 766.01(4)(b)3., and are subject to the classification rules of section 766.62. *See infra* § 2.191.

When considering the application of section 766.62(2) (dealing with classification of mixed property deferred employment benefits) to a plan involving disability payments, a question arises: When does the plan commence? Is it from the moment coverage begins or from the date of the injury?

➢ ***Example.*** Assume that an employee becomes a member of a plan that provides, among other benefits, compensation for loss of income during disability. The employee begins participation in the plan five years before the determination date. Three years after the determination date, the employee is disabled, ceases employment, and receives $10,000 as compensation for loss of income during disability. Assume that at all relevant times the employee and the

employee's spouse are domiciled in Wisconsin. It may be argued that the plan actually begins when the injury occurs. The argument is that since the definition of a deferred-employment-benefit plan in section 766.01(4) does not include various types of insurance benefits "except to the extent that benefits under the plan … [r]epresent a right to compensation for loss of income during disability," payments for disability are not a plan until injury occurs and a right to compensation accrues. *See* Wis. Stat. § 766.01(4)(b)3. If that is the case, the $10,000 is entirely marital property because it represents income lost during marriage. *See supra* § 2.8 (statutory definition of during marriage). This argument is consistent with the nature of a plan that compensates for the loss of future income.

On the other hand, the provisions of section 766.01(4)(b)3. modify the words "benefits under the plan." Typically, disability benefits are paid in connection with a plan offering an employee a variety of benefits, only one of which is payment for disability should it occur. Under this view, the plan referred to commences on the day the employee becomes a participant in the overall plan and begins to earn all the benefits under it. The result of this analysis is that 5/8 of the $10,000 is nonmarital property and 3/8 is marital property.

Classification of other types of disability payments (usually made from policies purchased by a spouse) are treated differently. Some courts hold that disability payments that compensate for pain and suffering are separate property. *See In re Marriage of Mueller*, 137 Cal. Rptr. 129 (Ct. App. 1977); *In re Marriage of Kittleson*, 585 P.2d 167 (Wash. Ct. App. 1978); *see also Leighton v. Leighton*, 81 Wis. 2d Wis. 2d 620, 261 N.W.2d 457 (1978) (holding that veteran's federal disability pension was compensation for bodily impairment and could not be divided at divorce).

Compensation for lost income from a disability policy, on the other hand, is marital property if it replaces income lost during marriage and after the determination date under the general principles of subsections 766.31(4) and (1). To the extent disability payments replace earnings lost after termination of the period defined as during marriage, the disability payments should be treated as the recipient's nonmarital property.

Whether the source of the premium payment is marital property funds or nonmarital property funds should not be relevant because of the

definition of income in section 766.01(10). As defined in that section, income includes proceeds (other than death benefits) received from a disability insurance policy or any plan, fund, program, or other arrangement providing benefits similar to that form of insurance. Under section 766.31(4), income of all types and regardless of source (unless subject to a unilateral statement, marital property agreement, or other exception described in section 2.69, *supra*) is marital property to the extent it is earned or accrued by a spouse during marriage and after the determination date.

This analysis precludes the type of analysis used in *Elfmont v. Elfmont*, 891 P.2d 136 (Cal. 1995), in which the court, applying California law, explained that if the insured spouse becomes disabled during marriage, the benefits received during marriage are community property. The court said that if benefits continue after the spouses separate, the benefits are separate property of the spouse whose income they replace unless, during marriage, the premiums were paid with community property funds with the intent to provide retirement income. If, however, the insured spouse does not become disabled during the last policy term for which the premium was paid before the parties' separation, the community will have no interest in the benefits produced by renewals of the policy for subsequent terms, because the renewal premium will not have been paid during marriage with community funds and with the intent of providing community retirement income. But see *In re Marriage of Brewer*, 949 P.2d 404 (Wash. Ct. App. 1998), in which the court "reluctantly" held that because all premiums were paid from community funds, the disability benefits received after dissolution by the insured spouse were all community property even though no retirement element was involved.

2. Wrongful-death Proceeds [§ 2.137]

It has been stated that in community property jurisdictions, wrongful-death proceeds are treated as community property. *See* William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* § 84, at 209 (2d ed. 1971). This would appear not to be true in Wisconsin.

It is true, as one authority points out, that in the case of the wrongful death of a spouse, the community may be injured by the wrongful death to the extent of deprivation of the deceased spouse's earnings or services for the period of that spouse's normal life expectancy. *See id*. Pecuniary

loss of this type is the major element of damages under the Wisconsin wrongful-death statute. *See* Wis. Stat. § 895.04(4). Nonetheless, a recovery for pecuniary injury arguably should not be classified as marital property for two reasons. First, the wrongful death of a spouse gives rise to a cause of action, but death terminates the marriage, and there can be no marital property after the marriage terminates. Second, the Wisconsin wrongful-death statute vests the recoveries not in the victim's estate (with the exception of certain expenses paid by the estate) but in named beneficiaries. *See* Wis. Stat. § 895.04; *Weiss v. Regent Prop., Ltd.*, 118 Wis. 2d 225, 346 N.W.2d 766 (1984). If this vesting of the recoveries does not create solely owned property in the beneficiaries described in the statute, then presumably a court or the parties must characterize the various wrongful-death recoveries permitted by the statute. These recoveries include pecuniary loss, up to $500,000 per occurrence in the case of a deceased minor and up to $350,000 per occurrence for a deceased adult; for loss of society and companionship under section 895.04(4); and various medical and funeral expenses described in section 895.04(5). A court should consider what the award is designed to replace and classify the various recoveries accordingly. Reppy & Samuel, *supra* § 2.19, at 180–81; *see also Smith v. State Farm & Cas. Co.*, 192 Wis. 2d 322, 531 N.W.2d 376 (Ct. App. 1995) (holding that Act does not limit innocent spouse's recovery in wrongful-death action brought as result of other spouse's negligence).

3. Worker's Compensation [§ 2.138]

The Act does not specifically address the subject of worker's compensation, nor are there any Wisconsin cases that deal with that subject in the context of the Act.

In *Bugh*, 608 P.2d 329, the court held that worker's compensation was awarded in lieu of lost wages and not as damages for pain, suffering, and monetary loss caused by the employer. The court held that worker's compensation paid during marriage to compensate for earnings that otherwise would have been paid to and earned by the community during the marriage was community property; worker's compensation paid after the community was dissolved compensated for earnings that otherwise would have been earned by and paid to the injured worker after the marriage ended and therefore should be the worker's separate property.

Other elements of worker's compensation will require classification, such as certain death benefits, Wis. Stat. §§ 102.46–.49, and medical expenses, Wis. Stat. § 102.42. A court should consider what the award is designed to replace and classify the various recoveries accordingly.

4. Recovery for Loss of Consortium [§ 2.139]

Wisconsin common law allows a spouse to recover for loss of consortium. *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N.W.2d 137 (1967). Section 766.97(3), which abolishes a spouse's common law rights to compel the other spouse's sexual services, specifically states that nothing in its provisions affects a spouse's common law right to consortium or society and companionship. The Act, however, does not specifically classify a recovery for loss of consortium as either marital or individual property.

Texas treats a recovery for loss of consortium as the recipient spouse's separate property. *See Reed Tool Co. v. Copelin*, 610 S.W.2d 736 (Tex. 1980). The general language of a California statute apparently classifies a recovery for loss of consortium as community property. *See* Cal. Fam. Code § 781 (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. 19 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot). Nonetheless, the court in *Lantis v. Condon*, 157 Cal. Rptr. 22 (Ct. App. 1979), noted that loss of consortium impairs spousal interests that are wholly separate and distinct from the interests of the other spouse and that a proper solution would be to reclassify damages for this type of injury as separate property.

Dealing with pre-Act law, the Wisconsin Supreme Court in *Richardson v. Richardson*, 139 Wis. 2d 778, 407 N.W.2d 231 (1987), held that in a dissolution proceeding, a circuit court should presume that the uninjured spouse is entitled to the entire amount recovered for loss of consortium. The court's reasoning is consistent with treating a recovery for loss of consortium as the uninjured spouse's individual property.

IX. Predetermination Date Property [§ 2.140]

A. Definition [§ 2.141]

Subject to a major exception, this chapter uses the term predetermination date property to refer to all property owned by either or both of the spouses at the determination date. The major exception, which will increase in significance as time passes, involves property owned by a spouse at a marriage occurring after January 1, 1986, if both spouses, at the date of marriage, have a Wisconsin domicile; such property is that spouse's individual property. Wis. Stat. § 766.31(6); *see supra* § 2.110. The determination date is the last to occur of the following: (1) marriage; (2) January 1, 1986; or (3) the date both spouses establish a domicile in this state. Wis. Stat. § 766.01(5). For a discussion of what constitutes a domicile, see section 13.45–.48, *infra*. For a discussion of multiple determination dates, see section 2.8, *supra*.

➢ ***Note on Terminology.*** The comments to UMPA sometimes refer to predetermination date property as property "having any other classification," meaning property other than marital or individual property, which are both creations of the Act. UMPA § 4 cmt.

The term predetermination date property does not imply a classification all its own. Rather, each predetermination date asset has its own particular incidents of ownership that attached under the law that governed before the determination date and that continue except as altered by the Act. Predetermination date property is not a type of individual property.

Section 766.31(1) clarifies that the classification of marital property does not include assets that are described in section 766.31(8) (i.e., predetermination date property).

Sections 46 and 47 of 2005 Wisconsin Act 216 confirm in a clarifying amendment to section 766.31(6)(a) that property owned by a spouse at a marriage that occurs on the determination date is that spouse's individual property. A marriage can occur on the determination date only if it occurs after January 1, 1986, and both spouses have a Wisconsin domicile at the date of marriage. On the other hand, if the date of marriage precedes the determination date (as for example, a marriage in a common law state before the spouses change domicile to Wisconsin), the

property owned by a spouse at the determination date is unclassified property (predetermination date property).

B. Basic Rule [§ 2.142]

The first clause of section 766.31(8) states the general rule: "Except as provided otherwise in this chapter, the enactment of this chapter does not alter the classification and ownership rights of property acquired before the determination date.…"

This provision derives from UMPA section 4. A comment to this UMPA section states the following:

> 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.… Trust interests would be regulated by governing instruments. [UMPA] is *not* designed to alter these various incidents of ownership or to reclassify such property.

UMPA § 4 cmt.

C. Three Exceptions to Basic Rule [§ 2.143]

1. In General [§ 2.144]

The opening language of section 766.31(8) states that chapter 766 does not alter the classification and ownership rights of predetermination date property "[*e*]*xcept as provided otherwise in this chapter*" (emphasis added). The comment to UMPA section 4 explains that there are three "minor" exceptions to the general rule that ownership rights and classification of predetermination date property are unaltered by UMPA upon arrival of the determination date. The first is the "as-if-individual" rule, the second is the deferred marital property election at death, and the third is the income treatment already described, *see supra* § 2.69, under which income from predetermination date property earned or accrued by a spouse during marriage and after the determination date is marital property, unless one of the exceptions referred to in section 2.69, *supra*, applies. *See supra* § 2.8 (statutory definition of during marriage).

Sections 2.145–.147, *infra*, discuss these three exceptions. Section 2.148, *infra*, offers some examples.

2. "As-if-individual" Rule [§ 2.145]

Although predetermination date property is not individual property, UMPA § 4 cmt., section 766.31(9) of the Act provides as follows:

> Except as provided otherwise in this chapter and except to the extent it would affect the spouse's ownership rights in the property existing 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*.

(Emphasis added.) The comment to UMPA section 4 (from which section 766.31 derives) states that section 4 is not a reclassification statute; rather, the section identifies

> pre-determination date property that is solely owned as functioning with a "fraternal twin" relationship to individual property under [UMPA]. 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 [UMPA].

By its terms, the as-if-individual rule applies only during marriage, *see supra* § 2.8 (statutory definition of during marriage); it does not apply at death or dissolution. When a spouse who owns or retains certain interests in predetermination date property dies and is survived by the other spouse, a deferred marital property election may apply. At dissolution, the property is subject to the rules of section 767.61. Note also that in an equitable proceeding, a court may subject predetermination date property to a surviving spouse's rights under chapters 852 and 861 if property arrangements are made in fraud of those rights. Wis. Stat. § 861.17.

During marriage, the as-if-individual rule treats predetermination date property as if it were individual property; consequently, all rules pertaining to individual property apply to predetermination date property during marriage unless they would affect the spouse's ownership rights. This means the owner (usually titled) spouse:

1. Enjoys exclusive rights of management and control under section 766.51(1)(a), (6);

2. May make gifts of the property without regard to the dollar amounts in section 766.53; and

3. May deal with the property without concern about the good-faith duty of section 766.15(1).

For a description of the attributes of individual property, see section 2.108, *supra*.

The as-if-individual rule is itself subject to exceptions. Thus, predetermination date property is treated as if it were individual property "[e]xcept as provided otherwise in [chapter 766] and except to the extent that it would affect the spouse's ownership rights in the property existing before the determination date." Wis. Stat. § 766.31(9).

The reference to exceptions in chapter 766 has only historical interest. Before the 1985 Trailer Bill, the deferred marital property rules were contained in chapter 766. The 1985 Trailer Bill moved the deferred marital property rules to chapter 861. In addition, section 766.75 had provisions treating certain predetermination date property as marital property at dissolution before the 1985 Trailer Bill repealed them. *See infra* § 2.146.

The second exception to the as-if-individual rule, which prohibits the rule's application "to the extent that it would affect the spouse's ownership rights in the property existing before the determination date," Wis. Stat. § 766.31(9), is

> 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 [UMPA]. On the other hand, tenancy in common property could function as if it were individual property under [UMPA's] provisions with each owner's undivided interest being treated as though it were individual property.

UMPA § 4 cmt.

Apparently the thinking is that certain types of ownership rights (e.g., those associated with community property brought into Wisconsin) are so totally inconsistent with ownership rights normally associated with individual property that the as-if-individual rule should not apply to them. Tenancy-in-common property, on the other hand, appears to be close enough to individual property to function as individual property. *Id.*

3. Deferred Marital Property Election at Death [§ 2.146]

A second exception to the general rule that predetermination date characteristics will not be altered involves the application of the deferred marital property election in connection with the value of certain kinds of predetermination date property owned at death by a Wisconsin domiciled spouse who is survived by the other spouse. Hardly a minor exception, the election has a dramatic impact on spouses with a domicile in Wisconsin and those who later establish a domicile in Wisconsin. UMPA applies deferred marital property concepts at the termination of a marriage by death or dissolution. UMPA §§ 17, 18. In Wisconsin, the deferred marital property election applies only at death; deferred marital property does not exist at dissolution. *See* Wis. Stat. Ann. § 766.75 Legis. Council Notes—1985 Act 37, §§ 141 to 143 (West 2009).

First, a technical point must be noted. The introductory clause of section 766.31(8) uses the words "[e]xcept as provided otherwise in this chapter," referring to chapter 766. As originally enacted, the Act embedded deferred marital property concepts in chapter 766 as part of sections 766.75(1) (dissolution) and 766.77 (death). Thus, the original deferred marital property concept was clearly an exception found in chapter 766 to the general rule that predetermination date property retains its predetermination date characteristics. The 1985 Trailer Bill repealed sections 766.75(1) and 766.77 and moved the deferred marital property concept to chapters 851 and 861, so that concept applies only at death in connection with the election available to a surviving spouse. Nevertheless, the deferred marital property rule still operates as an exception to the general rule in section 766.31(8) because it is used in connection with an important elective right granted a surviving spouse.

The definition of deferred marital property and the deferred marital property election are given separate and detailed treatment. *See infra* §§ 2.220–.246, ch. 12. At this point, however, it should be noted that the value of predetermination date property that is deferred marital property is potentially subject to a surviving spouse's deferred marital property election under section 861.02. Deferred marital property is predetermination date property acquired while spouses are married and while chapter 766 does not apply, but that would have been marital property under chapter 766 had chapter 766 applied when the property was acquired. Wis. Stat. § 851.055. The deferred marital property election has important estate planning implications. *See infra* ch. 10.

4. Income Rule [§ 2.147]

If none of the exceptions referred to in section 2.69, *supra*, applies, income earned or accrued by a spouse during marriage and after the determination date and attributable to predetermination date property is classified as marital property. *See supra* § 2.69; *see also supra* § 2.8 (statutory definition of during marriage). This rule constitutes the third exception to the general rule that ownership rights and classification of predetermination date property are unaltered by the Act.

5. Examples [§ 2.148]

Three examples may clarify the application of subsections 766.31(8) and (9).

- ***Example 1.*** Assume that while the spouses were married but before the determination date (and thus before chapter 766 applied to the spouses), a husband purchased stock titled in his name and used his wages (a marital property asset if chapter 766 had then applied) for the purchase. During marriage and after the determination date (and assuming no reclassification by means provided by the Act), he owns all of the incidents of ownership in that asset that he would have owned if chapter 766 had never been adopted, except that in the absence of a unilateral statement, a court decree or marital property agreement to the contrary, or an interspousal gift, the dividends generated during marriage and after the determination date are classified as marital property. After the husband's death, he is survived by his wife. The stock and its dividends accumulated before

the determination date and still owned by the husband at his death are deferred marital property subject to his wife's elective right under section 861.02.

➢ ***Example 2.*** Assume that the husband in Example 1 purchased the stock with property that would have been individual property rather than marital property had chapter 766 then applied. At death, he can dispose of all the stock and half the dividends earned and accumulated after the determination date free of any elective right; the value of the dividends held by the husband at his death but accumulated before the determination date are in his augmented deferred marital property estate subject to his wife's section 861.02 election. In the absence of a unilateral statement, a court decree or marital property agreement to the contrary, or an interspousal gift, half the dividends held by the husband at his death but accumulated during marriage and after the determination date are owned by his wife.

➢ ***Example 3.*** Finally, assume that when the husband in Example 1 purchased the stock, he paid for it partially with inherited assets (which would not have been marital property had chapter 766 then applied) and partially with his wages (which would have been marital property had chapter 766 then applied). In this case, the spouses own all the dividends earned during marriage and after the determination date as marital property in the absence of an interspousal gift, a court decree or marital property agreement to the contrary, or a unilateral statement. If the husband dies after the determination date and is survived by his wife, he can dispose of that portion of the stock traceable to the inheritance. The value of the stock purchased by his wages is in his augmented deferred marital property estate subject to his wife's section 861.02 election. He can dispose of half the dividends earned and accumulated after the determination date. The dividends held by him at his death but accumulated before the determination date are subject to his wife's section 861.02 election; and in the absence of a unilateral statement, a court decree or marital property agreement to the contrary, or an interspousal gift, half the dividends held by him at his death but accumulated during marriage and after the determination date are owned by his wife. *See also infra* § 3.11.

D. Appreciation [§ 2.149]

1. In General [§ 2.150]

Three types of appreciation are associated with predetermination date property:

1. Substantial appreciation of predetermination date property resulting from substantial undercompensated efforts of either spouse applied to the predetermination date property during marriage and after the determination date, *see infra* § 2.151; *see also supra* § 2.8 (statutory definition of during marriage);

2. Substantial appreciation of predetermination date property resulting from substantial undercompensated efforts of either spouse applied to the predetermination date property while married and while chapter 766 did not apply, *see infra* § 2.152; and

3. All other types of appreciation of predetermination date property, whether accruing before or after chapter 766 applies, including appreciation resulting from (a) general market conditions and (b) spousal efforts if all the tests of section 766.63(2) are not met, *see infra* §§ 2.153, 3.44.

2. Substantial Appreciation Resulting from Spousal Efforts During Marriage and After Determination Date [§ 2.151]

Section 766.63(2) provides that the application by either spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity (generally referred to in this chapter as *efforts*) to either spouse's property other than marital property creates marital property if the appreciation is substantial and if reasonable compensation is not received. Consequently, substantial appreciation of either spouse's predetermination date property resulting from substantial undercompensated efforts of either spouse during marriage and after the determination date is marital property. Four conditions must be satisfied. Appreciation of predetermination date property resulting from spousal

efforts during marriage and while chapter 766 applies is marital property whenever all the following are true:

1. The appreciation is substantial.

2. The appreciation is the result of a spouse's efforts.

3. The efforts are substantial.

4. Reasonable compensation is not received for the efforts.

In the absence of reclassification by means provided by the Act, all other appreciation of predetermination date property (including that resulting from market conditions) is not marital property; rather, it is either (1) potentially deferred marital property subject to the surviving spouse's deferred marital property election at the owner's death or (2) predetermination date property that is not deferred marital property. *See infra* §§ 2.152, .153.

➢ ***Example.*** Assume that a husband domiciled in Wisconsin marries in 1979 and on January 1, 1981, inherits shares of stock in a business from his mother. The husband expends substantial undercompensated effort in the business while married and before chapter 766 applies and also during marriage and after the determination date, and the value of the stock increases substantially because of those efforts. Assume that the husband predeceases his wife on January 1, 2010. The substantial appreciation of the husband's business resulting from his substantial undercompensated efforts during marriage and after the determination date is marital property. For marital property purposes, such appreciation ceases at death. The appreciation resulting from efforts applied while married and before chapter 766 applied is considered in section 2.152, *infra*.

3. Substantial Appreciation Resulting from Spousal Efforts While Married and While Chapter 766 Did Not Apply [§ 2.152]

Substantial appreciation of either spouse's predetermination date property resulting from substantial undercompensated efforts of either spouse applied while married and while chapter 766 did not apply is

deferred marital property subject to the surviving spouse's election at the owner's death if at death all the following are true:

1. The owner has a Wisconsin domicile.

2. The asset (or assets traceable to it) is part of the augmented deferred marital property estate.

3. The owner is survived by his or her spouse.

Such appreciation meets the requirements of section 851.055 because it would have been marital property had chapter 766 applied to the spouses while the effort was expended. *See* Wis. Stat. §§ 851.055, 766.63(2).

➢ ***Example.*** Assume the facts in the example in section 2.151, *supra*. Assume that at his death the husband has a Wisconsin domicile and owns the stock. If the husband is survived by his spouse (regardless of her domicile at his death), substantial appreciation of the husband's stock is deferred marital property at his death to the extent that the appreciation resulted from his substantial undercompensated efforts applied while married and while chapter 766 did not apply.

Suppose in the example just given that substantial appreciation accrues while chapter 766 applies (that is, during marriage and after the determination date) with respect to the efforts applied while the spouses were married but before chapter 766 applied. Is the appreciation deferred marital property? The question arises because of doubt as to when appreciation is acquired. Section 851.055 states that deferred marital property is property acquired while spouses are married and while chapter 766 does not apply; in the example given, the efforts were expended before chapter 766 applied, but some of the appreciation caused by those efforts accrued after chapter 766 applied. On the one hand, appreciation actually occurred after the determination date. On the other hand, the better view is that the appreciation that accrued while chapter 766 applied is a direct consequence of efforts expended before chapter 766 applied and thus is inherently part of the asset. This view is supported by the labor-mixing rule in section 766.63(2). Section 766.63(2) does not set any time limitations on when appreciation must accrue so as to be marital property if all the conditions of section 766.63(2) are met.

4. Other Appreciation Accruing Before and After Chapter 766 Applies [§ 2.153]

Appreciation of predetermination date property, other than substantial appreciation resulting from substantial undercompensated efforts of either spouse, is treated as if it is inherently part of the asset that produced the appreciation. This is so whether the appreciation accrues before or after chapter 766 applies. If such appreciation (generally that resulting from market conditions but also that resulting from spousal efforts if the conditions described in section 2.151, *supra*, are not met) accrues on predetermination date property that is deferred marital property, then such appreciation is also deferred marital property. If such appreciation accrues on predetermination date property that is not deferred marital property, then such appreciation is not deferred marital property. If the appreciation accrues on mixed property, the appreciation must be apportioned. See *Plachta v. Plachta*, 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984), and *Wierman v. Wierman*, 130 Wis. 2d 425, 387 N.W.2d 744 (1986), cases in which similar reasoning was applied in the dissolution context to appreciation resulting from causes other than spousal efforts.

E. Tracing [§ 2.154]

➢ ***Example 1.*** Assume that a husband owns a predetermination date asset worth $100,000. During marriage and after the determination date, he sells the asset and reinvests the proceeds in real estate. Is the real estate classified as predetermination date property? The answer is yes, even though the real estate was acquired after the determination date.

Section 766.31(8) provides that enactment of chapter 766 alters neither the classification and ownership rights of property acquired before the determination date nor the classification and ownership rights of property acquired during marriage and after the determination date in exchange for or with the proceeds of property acquired before the determination date. This rule permits tracing. When predetermination date assets are sold, the proceeds are reinvested, and the source of the reinvestment can be traced, the reinvestment retains the source's predetermination date classification and ownership rights.

➢ ***Example 2.*** Assume that, in Example 1 above, the original predetermination date asset was stock titled in the husband's name and that the stock would have been marital property had it been acquired during marriage and after the determination date. The stock is therefore potentially deferred marital property subject to the wife's election under section 861.02 if she survives her husband. Is a subsequent acquisition during marriage and after the determination date that is traceable to the original asset deferred marital property subject to the wife's election under section 861.02 if she survives her husband, he dies domiciled in Wisconsin, and he still owns the asset at his death? The answer is not expressly set forth in the Act. Section 851.055, which defines deferred marital property, does not include a tracing rule and only applies to acquisitions made before chapter 766 applies. The better rule is that mere sale or exchange during marriage and after the determination date (that is, while chapter 766 applies) should not eliminate what would otherwise be an asset's deferred marital property status. Section 766.31(8) states that the reinvestment retains the classification and ownership rights of its predetermination date property source if traceable to that source, and the policy behind the deferred marital property election is a strong one. Thus, section 766.31(8) should be interpreted to mean that an asset acquired during marriage and after the determination date (that is, while chapter 766 applies) retains the deferred marital property character of the source to which it is traceable.

The tracing rule in section 766.31(8) is implicit in UMPA and the Act as originally enacted. *See* Wis. Stat. Ann. § 766.31(8) Legis. Council Notes—1985 Act 37, §§ 76 to 83 (West 2009). An asset that cannot be traced to predetermination date property is reclassified as marital property. Wis. Stat. § 766.63(1). The Act provides other means of reclassifying predetermination date property to marital property, such as a marital property agreement or, for example, an attempt by spouses under document of title to establish a joint tenancy (in which case the property becomes survivorship marital property). *See* Wis. Stat. Ann. § 766.31(8) Legis. Council Notes—1985 Act 37, §§ 76 to 83 (West 2009); *see also* Wis. Stat. § 861.02(2) (presuming property at death to be deferred marital property if presumption favorable to marital property is rebutted); *infra* §§ 2.283–.295 (reclassification methods).

An analogous case involves a spouse who acquires separate property while domiciled in a common law state, changes domicile to a community property state, sells the separate property, and reinvests the

proceeds. It has been stated that community property jurisdictions characterize the reinvestment as separate property if tracing to the source is possible. *See* A.M. Swarthout, Annotation, *Change of Domicil as Affecting Character of Property Previously Acquired as Separate or Community Property*, 14 A.L.R.3d 404 (1967).

X. Mixed Property [§ 2.155]

Frequently, an asset's classifications will be mixed so that it is not wholly individual, marital, or predetermination date in character. Except for certain life insurance policies and deferred-employment-benefit plans, mixing marital property with property having any other classification reclassifies the other property to marital property unless the component of the mixed property that is not marital property can be traced. Wis. Stat. § 766.63(1). Consistent with the presumption that all spousal property is marital property, Wis. Stat. § 766.31(2), the party seeking to establish the nonmarital property component of a mixed asset has the burden of tracing that component. In addition, different types of predetermination date property can be mixed: property that constitutes deferred marital property can be mixed with property that does not constitute deferred marital property. *See infra* ch. 3. After a spouse's death, if it can be proved that an asset is not marital property, the burden of tracing the component that is not deferred marital property, for the purpose of separating it from the deferred marital property component, is still on the party seeking to trace the component that is not deferred marital property. *See* Wis. Stat. § 861.02(2). Neither the Act nor UMPA specifies tracing rules. It is contemplated that tracing rules will be developed by the case law of the adopting state. These matters are considered in chapter 3, *infra*.

XI. Life Insurance [§ 2.156]

A. In General [§ 2.157]

Life insurance policies and deferred employment benefits are subject to special classification rules that function independently of section 766.31. These benefits and policies are examined in sections 2.158–.183 and 2.184–.219, *infra*, respectively.

Section 766.61 of the Act, based in large part on section 12 of UMPA, classifies the ownership interest in and proceeds of all life insurance policies insuring spouses. The Act does not provide specific classification rules if section 766.61 does not apply (as it would not, for example, if a policy owned by a spouse insured a third person such as a child or business partner); presumably, the general classification rules set forth in other sections of the Act apply to such a policy.

➢ ***Note.*** Section 766.61 does not apply to a policy held by a deferred-employment-benefit plan. Wis. Stat. § 766.61(8). Deferred employment benefits, regardless of the nature of the assets held by the deferred-employment-benefit plan, are classified under section 766.62.

B. Definitions [§ 2.158]

1. In General [§ 2.159]

Of the terms defined in section 766.61, four have primary importance: policy, owner, ownership interest, and proceeds. The date a policy becomes effective and the definition of during marriage must also be considered.

2. Policy [§ 2.160]

For the general purposes of section 766.61, the term *policy* means an insurance policy insuring the life of a spouse and providing for payment of death benefits at that spouse's death. Wis. Stat. § 766.61(1)(c). For purposes of section 766.61(3)(e) (dealing with written consents), however, the term policy includes an insurance policy insuring the life of any individual and providing for payment of death benefits at the insured's death. *Id.* Unless otherwise indicated in sections 2.161–.183, *infra*, the term policy means a policy as defined for the general purposes of section 766.61.

3. Owner [§ 2.161]

For the purposes of section 766.61, the term *owner* means either (1) the person appearing on the policy issuer's records as having the

ownership interest or (2) the insured, if no other person appears on those records as the person having the ownership interest. Wis. Stat. § 766.61(1)(a).

In the case of group insurance, the term owner means the holder of each individual certificate of coverage under the group plan; it does not mean the person who contracted with the policy issuer on the group's behalf, whether or not the person is listed as the owner on the contract. *Id.*

The above definitions do not determine ownership as a matter of property law or classification between spouses; those rights are determined by the applicable classification rules. In regard to life insurance policies, the terms *own* and *ownership interest* have the special meanings given in subsections 766.61(1)(a) and (b), unless otherwise indicated. The owner of a policy, however, has all the rights of management and control of the policy. Wis. Stat. § 766.51(1)(d). In addition, as used in sections 2.162–.183, *infra*, the term *record owner* means an owner for purposes of section 766.61.

4. Ownership Interest [§ 2.162]

Except as provided in section 766.61(3)(e) concerning written consents, the term ownership interest means an owner's rights under a policy. Wis. Stat. § 766.61(1)(b). In connection with written consents, the term includes the interests of a spouse who is not named as an owner on the policy issuer's records. Wis. Stat. § 766.31(3)(e); *see infra* § 2.177.

5. Proceeds [§ 2.163]

The term *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." Wis. Stat. § 766.61(1)(d).

6. Effective Date of Policy [§ 2.164]

When applying the classification rules and apportionment formulas applicable to life insurance, *see infra* §§ 2.168–.172, it is often necessary to determine both a policy's issuance date and its effective date. The effective date is important in applying apportionment formulas in section 766.61(3), which are expressed in terms of when the policy is "in effect." Section 766.61(2m) establishes a policy's effective date with respect to nongroup and group policies.

For purposes of determining the marital property component of the ownership interest and proceeds of a *nongroup* policy, the policy's effective date is the date of original issuance or the date of coverage, whichever is earlier, if the policy is thereafter kept in force merely by continuing premium payments, without any further underwriting. Wis. Stat. § 766.61(2m)(a). If additional underwriting is required after the policy's original issuance, or if the proceeds increase after the original issuance because of unscheduled additional premiums paid by the policyholder, the policy's effective date is the date on which the newly underwritten or newly increased coverage begins. *Id.* Questions of interpretation arise because a policy's effective date occurs after the issuance date when additional underwriting is required or when an unscheduled premium is paid. For a discussion of these questions in connection with section 766.61(3)(a)–(d), see section 2.174, *infra*.

For purposes of determining the marital property component of the ownership interest and proceeds of a *group* policy, the policy's effective date is the date individual coverage begins, even if the sponsoring employer or association subsequently changes policy issuers or the amount of coverage. Wis. Stat. § 766.61(2m)(b). Thus, classification will not change simply because an employer or association changes its policy issuer. If additional underwriting is required after the group policy's original issuance or if coverage is provided by a different employer or association, the policy's effective date is the date on which the newly underwritten or newly provided coverage begins. *Id.* A policy's issuance date and effective date may not be the same. *See infra* § 2.174.

The Act does not define the term *underwriting*.

7. During Marriage [§ 2.165]

The formulas developed under section 766.61 to determine a policy's marital property component often require the calculation of a numerator that among other factors refers to a period "during marriage." It must be remembered that section 766.01(8) defines the term during marriage to mean "a period in which both spouses are domiciled in this state that begins at the determination date and ends at dissolution or at the death of a spouse." Thus, a marital property component in a policy cannot accrue for any time during which the insured or the insured's spouse is not domiciled in Wisconsin, even though the spouses remain married. *See supra* § 2.8.

C. Classification Rules [§ 2.166]

1. In General [§ 2.167]

Although certain interests are given special treatment in section 766.61 (e.g., interests of certain creditors, payors, recipients of support obligations, *see infra* §§ 2.179–.182), the basic classification rules for life insurance policies and their consequences are set forth in section 766.61(3). Based in large part on section 12(c) of UMPA, section 766.61(3) applies to any insurance policy on the life of a spouse, whether the policy is owned by that spouse or by the other spouse, and whether it is issued, or paid for, either before or after the determination date. Whether section 766.61(3) applies to a policy owned by a third person is considered in section 2.172, *infra*.

2. Policy on Owner Spouse [§ 2.168]

a. Policy Issued During Marriage and After Determination Date [§ 2.169]

A life insurance policy issued after the determination date designating the insured spouse as the owner is marital property, except as provided in section 766.61(3)(a)2. Wis. Stat. 766.31(3)(a)1. The ownership interest and proceeds of such a policy are marital property *regardless* of the classification of property used to pay premiums on the policy.

➢ ***Example 1.*** Assume that during marriage and after the determination date, a husband applies for and is the record owner of a $100,000 insurance policy on his life and that he pays all premiums with cash he inherited. Even though payment of all premiums was from his nonmarital property, the ownership interest in the policy and its proceeds is classified as marital property. The source of premium payments is irrelevant for a policy when the insured spouse is the record owner and the policy was issued during marriage and after the determination date. Because the insurance proceeds are marital property, the husband's surviving spouse could claim $50,000 of the proceeds if the husband designates a third person as the beneficiary without his wife's written consent or agreement. *See* Wis. Stat. § 766.70(6)(b)1.

Section 766.61(3)(a) does not deal with the classification of a policy or its proceeds after the dissolution of a marriage when the insured may continue to pay premiums out of his or her solely owned property. The policy may be assigned by a divorce decree. A decree's failure to mention the policy may mean that each former spouse owns, as an equal tenant in common, an undivided one-half interest in the former marital property component of the policy and in the proceeds attributable to that component. *See* Wis. Stat. § 766.75.

Section 766.61(3)(a)2. deals with the classification of such a policy after either or both of the spouses change domicile to another state. If a life insurance policy is issued after the determination date designating the insured spouse as the owner, and after the policy's issuance the insured or the insured's spouse is at any time not domiciled in Wisconsin, the ownership interest and proceeds of the policy become mixed property. Wis. Stat. § 766.61(3)(a)2. The marital property component of the ownership interest and proceeds is the amount that results from multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the period during marriage that the policy was in effect, *see supra* § 2.165, and the denominator of which is the entire period that the policy was in effect. Wis. Stat. § 766.61(3)(a)2.

➢ ***Example 2.*** Assume that a policy is issued after the determination date to the insured spouse who is the record owner. The policy is in effect for 15 years, and the insured and the insured's spouse are married the entire time. At the beginning of the 10th year, the insured's spouse changes domicile from Wisconsin to a common law

state. Based on these facts, two-thirds of the entire ownership interest and proceeds of the policy is marital property. The other one-third is nonmarital property.

➢ ***Note.*** Section 766.61(3)(a)2. became part of the Act as the result of the 1988 Trailer Bill and does not affect rights that accrued before May 3, 1988, the effective date of the 1988 Trailer Bill. Wis. Stat. § 766.03(5). Thus, section 766.61(3)(a)2. should not deal with policies issued after the determination date when the insured's spouse was named as a record owner before May 3, 1988, and the insured or his or her spouse was domiciled outside Wisconsin after the determination date but before May 3, 1988.

For a discussion of the relationship between section 766.61(2m)(a) (dealing with additional underwriting or payment of unscheduled premiums) and section 766.61(3)(a), see section 2.174, *infra*. As to the impact of the deferred marital property rules on life insurance policies and proceeds, see sections 2.242 and 12.148, *infra*.

b. Policy Issued Before Determination Date with Premiums Paid After That Date [§ 2.170]

Section 766.61(3)(b) deals with life insurance policies issued before the determination date and designating the insured spouse as the owner. If a policy is issued before the determination date designating the insured spouse as the owner, and all premiums paid after the determination date are paid from nonmarital property, the policy and proceeds remain nonmarital property; however, all or a portion of the policy may be subject to the deferred marital property election. *See infra* § 2.242.

If, however, even one premium on such a policy is paid from marital property funds after the determination date, the policy becomes a type of mixed property. After a premium is first paid from marital property funds, the source of future premium payments is irrelevant; the marital property component of the ownership interest and proceeds of the policy is determined by a formula based, in large part, on the time before and after a premium is first paid from marital property funds. The marital property component is the amount that results from multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the period during marriage that the policy was in effect after the date on

which a premium was first paid from marital property funds, and the denominator of which is the entire period that the policy was in effect. Wis. Stat. § 766.61(3)(b); *see supra* § 2.165 (statutory definition of during marriage). Thus, either the inadvertent or the deliberate payment of only one premium from marital property funds creates a marital property component that grows over time.

➢ ***Comment.*** Section 766.61(3)(b) refers to the date when "a premium" is first paid from marital property after the determination date. A question arises whether the time apportionment formula is triggered if only a *portion* of a premium is paid from marital property funds and the balance from nonmarital property funds. It is difficult to imagine what the outcome would be if the words a premium do not include a portion of a premium. Perhaps some system of reimbursement could be devised, but it appears that the intent of section 766.61(3)(b) is to establish as simple a rule as possible. In keeping with that intent, it appears that the words "a premium" should be read to mean, in effect, "a premium or portion of a premium."

➢ ***Example 1.*** Assume that a policy is issued before the determination date designating the insured spouse as the owner. The policy is in effect for 15 years, and the insured and his or her spouse are married the entire time. A premium is first paid from marital property funds after the determination date at the beginning of the 10th year; premiums for the next 5 years are paid from nonmarital property funds. Based on these facts, one-third of the entire ownership interest and proceeds of the policy is marital property. After one premium is paid from marital property funds, the source of subsequent premium payments is irrelevant. The balance of the proceeds is nonmarital property, some of which may be deferred marital property. *See infra* § 2.242.

Section 766.61(3)(b) does not expressly tell how to adjust the apportionment formula if the insured or his or her spouse is no longer domiciled in Wisconsin. Section 2.169, *supra*, explains that such adjusting language is used in connection with life insurance policies issued to a spouse after the determination date. No adjusting language is necessary in connection with section 766.61(3)(b) because the definition of the term during marriage in section 766.01(8) when read in combination with the time-apportionment formula provided in section 766.61(3)(b) automatically apportions marital property interests and

nonmarital property interests if one or both of the spouses are no longer domiciled in Wisconsin. *See* Wis. Stat. Ann. § 766.61(3)(c)2. Legis. Council Committee Notes—1987 Act 393 (West 2009).

➢ ***Example 2.*** Assume the same facts as in Example 1 above, but assume that either the insured or his or her spouse changes domicile to another state on the final day of the 11th year after the policy was issued and that he or she remains domiciled outside Wisconsin. In that case, only 1/15th of the entire ownership interest and proceeds of the policy is marital property.

Upon the dissolution of a marriage, the marital property component of a policy subject to section 766.61(3)(b) ceases to grow because the numerator of the fraction refers to the period during marriage, which ends at dissolution. As to the effect of a divorce decree, see section 2.169, *supra*.

For a discussion of the consequences of additional underwriting or payment of unscheduled premiums in connection with a policy issued before the determination date, see section 2.174, *infra*.

3. Policy on Spouse Designating Other Spouse as Owner [§ 2.171]

If the insured's spouse is the record owner of the life insurance policy, then the ownership interest and proceeds of the policy are the individual property of the record owner spouse, except as provided in section 766.61(3)(c)2. Wis. Stat. § 766.61(3)(c)1. The ownership interest and proceeds remain the individual property of the record owner spouse, regardless of the classification of property used to pay premiums on the policy. *Id.* Section 766.61(3)(c) makes no distinction between policies issued before and after the determination date. Neither does section 766.61(3)(c) distinguish between a policy designating the noninsured spouse as owner from issuance and a policy first issued to the insured spouse who later transfers it to the noninsured spouse.

Because a policy described in this section is the individual property of the record owner spouse, it follows that amounts borrowed from such a policy are also that spouse's individual property. It is not clear, however, what classification attaches to the dividends on such a policy when such

dividends exceed aggregate premiums paid. Such excess dividends are considered income under section 766.01(10), and the general rule is that income from individual property is marital property. Wis. Stat. § 766.31(4). However, if the policy is a spouse's individual property because a gift was made of the policy by the insured spouse to the noninsured spouse, the income is individual property unless a contrary intent of the insured spouse regarding the income's classification is established. Wis. Stat. § 766.31(10).

After the issuance of a policy designating the noninsured spouse as the owner, if either the insured or his or her spouse is at any time not domiciled in Wisconsin, a portion of the ownership interest and proceeds of the policy is individual property, and a portion is other than individual or marital property. Wis. Stat. § 766.61(3)(c)2. The individual property component of the ownership interest and proceeds is the amount that results from multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the entire period during which the policy was in effect, less that period during which the insured or his or her spouse was at any time not domiciled in this state, and the denominator of which is the entire period that the policy was in effect. *Id.* Thus, the operative period for determining the individual property component is the period during which both spouses are domiciled in Wisconsin after the policy is issued. The portion of the policy that is not individual property cannot be marital property; presumably, that portion may be classified under the laws of the state in which the record owner is domiciled.

As to the relationship between section 766.61(2m)(a), governing a policy's effective date, and section 766.61(3)(c), see section 2.174, *infra*.

4. Policy on Spouse Owned by Third Party [§ 2.172]

Section 766.61(3)(d) applies to a life insurance policy insuring a spouse and designating a person other than either spouse as the policy's owner. If no premiums are paid from the spouses' marital property funds, the ownership interest and proceeds are unaffected by chapter 766. Wis. Stat. § 766.61(3)(d), (6). But if at least one premium is paid from the spouses' marital property funds, the ownership interest and proceeds of the policy are in part property of the designated policy owner and in part the spouses' marital property, regardless of the classification of property used to pay premiums after the initial payment of a premium

from marital property. The mathematical formula used to determine the marital property component of the ownership interest and proceeds is the same as that set forth in section 766.61(3)(b). *See supra* § 2.170. Thus, the marital property component of the ownership interest and proceeds is the amount that results from multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the period during marriage that the policy was in effect after the date on which a premium was first paid from marital property funds, and the denominator of which is the entire period the policy was in effect. Wis. Stat. § 766.61(3)(d); *see supra* § 2.165 (statutory definition of during marriage).

➢ ***Note.*** Another view is that the premiums paid from the spouses' marital property funds are a completed gift with the result that section 766.61(3)(d) would not apply. This point is discussed later in this section.

If section 766.61(3)(d) applies, its time-apportionment formula must be adjusted if one or both of the spouses from whose marital property a premium was paid are no longer domiciled in Wisconsin. The definition of the term during marriage when read with the time-apportionment formula in section 766.61(3)(d) automatically apportions the marital property and nonmarital property interests if one or both of the spouses are no longer domiciled in Wisconsin. *See supra* § 2.170.

A typical business-based life insurance policy (e.g., a "key-employee" policy owned by a corporation) is an example of a policy owned by a third party but insuring a spouse. Ordinarily, no portion of the policy is marital property because the business owns the policy and pays the premiums. UMPA § 12 cmt. (The same result obtains if another partner or stockholder owns the policy and pays the premiums.)

If an entire policy insuring a spouse (including one subject to a split-dollar arrangement) is owned by a third party, then from the date a premium is first paid from marital property of the insured and his or her spouse, the policy and proceeds have a marital property component subject to the formula set forth in section 766.61(3)(d).

➢ ***Example 2.*** Suppose that an adult child owns a policy insuring his father and the father pays a premium from marital property directly to the insurance company. In such a case, a marital property

component is created. *See* Wis. Stat. § 766.61(3)(d). The child owns the balance.

Some may argue that payment of the premium in the above example is a gift to the child (subject to remedies of the father's spouse in section 766.70 if the premium paid exceeds the dollar amounts of section 766.53) and that a completed gift to a third person can no longer be marital property. If that is true, however, it is difficult to conceive of a situation in which a marital property component would be created under section 766.61(3)(d).

On the other hand, a case can be imagined in which application of section 766.61(3)(d) leads to incongruous results. Assume that in Example 2 above the father paid the very first premium from marital property funds and the child then paid all subsequent premiums from marital property funds owned by the child and his or her spouse. Under a literal application of section 766.61(3)(d), the time-apportionment formula producing the marital property component owned by the child's parents would begin on the date the first premium was paid from the parents' marital property funds. However, the child also used marital property funds to pay premiums. Under these circumstances, would the child, the child's spouse, and the child's parents have overlapping marital property interests in the policy and proceeds? The Act does not provide an answer.

Suppose, though, that the father in Example 2 made a completed gift of marital property cash to his child and that all marital property interests in the gift were reclassified and divested—perhaps because the father's spouse acted together with the father in the gift or simply because such a gift is complete from the moment of transfer (although if the gift exceeded the dollar amounts of section 766.53, it would be subject to the other spouse's remedies under section 766.70(6)(a)). Suppose also that the child then paid the premium from the funds acquired by gift or from his or her other assets. Under these circumstances, a marital property component with respect to the father's marriage should not be created under section 766.61(3)(d), assuming that the child was not acting as the father's agent, because the cash was no longer marital property.

A policy insuring a spouse may be owned by an irrevocable insurance trust entirely for a third party's benefit. If the insured spouse uses marital property to pay the premiums directly to the insurance company, a marital property component may be created under section 766.61(3)(d).

The same result may obtain if a business under a noncontributing split-dollar arrangement pays premiums directly to the insurance company because that portion based on PS 58 or PS 38 costs is treated as compensation of the insured spouse. (PS 58 and PS 38 refer to the economic benefit received by the employee by way of insurance protection, using government premium rates. See, for example, I.R.S. Notice 2002-8, 2002-4 I.R.B. 398.)

What if marital property cash is transferred to the trust and the trustee pays the premium? Will a marital property component exist under section 766.61(3)(d), or is this case similar to the example in the preceding paragraph, in which a transfer of cash was made to an adult child who then paid the premium? In such circumstances, section 766.31(5) may play a role.

Section 766.31(5) provides that a transfer of property to a trust does not by itself change the classification of the property so transferred. It is believed that if the trust is irrevocable, the fact of irrevocability suffices to make the transfer a completed gift and thereby reclassify the property. *See supra* §§ 2.98–.104. In these circumstances, section 766.61(3)(d) should not apply. If the transfer is unilaterally accomplished by a spouse with management and control, it should be a completed gift, subject to the other spouse's remedies, including that under section 766.70(6)(a). *See id.*; *see also infra* ch. 10. There should be no marital property component under section 766.61(3)(d).

➢ ***Practice Tip.*** The cautious attorney may desire to reclassify the cash or income used to pay premiums as the settlor spouse's individual property before transferring the cash or income to the trust. Reclassification may be accomplished by gift, written consent, marital property agreement, or, in an appropriate case, unilateral statement. If the insurance trust provides an income interest for the noninsured spouse's benefit with the remainder to a third person, some of the discussion in sections 2.98–.104, *supra*, may be relevant ("Marital Property Transferred to Trust by Spouse or Spouses"). In general, it is good practice to avoid using marital property to fund such a trust or to pay premiums on a policy owned by such a trust. For a discussion of tax consequences, see chapters 9 and 10, *infra*.

For a discussion of the consequences of additional underwriting or payment of unscheduled premiums in connection with a policy issued before the determination date, see section 2.174, *infra*.

5. Policy Insuring Third Party [§ 2.173]

The classification of a policy owned by a spouse that insures a third party is governed by classification rules in the Act other than those found in section 766.61. An example is a policy used to fund a cross-purchase arrangement. *See infra* §§ 4.79, ch. 10. Section 766.61(3)(d) may apply to such a policy if the third-party insured is married and marital property of the insured rather than property of the owner is used to pay a premium. *See supra* § 2.172.

6. Effect of Section 766.61(2m) on Time-apportionment Formulas [§ 2.174]

Questions may arise in connection with the relationship between section 766.61(2m)(a), governing a policy's effective date, and the time-apportionment formulas in section 766.61(3)(a), (b), (c), and (d).

➢ ***Example.*** Assume that a policy designating the insured spouse as owner is issued before the determination date and that after the determination date all scheduled premiums are paid with individual property. Assume that after the determination date an unscheduled premium is paid to secure additional proceeds. Does classification depend on whether the unscheduled premium is paid from marital property funds or from nonmarital property funds?

In the example, the policy was issued before the determination date, but the increased coverage began after the determination date. Under section 766.61(2m)(a), the policy has a new effective date when the right to increased proceeds begins. Does this mean the policy's issuance date can be ignored? The answer is not clear, and in certain cases, it may have significant consequences. The language of section 766.61(2m)(a) and the formulas in section 766.61(3) support the view that the two dates are not necessarily the same. Although section 766.61(2m)(a) is the only place in section 766.61 that the words *effective date* appear, the formulas in section 761.61(3) refer to when a policy is "in effect." Presumably, the words "effective date" tie to "in effect" rather than "date of issuance." In addition, section 766.61(2m)(a) states that the effective date of a nongroup policy is the date on which the newly underwritten right to proceeds or the right to increased proceeds begins, but as section 766.61(2m)(a) acknowledges, either or both of those events occur "after

original issuance of the policy." On the other hand, it may be argued that section 766.61(2m)(a) creates a device designed to reclassify life insurance policies to marital property if additional underwriting occurs or unscheduled premiums are paid after the determination date, and to achieve that objective in full, the policy's issuance date should be moved to its new effective date.

Consider the possible application of section 766.61(3)(a) to the above example. Section 766.61(3)(a) states that a policy issued after the determination date designating the insured spouse as owner is marital property regardless of the source of the premiums paid. If the date of issuance in the example is deemed to move up in time to the new effective date, then it is as if a new policy was issued after the determination date with the insured spouse as record owner. Such a policy is entirely marital property. If the two dates are not the same (that is, the issuance date is not moved up in time but remains as is), then section 766.61(3)(a) is inapplicable because the policy in the example was not issued after the determination date.

Assuming, in the example, that the issuance date and the effective date cannot be read to be the same, the application of section 766.61(3)(b) must be considered. If a policy issued before the determination date designates the insured as the owner, the policy and its proceeds become mixed property if a premium is paid from marital property funds after the determination date. A formula is established to determine the marital property component. The marital property component is the amount that results from multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the period during marriage that the policy was in effect after the date on which a premium was first paid from marital property funds, and the denominator of which is the entire period that the policy was in effect. *See supra* § 2.165 (statutory definition of during marriage).

When no additional proceeds are purchased, the time-apportionment formula is clearly understood. In the example, however, an additional unscheduled premium was paid. That automatically gave the policy an effective date after the determination date. If the unscheduled premium was paid from marital property funds, it appears that the entire policy is reclassified as marital property because the numerator and the denominator in the formula set forth in section 766.61(3)(b) are the same.

What if nonmarital property funds were used to pay the unscheduled premium? The time-apportionment formula in section 766.61(3)(b) computes a marital property component only after a premium is paid from marital property funds. If only nonmarital property funds were used to pay premiums, the fact that the policy has a new effective date seems to be irrelevant. Note, however, that even though the policy may not be reclassified as marital property, there are still property law consequences (assuming the issuance date is not moved up to the new effective date). A new effective date alters the formula. Thus, if a premium is subsequently paid from marital property funds, the denominator begins on the policy's new effective date, so that time elapsed between the issuance date and the new effective date is ignored, thereby enlarging the marital property component.

The formula in section 766.61(3)(d), involving policies owned by a third party, is the same as that in section 766.61(3)(b). Thus, the foregoing discussion should be relevant to section 766.61(3)(d). The foregoing discussion may be moot as far as section 766.61(3)(c) is concerned because a policy owned by a spouse insuring the life of the other spouse is the owner spouse's individual property regardless of the source of the premiums.

D. Deferred Marital Property [§ 2.175]

For application of the deferred marital property rules to life insurance policies and proceeds, see sections 2.242 and 12.136, *infra*.

E. Comparison with Other Community Property States [§ 2.176]

The Wisconsin classification system used for life insurance policies subject to section 766.61 is quite different from the systems found in other community property jurisdictions. Some community property jurisdictions use rules based on inception of title or source of premiums. Under the rule based on inception of title (used in Texas, for example), marital status when the first premium is paid determines the ownership of the policy. *See* McClanahan, *supra* § 2.4, at 363. If subsequent premiums are paid from property of another classification, a claim for reimbursement usually arises to the extent of the amount of premiums paid, rather than as a pro rata proportion of the proceeds when paid. The

rule based on source of premiums (used in California, for example), is different. *Id.* Ownership of the policy and the proceeds is apportioned according to the amount of premiums paid from separate property and community property. *See also* Reppy & Samuel, *supra* § 2.19, at 88 ("Elsewhere the last premium is viewed as the sole source of the proceeds payable at the insured's death—earlier payments are viewed as buying coverage for a period that has expired.") (citing cases from Idaho, New Mexico, and Arizona).

Wisconsin, on the other hand, uses UMPA's rule that a policy is entirely marital property if it is issued after the determination date and is owned by the insured spouse. In other cases in which the insured is a spouse, Wisconsin applies UMPA's time-apportionment formula. *See* UMPA § 12; *see also supra* § 2.170. Consequently, rules from other community property jurisdictions will be of limited value when classifying life insurance policies insuring spouses domiciled in Wisconsin.

➢ ***Note.*** Classification of a policy owned by a spouse and insuring a third party is not governed by section 766.61. *See supra* § 2.173. Presumably, the policy must be classified under the Act's general classification rules, and in these cases, precedent from other community property jurisdictions may be relevant.

F. Written Consent [§ 2.177]

A written consent is a document signed by a person against whose interests it is sought to be enforced. Wis. Stat. § 766.01(16). Consents can be useful for policies that insure a settlor spouse and are held by an irrevocable insurance trust naming the other spouse as a trust beneficiary. *See infra* ch. 10. A consent is also useful for a policy owned by an insured spouse who wishes to name a beneficiary other than the other spouse.

Section 766.61(3)(e) reads in part as follows:

> A written consent in which a spouse consents to the designation of another person as the beneficiary of the proceeds of a policy or 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. Unless the written consent expressly provides otherwise, a written consent under this paragraph is revocable in writing and is effective only with respect to the beneficiary named in it. Unless the written consent expressly provides otherwise, a revocation of a written consent is effective no earlier than the date on which it is signed by the revoking spouse and does not operate to reclassify any property which was reclassified or in which the revoking spouse relinquished an interest from the date of the consent to the date of revocation.

Note that section 766.61(3)(e) differs in many respects from section 12(c)(5) of UMPA.

Under section 766.61(3)(e), the spouse who is the record owner may designate a beneficiary. The other spouse need not participate in the actual designation, but that spouse may in writing subsequently consent to the record owner's designation and future designations.

Section 766.61(3)(e) states that the consent is revocable unless expressly provided otherwise. From a planning standpoint, irrevocable consents have the advantage of certainty. The introductory phrase in the second sentence also indicates that a written consent may specify the effect of changing a beneficiary after the written consent is executed; if the written consent is not specific on this point, the consent applies only to the beneficiary originally named in the consent.

Section 766.61(3)(e) authorizes consents purporting to deal with assets used to pay premiums. Consequently, a written consent so stating may relinquish or reclassify the consenting spouse's interest in any assets used to pay premiums. *See infra* ch. 10.

Section 766.61(3)(e) uses the important words "to the extent the consent provides." Thus, a consent to a beneficiary may relinquish or reclassify all or a portion of a consenting spouse's interest in the ownership interest and proceeds of a policy, or it could be limited to classification of property used to pay premiums (although most consents will deal with all aspects of a policy, including ownership, naming of beneficiary, and property used to pay premiums). Wis. Stat. § 766.31(3)(e).

- ***Example.*** Assume that a wife names her son as the beneficiary of a life insurance policy insuring her life and designating her as owner,

and that her husband consents in an irrevocable written consent. The consent can provide that the husband relinquishes his rights not only to the proceeds when his wife dies, but also to all other ownership interests in the policy and proceeds, without regard to the classification of property used by his wife or another person to pay premiums. A relinquishment of all ownership rights means that the wife can borrow against the policy's cash surrender value, if any, and that the proceeds of the loan are her individual property. The husband's irrevocable consent could also state that the policy, and the assets used to pay premiums as well, are reclassified as the wife's individual property despite subsequent premium payments from property of other classifications. For a discussion of tax consequences, see chapter 9, *infra*; for planning, see chapter 10, *infra*.

➢ ***Comment.*** Section 766.61(3)(e) as amended is a great deal more flexible than its predecessor; it specifically states that relinquishment or reclassification of a spouse's interest in property used to pay premiums or in the ownership interest or proceeds of the policy is determined according to the terms of the written consent. Consents, therefore, can be tailor-made.

Because a consent may reclassify an insurance policy described in section 766.61, it should be possible to reclassify a predetermination date policy (even one with a component potentially subject to the deferred marital property election) as the individual property of the insured spouse.

Unless it is expressly irrevocable, a consent may be revoked. Unless the written consent provides otherwise, a revocation is effective no earlier than the date it is signed by the revoking spouse. Any implication that a revocation may be retroactive is inconsistent with the general rule that a spouse may not unilaterally reclassify the other spouse's property interests. Thus, unless the written consent itself so provides, a revocation of the consent does not reclassify any property that was reclassified by the written consent or any property in which the revoking spouse relinquished an interest during the period between the date of consent and the date of revocation. Wis. Stat. § 766.61(3)(e). After a revocation, the ownership rules and formulas under section 766.61 begin to apply. For a discussion of the tax and planning consequences of revocation, *see* chapter 10, *infra*.

➢ ***Caveat.*** There may be uncertainty about whether a written consent can apply to insurance policies acquired after the written consent is executed. Section 766.61(3)(e) refers to "a policy," perhaps implying that the policy must be in existence or applied for at the date of the consent. The better rule permits a consent to apply to after-acquired policies and substituted policies. A marital property agreement can apply to after-acquired property. Wis. Stat. § 766.58(3)(a); *see infra* ch. 7.

G. Spousal Remedies [§ 2.178]

If a spouse with management and control unilaterally transfers a life insurance policy that is marital property to a third person or entity, whether the nondonor spouse may invoke remedies under section 766.70(6)(a) turns on whether the gift's value is within the dollar amounts of section 766.53. Section 766.53 has special rules dealing with gifts of life insurance policies. For a discussion of life insurance policies and available remedies, see sections 8.50–.52, *infra*. For a discussion of tax consequences, see section 9.51, *infra*. For a discussion of elective rights in connection with deferred marital property life insurance policies, see sections 2.242 and 12.151, *infra*.

Sections 766.70(7) and 766.61(7) deal with the rights of the spouses when the noninsured spouse dies first.

➢ ***Example.*** Assume that a husband purchases and is record owner of a $200,000 policy on his life after the determination date. The policy is classified as marital property. *See supra* § 2.169. The policy's interpolated terminal reserve and unused portion of the term premium is $10,000 when the husband's wife predeceases him. What interest does the wife's estate have in the policy on the surviving husband's life?

In the example, the wife's interest in the policy at the time of her death is $5,000. Under section 766.70(7), a surviving spouse may purchase the deceased spouse's interest in the policy from the deceased spouse's estate within the time limitations set forth in that section. What if the purchase is not made? The surviving husband continues to own at least half the policy. What about the interest of the wife's estate?

Section 766.61(7) provides that the interest of the wife's estate is limited to a dollar amount equal to one half the marital property interest in the interpolated terminal reserve and in the unused portion of the term premium of the policy on the date of her death (in the example, $5,000). All other rights of the decedent wife in the ownership interest and proceeds of the policy terminate. All other rights are owned by the husband. See section 12.13, *infra*, for a more detailed discussion.

An exception to the application of section 766.61(7) is provided in section 854.14(3m)(b)2., which applies when the predeceasing spouse is murdered by the insured spouse. In such a case, the decedent's interest is a fractional interest equal to one-half the portion of the policy that was marital property immediately before the death of the decedent spouse. Thus, if the policy had a cash surrender value of $100,000 on a policy paying a death benefit of one million dollars, then the decedent spouse's interest is a fractional interest equal to one-half the cash surrender value. Because the statute is expressed in terms of a fractional interest (not dollar terms) and, according to the Committee Notes, is not frozen, the implication is that the decedent spouse's estate plan passes a one-half ownership interest in the policy to the decedent spouse's nonspousal beneficiaries. Presumably those beneficiaries have an obligation to pay half of all future premiums.

H. Protected Parties [§ 2.179]

1. Payors [§ 2.180]

The general rule is that a policy issuer may rely on and act in accordance with the policy and the issuer's records and that if the 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. Wis. Stat. § 766.61(2)(b)1. Accordingly, the classification of a policy or a portion of a policy as marital property has no effect on the policy issuer's duty to perform under its contract when making payment or taking action in accordance with the policy and its records. Wis. Stat. § 766.61(2)(b)2.

A major exception to the rule occurs if at least five business days before making payment or taking action in accordance with the policy and the issuer's records, a policy issuer receives at its home office a notice of claim. Wis. Stat. § 766.61(2)(c)1. A notice of claim means a

written notice, by or on behalf of a spouse, former spouse, surviving spouse, or person claiming under a deceased spouse's disposition at death, that the person sending the notice claims to be entitled to the proceeds, the payments, or an interest in the policy. Wis. Stat. § 766.61(2)(a)2.

Upon receipt of a notice of claim, the issuer must notify the party directing the payment or action (usually a person claiming to be a beneficiary) that a notice of claim has been received. The issuer may not take any action on the policy for 14 business days after receiving the notice of claim. Wis. Stat. § 766.61(2)(c)1.

Within 14 business days after receiving the notice of claim the issuer must receive at its home office, as purporting to support the notice of claim, a decree, marital property agreement, written directive signed by the beneficiary and surviving spouse, consent under section 766.61(3)(e), or proof that a legal action has been filed, including a copy of an election filed under section 861.08 (deferred marital property election), to secure an interest as evidenced in such a document. If appropriate documentation in support of the claim is received on a timely basis, the issuer may make payment or take action on the policy only after the issuer receives documentation from a court, or from the claimant and the person directing action or payment, indicating that the dispute has been resolved. Wis. Stat. § 766.61(2)(c)2. (Presumably, other forms of appropriate documentation should also suffice.)

If documentation purporting to support the claim is not submitted as and within the time limits described, the policy issuer "shall" take action or make payment as if there had been no notice of claim in the first place. Wis. Stat. § 766.61(2)(c)3. A policy issuer is not liable to any person for any claim for damages as a result of the suspension of policy action or the taking of any action under section 766.61(2). Wis. Stat. § 766.61(2)(d). However, a policy issuer must pay interest that accrues during the suspension of any action. *Id.*

➢ ***Note.*** Section 766.61(2)(c) does not define the term *policy issuer*. Consequently, questions may arise whether payors under self-insured plans are policy issuers within the meaning of section 766.61(2). If they are not policy issuers under that section, they might not enjoy the protection that section affords.

2. Creditors [§ 2.181]

Section 766.61(4), based on section 12(d) of UMPA, states that section 766.61 does not affect a creditor's interest in the ownership interest or proceeds of a policy that is assigned to the creditor as security or made payable to the creditor.

3. Owners or Beneficiaries of Policies Subject to Certain Decrees and Property Settlements [§ 2.182]

Section 766.61(5), based on section 12(e) of UMPA, states that 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 to parenthood is not marital property, regardless of the classification of property used to pay the premiums.

➢ ***Example.*** Suppose that a divorce decree names a husband as owner of an insurance policy on his life and requires him to maintain the policy for the benefit of his child from a prior marriage. Such a policy is the husband's nonmarital property, and the implication is that the proceeds could be paid free of any claims by the husband's second spouse, even if marital property funds were used to pay the premiums. Perhaps a claim for reimbursement from the husband could be made for marital property funds used to pay the premiums.

I. Policy Dividends [§ 2.183]

Certain life insurance policies permit the use of dividends either to purchase additional insurance or to reduce premium payments.

➢ ***Example.*** Assume that a wife owns an insurance policy on her life and that the policy is her individual property. The aggregate policy dividends earned or accrued during marriage and after the determination date are not income until they exceed aggregate premiums paid. Wis. Stat. § 766.01(10); *see supra* § 2.165 (statutory definition of during marriage). Once dividends constitute income earned or accrued during marriage and after the determination date, they are marital property (assuming no interspousal gift and no

marital property agreement, court decree, written consent, or unilateral statement to the contrary), and using such income to pay premiums results in a mixed asset under section 766.61(3)(b). (Mixing under section 766.63(1) would occur if the policy owned by the wife insured a third person.)

What if the wife in the above example uses the dividends to purchase additional insurance? Whether the policy dividends constitute income does not depend on what the dividends are used for but rather on whether the aggregate dividends exceed the aggregate premiums paid. Wis. Stat. § 766.01(10). Following this line of reasoning, dividends used to pay for additional insurance are not income until the aggregate dividends exceed the aggregate premiums paid. *Id.* But this does not fully answer the question.

Even if the dividends are not income, the issue is whether each addition to the policy should be treated as the purchase of a new and separate policy. If an addition is treated as a new policy, that new policy might be marital property. For example, any policy insuring a spouse that is owned by that spouse and issued after the determination date is marital property regardless of the classification or source of premiums paid. Wis. Stat. § 766.61(3)(a); *see supra* § 2.169. It appears, however, that each paid-up addition is an adjustment as an incident to an existing contract; the addition is not a new policy because the addition is not being offered as a new and independent contract to a customer, it does not involve a test of insurability, and it is not a payment of an unscheduled premium. *See supra* § 2.164.

What if the wife borrows from her individual property policy and later repays the loan with dividends? Income does not exist until the aggregate dividends exceed the aggregate premiums paid; only at this point may mixing occur. Without an interspousal gift, a unilateral statement, or a marital property agreement or court decree to the contrary, dividends earned or accrued during marriage and after the determination date in excess of the aggregate premiums paid are marital property. If the loan is repaid with marital property, a mixing problem may arise. *Cf. infra* §§ 3.39–.41 (mixing problems resulting from use of marital property to repay loan on individual property).

XII. Deferred Employment Benefits [§ 2.184]

A. In General [§ 2.185]

Deferred employment benefits are benefits from a deferred-employment-benefit plan. Wis. Stat. § 766.01(3m). Deferred-employment-benefit plans, in turn, are generally plans providing some form of deferred compensation. Wis. Stat. § 766.01(4). Although deferred employment benefits are a form of income for purposes of the Act, Wis. Stat. § 766.01(10), they receive distinct and special treatment under the Act. Sections 2.186–.219, *infra*, consider the definition of deferred-employment-benefit plans under the Act, the classification of deferred employment benefits, the terminable-interest rule, property and valuation issues, and administrative matters.

The impact of some of the classification rules set forth in the following sections is somewhat limited in the case of deferred-employment-benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461. *See infra* §§ 2.214–.217.

B. Definition of Deferred-employment-benefit Plan [§ 2.186]

1. Statutory Definition [§ 2.187]

Section 766.01(4)(a), based on section 1(4) of UMPA, defines the term *deferred employment benefit plan* as "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." This definition is drawn from (but is much broader than) the definition in ERISA and is intended to cover plans of both private and public employers. *See* UMPA § 1(4) cmt. The definition includes all types of deferred compensation arrangements, those that are qualified under ERISA and those that are not. *See infra* § 2.189 (list of included plans). In addition, certain plans are included in the definition in a roundabout way because of exceptions to exclusions from the definition under the Act. *See infra* § 2.191. Federal preemption may be relevant. *See infra* §§ 2.211–.217.

Deferred employment benefits are a form of income under the Act. Wis. Stat. § 766.01(10).

2. Significance of Definition [§ 2.188]

What the Act includes and excludes in its definition of deferred-employment-benefit plan is significant. Only deferred compensation plans included within the definition are subject to the classification provisions of section 766.62, *see infra* §§ 2.196–.199; excluded plans are subject to the Act's other classification provisions. Excluded plans are also not subject to the terminable-interest rule. *See infra* § 2.201. In other words, 50% of the marital property interest in an excluded plan is subject to the nonemployee spouse's right of testamentary disposition, whereas a plan included in the definition is not subject to that testamentary disposition. *See id.*

3. What Definition Expressly Includes [§ 2.189]

For purposes of the Act, deferred-employment-benefit plans include but are not limited to:

1. Pension, profit-sharing, and stock-bonus plans;

2. Employee stock-ownership or stock-purchase plans;

3. Savings or thrift plans;

4. Annuity plans;

5. Qualified bond-purchase plans;

6. Self-employed retirement plans;

7. Simplified employee pensions; and

8. Deferred compensation agreements or plans.

Wis. Stat. § 766.01(4)(a).

4. What Definition Expressly Excludes [§ 2.190]

Section 766.01(4)(b), based on the last sentence of section 1(4) of UMPA, specifically excludes certain plans from the basic definition of deferred-employment-benefit plan. Subject to exceptions, *see infra* § 2.191, section 766.01(4)(b) expressly excludes "life, health, accident or other insurance or a plan, fund, program or other arrangement providing benefits similar to insurance benefits."

➢ ***Note.*** Section 766.01(4)(b) does not exclude a deferred-employment-benefit plan from the basic definition simply because the plan holds life insurance policies along with other assets. Moreover, section 766.01(4)(b) does not exclude the life insurance policies held in the plan from the definition of deferred-employment-benefit plans. Regarding the classification of such life insurance policies, see section 2.199, *infra*.

5. What Definition Includes by Exception to Exclusions [§ 2.191]

Section 766.01(4)(b) lists four exceptions (also found in section 1(4) of UMPA) to the exclusion of certain benefits from the basic definition of deferred-employment-benefit plans, thus putting these benefits back into the basic definition. Those exceptions are:

1. *Benefits having a present value immediately realizable in cash at the employee's option*. Wis. Stat. § 766.01(4)(b)1. An example is a cafeteria plan that gives an employee the option to take cash or to allocate it under various programs provided by the employer to the "purchase" of health insurance, life insurance, a pension, and so forth. Life insurance held by such a plan is subject to the deferred-employment-benefit rules under section 766.62 as opposed to the rules applying to life insurance policies under section 766.61.

2. *Benefits constituting an unearned premium for the coverage (i.e., a return of premium), to the extent of the returned amount allocable to the participant*. Wis. Stat. § 766.01(4)(b)2.

3. *Benefits representing a right to compensation for loss of income during disability*. Wis. Stat. § 766.01(4)(b)3.; *see also supra* § 2.136

(when plan in connection with such benefits commences). Because of this exception, disability benefits offered by a plan are treated as deferred employment benefits subject to the classification rules of section 766.62. Disability payments made pursuant to individually purchased disability insurance are treated differently. *See supra* § 2.136.

4. *Benefits representing a right to payment of expenses incurred before the time of valuation*. Wis. Stat. § 766.01(4)(b)4. It is not clear what is meant by the word *valuation*. Probably it means the date when classification becomes relevant. Suppose, for example, a husband incurs medical expenses, and before his plan reimburses him, his wife dies. The reimbursement the husband receives after his wife's death is apparently his solely owned property because his wife's interest in it terminated at her death. *See infra* § 2.201.

6. Arrangements Not Addressed by Definition [§ 2.192]

a. Unfunded Plans Created Pursuant to Contracts or Partnership Agreements [§ 2.193]

The definition of deferred-employment-benefit plan in section 766.01(4)(a) does not refer specifically to unfunded plans created pursuant to contracts or partnership agreements and paying some defined amount after retirement. Nevertheless, such plans should be included in the basic definition because they are a form of compensation or benefit from employment "deferred to a later date or the happening of a future event." Wis. Stat. § 766.01(4).

b. IRAs [§ 2.194]

The definition in section 766.01(4)(a) does not refer specifically to IRAs. However, by implication of the terminable-interest rule, IRAs are not included in the definition of deferred-employment-benefit plan. The terminable-interest rule states:

> [I]f the nonemployee spouse predeceases the employee spouse, the marital property interest of the nonemployee spouse in all of the following terminates at the death of the nonemployee spouse:
>
> (a) A deferred employment benefit plan.
>
> (b) Assets in an individual retirement account that are traceable to the rollover of a deferred employment benefit plan.

Wis. Stat. § 766.62(5); *see also* Wis. Stat. §§ 766.31(3), .58(7)(a), .588(1)(b)1. Subsection (b) was added to section 766.62(5) by 1993 Wisconsin Act 160, effective April 1, 1994. The passage of the amendment suggests that an IRA was not within the definition of a deferred-employment-benefit plan in the first place. The terminable-interest rule does not apply to benefits that are not within that definition. The implication is that the amendment was needed to extend the terminable-interest rule to IRAs in the case of certain rollovers because IRAs are not within the definition.

➢ ***Note.*** It may be assumed that the words *nonemployee spouse* mean the spouse who does not create the IRA even though, in fact, a spouse who is not employed may create an IRA.

For a discussion of the application of the terminable-interest rule to IRAs, including IRAs in existence on the effective date of 1993 Wisconsin Act 160, see section 2.202, *infra*.

c. Stock Options [§ 2.195]

It is unclear whether employee stock options are included within the statutory definition of deferred-employment-benefit plans. As noted in section 2.187, *supra*, the definition in section 766.01(4)(a) includes "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." Section 766.01(4)(a) lists examples, including pension and profit-sharing arrangements and stock-bonus plans, but does not mention stock options.

The two main elements of the statutory definition are:

1. Compensation (or benefits); and

2. The deferral of the compensation or benefits to a later date or event.

Employee stock options are almost always compensatory in nature, but whether they provide benefits deferred to a later date is not clear. Some options are immediately exercisable at a discount, thus offering immediate benefits. Others may be exercisable at a later date; however, their value depends on the value of the stock subject to the option. Thus, whether an option holder will ever receive a benefit is uncertain.

Wisconsin courts have not considered the issue of whether stock options are deferred-employment-benefit plans under the Act. However, two cases in dissolution proceedings in Wisconsin and California may be relevant. Both *Chen v. Chen*, 142 Wis. 2d 7, 12, 416 N.W.2d 661 (Ct. App. 1987), and *Hug v. Hug*, 201 Cal. Rptr. 676 (Ct. App. 1984), note that stock options are a form of compensation, the benefits of which are postponed to a future date, and then compare them to pensions. Pensions clearly are deferred-employment-benefit plans; thus, the reasoning in *Chen* and *Hug* suggests that a court will find stock options to be a deferred-employment-benefit plan under the Act.

Stock options and the stock acquired through their exercise raise certain classification issues. Specifically, whether a stock option is within the definition of a deferred-employment-benefit plan will determine whether the formulas in section 766.62 applicable to plans that straddle the determination date (straddle plans) apply. *See infra* § 2.198.

C. Classification Rules [§ 2.196]

1. In General [§ 2.197]

Deferred employment benefits are subject to the classification rules of section 766.62. Section 766.62(1), based on section 13(a) of UMPA, states that a deferred employment benefit attributable to the employment of a spouse occurring after the determination date is marital property.

A deferred employment benefit attributable to employment of a spouse occurring partly before and partly after the determination date is mixed property. Wis. Stat. § 766.62(2). The benefit is apportioned between the nonmarital and marital property components according to a formula. The marital property component is determined by multiplying the entire benefit by a fraction, the numerator of which is the period of

employment giving rise to the benefit that occurred after the determination date and during marriage, and the denominator of which is the total period of employment giving rise to the benefit. *Id.*; *see* UMPA § 13(b); *see also supra* § 2.8 (statutory definition of during marriage). Some examples are helpful.

➢ ***Example 1.*** Assume that a deferred employment benefit is $300,000, the spouse was employed while married 5 years before the determination date and 10 years after it, and the entire time of employment gave rise to the benefit. In this relatively simple case, the marital property component of the benefit is $200,000 ($300,000 multiplied by the fraction 10 years divided by 15 years). The balance is nonmarital property. The formula under section 766.62(2) is only used to determine the marital property component. The Act's general principles are used to determine the nonmarital property component. In this example, if a third party is named as beneficiary without the surviving spouse's consent, the nonmarital property component is deferred marital property potentially includible in the augmented deferred marital property estate subject to the election provided a surviving spouse by section 861.02. This is because the nonmarital property component would have been marital property if acquired while chapter 766 applied. *See infra* § 2.243.

➢ ***Example 2.*** Assume the same facts as in Example 1 above except that the spouse's employment began, while the spouses were married, 10 years before the determination date and 5 years before the plan was established. Thus, in this example, the entire period of employment is 20 years, but the first 5 years of employment did not give rise to a benefit. The marital property component of the $300,000 benefit is $200,000 ($300,000 multiplied by the fraction 10 years divided by 15 years). If a third party is named as beneficiary without the surviving spouse's consent, $100,000 (the balance of the benefit) is deferred marital property potentially includible in the augmented deferred marital property estate subject to the election provided a surviving spouse under section 861.02. *See infra* § 2.243.

➢ ***Example 3.*** Assume that, while married, a spouse begins employment 10 years before the determination date and that a deferred-employment-benefit plan is established on the determination date. Assume that employment giving rise to a benefit continues for 10 more years during marriage and after the determination date.

Assume that the benefit is $300,000. The marital property component of the benefit is $300,000 (benefit of $300,000 multiplied by the fraction 10 years divided by 10 years).

Section 766.62(1)(b) provides a formula for calculating the marital property component in a deferred employment benefit when the employed spouse, the other spouse, or both spouses are at any time not domiciled in Wisconsin. In such a case, the benefit is mixed property. Under section 766.62(1)(b), the marital property component is the amount that results from multiplying the entire benefit by a fraction, the numerator of which is the period of employment giving rise to the benefit that occurred after the determination date and during marriage, and the denominator of which is the total period of the employment. It must be remembered that section 766.01(8) defines the term during marriage to mean a period during which both spouses are domiciled in Wisconsin, beginning at the determination date and ending at dissolution or the death of a spouse. Thus, a marital property component in a deferred employment benefit ceases to grow when one or both of the spouses are not domiciled in Wisconsin.

Consider again Example 1 above. In that example, the spouses were married for the entire time that the employment gave rise to the benefit. Five of those years occurred before the determination date and 10 years after it. If the example is altered so that 5 years after the determination date one of the spouses changes domicile from Wisconsin to another state and remains there, the marital property component of the benefit is $100,000 ($300,000 multiplied by the fraction 5 years divided by 15 years). The balance is nonmarital property.

➢ ***Note.*** Section 766.62(1)(b) was created by the 1988 Trailer Bill and does not affect rights that accrued before its May 3, 1988, effective date. Wis. Stat. § 766.03(5). Before May 3, 1988, the concept of marital domicile was a part of the Act. For a discussion of that concept, see section 13.46, *infra*.

➢ ***Comment.*** A time-apportionment formula is particularly useful for defined-benefit plans because those plans do not provide separate accounts detailing contributions and earnings history for each participant. A time-apportionment formula may, however, be somewhat arbitrary for defined-contribution plans that do provide account histories and that receive contributions varying in amount

over time (usually corresponding to the size of earnings). In addition, if there is inflation, dollars contributed early are worth more than dollars contributed late.

A plan's ownership or disposition provisions that conflict with section 766.62(1) or (2) are ineffective between spouses or former spouses or between a surviving spouse and a person claiming under a deceased spouse's disposition at death. Wis. Stat. § 766.62(3). Rules of federal preemption may also be relevant. *See infra* §§ 2.214–.217. In some cases, state law may preclude application of the Act. *See infra* § 2.218.

2. Stock Options [§ 2.198]

Whether a stock option is within the definition of a deferred-employment-benefit plan, *see supra* § 2.195, will determine whether the formulas applicable to straddle plans in section 766.62 apply. Wisconsin courts have not considered these questions within the context of the Act. However, *Chen*, 142 Wis. 2d 7, and *Hug*, 201 Cal. Rptr. 676—two dissolution cases discussed in section 2.195, *supra*—may be relevant.

In both *Chen* and *Hug*, the courts rejected arguments that an option granted during marriage must be entirely the holder's separate property because it could not be exercised until after dissolution. In *Hug*, the court emphasized that each case is fact-intensive, each option must be examined to determine its purpose, and a divorce court has great latitude in dividing the asset and determining a proper formula for doing so. 201 Cal. Rptr. at 679, 685–86.

In determining the amount subject to division in the dissolution, the court in *Hug* used a formula similar to that in section 766.62. *Hug* held that options that have exercise dates after dissolution should be divided in accordance with a formula, the numerator of which is the length of service from the date of commencement of service until the date of separation, and the denominator of which is the length of service from the date of commencement of service to the date when the option may first be exercised. *Id.* at 679.

In *Chen*, the appellate court said a formula need not be used to determine equitable results, but the court indicated that a formula like that used in *Hug* could be appropriate. *Chen*, 142 Wis. 2d at 14.

The Act, on the other hand, requires that the time-apportionment formulas of section 766.62 must be used if a deferred-employment-benefit plan is involved and it straddles the determination date. But a number of issues arise in applying those formulas if stock options are within the definition of deferred-employment-benefit plans.

The first issue that arises is what date should be used for the beginning of the time period in the numerator and denominator of the time-apportionment formulas. Is it the commencement of employment or the date the option is granted? When deferred-employment-benefit plans straddle the determination date, section 766.62 states that the numerator is the time of employment during marriage and after the determination date giving rise to the benefit. The denominator is the total period of employment giving rise to the benefit.

Assume a case in which employment begins before marriage and options are issued during marriage. *Hug* said the numerator should begin at the commencement of service. *Hug*, 201 Cal. Rptr. at 678. For all practical purposes under the Act, the numerator must begin on the determination date when straddle plans are involved. But assume the options were not contemplated by management or employees until shortly before their creation. *Nelson v. Nelson*, 222 Cal. Rptr. 790, 793 & n.4 (Ct. App. 1986), held that the numerator should begin with the *granting* of the option, saying that the options in *Hug* were designed to attract new employees and more generously reward past services, while the options in *Nelson* were designed so that only future increases in the value of the underlying stock could benefit the holders. Like *Hug*, *Nelson* emphasizes the need for a case-by-case analysis.

A second issue that arises in applying the time-apportionment formulas of section 766.62 to stock options is what date should be used for the end of the time period in the denominator. In *Hug*, the court said the denominator should begin on commencement of service and end on the date the option could first be exercised. *Hug*, 201 Cal. Rptr. at 678. *Harrison v. Harrison*, 225 Cal. Rptr. 234 (Ct. App. 1986), involved a plan in which options were vested upon being granted but permitted divestiture of stock received by virtue of exercise if an employee left employment for certain reasons and within a certain time of exercise. The court held that the denominator, like that in *Nelson*, should begin upon grant and end, not on exercise, but on the date the stock was no longer subject to divestment. *Id.* at 237–40.

When does the time period used in the denominator end if the holder of the option dies before the date the option may be exercised? If the terms of the option permit acceleration of exercise at the death of the holder, the denominator ends on the date of death. If acceleration is not permitted, presumably death would still be the ending point; otherwise, a nonmarital component would suddenly be created even in cases in which employment began after the determination date.

A third issue that arises is how stock acquired upon exercise of an employee stock option should be classified. If nonmarital property funds are used to pay the option price, then the stock will have both marital and nonmarital property components. The stock will also have marital and nonmarital components if an option straddles the determination date.

➢ ***Example.*** Assume that an employee began employment five years before marriage. Assume that three years into the marriage, options were issued and that four years later, the employee exercised the options and used inherited cash of $1,000 to pay the option price when the stock had a fair market value of $1,800. The gain on the transaction is $800. Five-ninths of the stock is individual property representing the payment of the option price with individual property. If the option is within the definition of a deferred-employment-benefit plan, *see supra* § 2.195, the numerator of the formula used to apportion the gain of $800 is the time of employment during marriage after the determination date giving rise to the benefit. In this case, that is seven years if the time of employment giving rise to the benefit is deemed to begin on the determination date. The denominator is the total time of employment giving rise to the benefit (in this case, 12 years). Thus, 7/12 of the gain of $800 is marital property. The other 5/12 of the gain is individual property. If an analysis like that in *Nelson* is appropriate, so that the time of employment giving rise to the benefit is deemed to begin upon grant of the option, the ratios in connection with the gain change to 4/12 and 8/12, respectively.

Assume, in the above example, that the stock acquired by virtue of the option doubles in value by the date of the employee's death. If the payment of the option price with individual property funds creates an ownership interest in the stock (which should be the case), then the marital and nonmarital components will share in the appreciation on a pro rata basis. This is the rule in California. *See Walker v. Walker*, 265 Cal. Rptr. 32 (Ct. App. 1989).

As to options that may be exercised after dissolution or the death of the holder and that are assigned in whole or in part to the nonholder spouse, the nonholder spouse must pay his or her share of the option price upon exercise. *See id.* at 34.

A fourth issue that arises is whether the taxability of stock options must be considered. If options are actually assigned between the spouses, each spouse must bear his or her own tax consequences upon exercise. However, if the options are not assignable and tax consequences fall wholly on the holder, even though benefits are received indirectly by the nonholder spouse, reimbursement to the holder or holder's estate of a portion of the income-tax liability may be appropriate. *See Harrison*, 225 Cal. Rptr. at 237 n.1, 240–41.

For a discussion of the issues considered above, see *Employee Stock Option B*, Equitable Distribution J., Oct. 1996, at 109.

3. Life Insurance Held by Plan [§ 2.199]

Some deferred-employment-benefit plans may hold life insurance policies insuring participants. The classification of the ownership interest and proceeds of a life insurance policy insuring a spouse and held by a deferred-employment-benefit plan is determined under section 766.62, which sets forth the classification rules of deferred-employment-benefit plans, rather than section 766.61, which deals with the classification of life insurance policies. Wis. Stat. § 766.61(8).

D. Terminable-interest Rule [§ 2.200]

1. In General [§ 2.201]

Section 766.62(5) and section 766.31(3) provide that the marital property interest of a nonemployee spouse in a deferred-employment-benefit plan, or in assets in an IRA that are traceable to the rollover of a deferred-employment-benefit plan, terminates at that spouse's death if he or she predeceases the employee spouse. This terminable-interest rule, which has no counterpart in UMPA, represents a policy decision by the Wisconsin Legislature to preserve such benefits for the employee spouse; consequently, the nonemployee spouse has no testamentary power of disposition over any part of a deferred-employment-benefit plan

attributable to the employment of an employee spouse or over assets in an IRA traceable to the rollover of such a plan. The legislature's goal was to ensure an employee spouse full access to benefits in a deferred-employment-benefit plan or assets in an IRA traceable to the rollover of such a plan during that spouse's retirement years if he or she is predeceased by the nonemployee spouse.

The terminable interest rule does not apply in a situation in which the employee spouse murders the nonemployee spouse; in that circumstance the estate of the nonemployee spouse may claim a marital property interest in the benefits. *Hackl v. Hackl (In re Estate of Hackl)*, 231 Wis. 2d 43, 604 N.W.2d 579 (Ct. App. 1999). The amendment of section 766.62(5) is discussed below.

Does the terminable-interest rule apply to deferred employment benefits after they have been paid to the employee? By their terms, at least, sections 766.62(5) and 766.31(3) are limited to deferred-employment-benefit plans and assets in IRAs traceable to the rollover of such plans; the sections make no reference to benefits paid from the plans and not rolled over into an IRA. It appears, therefore, that once paid out, such benefits are no longer subject to the terminable-interest rule.

➢ ***Example.*** Assume that a spouse's deferred employment benefit has a value of $200,000 and is entirely marital property. Assume that the employee retires, takes a lump-sum payment, and one day later the employee's spouse dies, survived by the retired employee. Assuming that the amounts received have not been reclassified by some means provided by the Act (such as a marital property agreement), the predeceasing spouse may will $100,000 to whomever he or she desires (the $100,000 being one half of the marital property component of $200,000). Amounts received by the retired spouse on the day he or she retired retain the classification they had on the day they were paid out, but because these assets were not part of a deferred-employment-benefit plan on the date the nonemployee spouse died, the terminable-interest rule does not apply.

For further discussion of the application of the terminable-interest rule to IRAs, see section 2.202, *infra*.

2005 Wisconsin Act 216, section 41, added a reference in section 766.31(3)(a) to section 766.62(5) to make clear that the two sections

mean the same thing. For application of the terminable-interest rule in connection with deferred-employment-benefit plans holding deferred marital property, see section 2.243, *infra*.

Consistent with *Hackl v. Hackl*, 231 Wis. 2d 43, 604 N.W.2d 579 (Ct. App. 1999), 2005 Wisconsin Act 216, section 58, by reference to section 854.14(3m)(c), amended section 766.62(5) to provide an exception to its application if the surviving spouse is the employee spouse and that spouse murdered the nonemployee spouse. In such a case, the terminable-interest rule does not apply, and the ownership interest at the death of the decedent (murdered) spouse in any deferred employment benefit, or in assets in an IRA that are traceable to the rollover of a deferred-employment-benefit plan that has a marital property component, is equal to one-half the portion of the benefit or assets that was marital property immediately before the death of the decedent spouse. Committee Note to section 140.

2. IRAs [§ 2.202]

As noted in section 2.201, *supra*, sections 766.62(5)(b) and 766.31(3) provide that the marital property interest of a nonemployee spouse in assets in an IRA traceable to the rollover of a deferred-employment-benefit plan terminates at the death of the nonemployee spouse if he or she predeceases the employee spouse. *See also* Wis. Stat. §§ 766.58(7)(a), .588(1)(b)1. (statutory marital property agreements).

The terminable-interest rule was extended to IRAs by 1993 Wisconsin Act 160, effective April 1, 1994. Although there is no grandfather clause, the rule probably does not apply to an IRA if the nonemployee spouse died before April 1, 1994. If it did, constitutional problems might arise in connection with a retroactive taking of vested interests.

Is there a retroactive taking of vested interests in connection with IRAs in existence on April 1, 1994, when the nonemployee spouse predeceases the employee spouse after that date? That taking does not injure the nonemployee spouse during his or her lifetime and in all probability may be justified under the state's power to regulate marriages and dispositions at death. See the analysis in section 1.17, *supra*, in connection with deferred marital property.

Moreover, application of the rule to IRAs simply extends the policy embodied in section 766.62(5)(a), which provides a terminable interest in connection with deferred-employment-benefit plans so that those benefits are preserved in their entirety for a surviving employee spouse.

➢ ***Note.*** Tracing may be important in certain cases. Sections 766.62(5)(b) and 766.31(3) apply only to assets traceable to the rollover of a deferred-employment-benefit plan and then only to the nonemployee spouse's marital property interest in those assets. What if such tracing cannot be done? Does this mean the terminable-interest rule does not apply? It would appear from the language of these sections that it does not.

In addition, an entire rollover may not be subject to the terminable-interest rule. Only the portion of a rollover that is marital property is subject to the rule. A rollover from a deferred-employment-benefit plan is nonmarital property to the extent determined under the time-apportionment formulas of section 766.62 in connection with plans that straddle the determination date. *See supra* § 2.197.

➢ ***Practice Tip.*** Spouses who do not want the terminable-interest rule to apply to IRAs may execute marital property agreements so stating.

3. Stock Options [§ 2.203]

As noted in section 2.195, *supra*, although it is likely that employee stock options are included within the definition of deferred-employment-benefit plan for purposes of the Act, it is not entirely clear. Whether a stock option is within this definition will determine whether the terminable-interest rule applies if the spouse not holding the option predeceases the holding spouse.

If the employee stock option is within the definition of a deferred-employment-benefit plan, the terminable-interest rule applies if the nonholding spouse dies first. If the stock option is not within the definition, formulas like those described in the previously discussed California dissolution cases may be appropriate. *See Harrison v. Harrison*, 225 Cal. Rptr. 234 (Ct. App. 1986); *Nelson v. Nelson*, 222 Cal. Rptr. 790 (Ct. App. 1986); *Hug*, 201 Cal. Rptr. 676.

E. Property and Valuation Questions [§ 2.204]

1. In General [§ 2.205]

Property and valuation questions in connection with the division of deferred employment benefits are many and complex. Section 766.62(2m) states in part: "Unless provided otherwise in a decree or marital property agreement, a mixed property deferred employment benefit shall be valued as of a dissolution or an employee spouse's death." This language is derived from section 13(b) of UMPA, but unlike the last sentence of section 13(b) of UMPA, section 766.62(2m) does not allow valuation questions to be settled by written consent. Spouses who wish to settle issues of that importance must do so by a marital property agreement. *See* Wis. Stat. Ann. § 766.62(2) Legis. Council Notes—1985 Act 37, § 128 (West 2009); *see also* Wis. Stat. Ann. § 766.31(7)(d), (3) Legis. Council Notes—1985 Act 37, §§ 76 to 83 (West 2009).

The quoted language of section 766.62(2m) applies only to a "mixed property" deferred employment benefit. That there is no reference to a benefit that is not mixed property is of little practical consequence, however. Under section 766.62, valuation and other questions pertaining to deferred employment benefits are left to state law. The comment to UMPA section 13 states:

> There are many significant and important problems regarding employee benefits which [UMPA] does not address specifically. As a property statute, the thrust of [UMPA] 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.… 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 [UMPA] 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.

Most of the difficult questions referred to in the comment to UMPA section 13 will be resolved in dissolution cases. At the employee spouse's death, the benefit amount is immediately determinable and valued. At the death of the nonemployee spouse, if the nonemployee spouse dies first, that spouse's interest in the plan terminates. With respect to dissolution, see section 11.18, *infra*.

2. The Property Right [§ 2.206]

The definition of property under the Act is broad and includes any interest that is present or future, legal or equitable, vested or contingent. Wis. Stat. § 766.01(15). With respect to deferred-employment-benefit plans, the Act's definition of property extends to nonvested as well as vested interests. This is consistent with equitable division principles at dissolution, *Bloomer v. Bloomer*, 84 Wis. 2d 124, 129 n.3, 267 N.W.2d 235 (1978); *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1978), and with the treatment of deferred-employment-benefit plans in other community property states, Reppy & Samuel, *supra* § 2.19, at 73.

Deferred-employment-plan benefits are sometimes subject to conditions that, if not observed, could lead to forfeiture of benefits. For example, a participant may have to live to a certain date (even after vesting) or agree not to establish a competing business. The existence of such conditions does not mean that there is no property right until maturation; rather, the conditions simply create a valuation problem. *See Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d 235 (1978); Reppy & Samuel, *supra* § 2.19, at 72.

3. Valuation [§ 2.207]

Since section 766.62 does not alter existing case law, *see supra* § 2.205, the significant case of *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d. 235 (1978), and its progeny continue to have vitality. *Bloomer* refers to many community property principles in its discussion of three different techniques for valuing pension benefits at divorce.

➢ ***Comment.*** Numerous authorities discuss the valuation of deferred employment benefits. Many are cited in the comment to section 13 of UMPA and in *Bloomer*. Nathaniel Sterling, *Division of Pensions: Reserved Jurisdiction Approach Preferred*, 11 Comm.

> Prop. J. 17 (1984), presents a useful discussion of the law in California and the advantages and disadvantages of using a present-valuation technique rather than a "reservation-of-jurisdiction" approach when the parties wait until the participant's retirement and then the parties or a court determines how the retirement benefits are to be divided.

The court in *Bloomer* also observed that contributions to a retirement fund by an employer or employee after the employee's divorce are not assets of the marital estate subject to division, and that therefore a retirement fund should be treated as if it were two funds, with only that part of the fund attributable to employment during the marriage considered in the division. *Bloomer*, 84 Wis. 2d at 127–28 n.1. Note that in a Wisconsin dissolution proceeding, the court need not divide the property between the spouses in accordance with its classification. *See infra* § 11.18.

F. Written Consent [§ 2.208]

There is no provision analogous to section 766.61(3)(e), which applies to life insurance policies, *see supra* § 2.177, that permits the nonemployee spouse to consent in writing to the designation of a third person as the beneficiary of deferred employment benefits. If a surviving nonemployee spouse fails to claim his or her former marital property interest in a deferred employment benefit paid to a third person, the nonemployee spouse may be making a gift to that person. *See infra* ch. 9 (tax consequences); *see also infra* §§ 2.211–.217 (federal preemption). A marital property agreement classifying the benefit as the participant spouse's individual property, combined with the other spouse's consent as required by ERISA, provides certainty for planning purposes.

G. Liabilities of Plan Administrators [§ 2.209]

Section 766.62(4) states that a deferred-employment-benefit plan administrator may make payments or take action in accordance with the plan and the administrator's records without fear of liability. The implication is that a plan administrator may act with impunity solely in accordance with the plan and the administrator's records (which will normally reflect the employee spouse's instructions), even in the face of actual knowledge of an adverse claim.

H. Spousal Remedies [§ 2.210]

If the employee spouse dies first after naming someone other than the surviving spouse as beneficiary of a deferred-employment-benefit plan, the surviving nonemployee spouse may have remedies under the Act, in addition to remedies that may be provided under federal legislation. *See infra* ch. 8; *see also* Wis. Stat. § 766.62(3) (rendering ineffective between spouses plan provisions that conflict with section 766.62(1) or (2)).

I. Federal Preemption [§ 2.211]

1. In General [§ 2.212]

Federal law may preempt state marital property laws with respect to deferred-employment-benefit plans by virtue of the federal Supremacy Clause under Article VI, Clause 2 of the U.S. Constitution, which provides that the laws of the United States are the supreme law of the land, state law notwithstanding. Preemption occurs in connection with certain federally sponsored plans that are established by Congress for federal employees and require payment of all benefits to the participants. Federal preemption also occurs in connection with certain aspects of private plans governed by ERISA.

2. Federal Benefits [§ 2.213]

In two important cases, the U.S. Supreme Court applied federal preemption rules to federally sponsored retirement plans. In each case, Congress responded by amending the legislation involved to change the result. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the Court held that the federal statute creating the Railroad Retirement Act, Pub. L. No. 93-445, 88 Stat. 1305 (1974) (codified as an amendment at 45 U.S.C. §§ 231–231v), preempted California law and that benefits under the plan had to be paid to the federal employee and could not be subjected to division under California community property laws in a divorce case. The Court also held that an offsetting award from other community property under California law could not be provided to the other spouse. At least one Wisconsin case, in a dissolution context, resulted in a similar holding. *See Pfeil v. Pfeil*, 115 Wis. 2d 502, 341 N.W.2d 699 (Ct. App.

1983). *But see Loveland v. Loveland*, 147 Wis. 2d 605, 433 N.W.2d 625 (Ct. App. 1988) (cited below). 45 U.S.C. § 231m subsequently was amended, however, to allow the treatment of railroad retirement benefits as "community property" at the dissolution of a marriage.

McCarty v. McCarty, 453 U.S. 210, 223 (1981), relied on *Hisquierdo* and held that a federal military-retirement statute preempted state law and prohibited the division of military-retirement pay as community property in a dissolution proceeding. Subsequently, Congress passed the Uniformed Services Former Spouses Protection Act, Pub. L. No. 97-252, 96 Stat. 718, 730–38 (1982) (codified at 10 U.S.C. § 1408), effective February 1, 1983. This act was specifically designed to overrule the result in *McCarty*. *See* S. Rep. No. 97-502 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1611.

As to military-disability pay, there is a division of authority. Some cases find federal preemption. *See, e.g.*, *Perez v. Perez*, 587 S.W.2d 671 (Tex. 1979); *Pfeil v. Pfeil*, 115 Wis. 2d 502, 341 N.W.2d 699 (Ct. App. 1983). *But see Loveland*, 147 Wis. 2d at 611 (distinguishing *Pfeil* and holding that federal preemption did not apply in dissolution proceeding involving spouse who unilaterally elected to convert military-retirement benefits into disability benefits). Others find no preemption. *See, e.g.*, *Stroshine v. Stroshine*, 652 P.2d 1193 (N.M. 1982).

With respect to federal civil-service and foreign-service retirement statutes, there is language in *McCarty* to the effect that the federal statutes involved do not preempt state law. *See McCarty*, 453 U.S. at 230–31. A Wisconsin holding is in agreement. *See Mack v. Mack*, 108 Wis. 2d 604, 323 N.W.2d 153 (Ct. App. 1982). Similar results obtain in connection with federal-civil-service disability benefits. *See, e.g.*, *Hughes v. Hughes*, 634 P.2d 1271 (N.M. 1981). A Wisconsin circuit court considered whether a veteran's disability pension and civil-service pension were classified as marital property or whether federal preemption existed and precluded a division of those benefits. *Yde v. Yde*, No. 740-850 (Wis. Cir. Ct. Milwaukee County Dec. 18, 1987). In this case, the benefit recipient was receiving Medical Assistance and was required, as a condition of the Medical Assistance, to turn over his income to the veterans' home. The court held that federal preemption precluded a division of both these benefits.

With respect to Social Security, see section 2.266, *infra*. For a useful discussion and catalog of federal plans and benefits, see Larry H.

Schwartz and David R. McClure, *Division of Federal Pension Benefits*, 11 Comm. Prop. J. 165 (1984).

3. Private Plans [§ 2.214]

a. In General [§ 2.215]

Federal preemption of private plans must be considered in connection with ERISA and the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426 (1984). Federal preemption is not an issue in connection with plans that are not governed by ERISA and REA. Moreover, the REA provides that ERISA cannot preempt state laws if a qualified domestic relations order (QDRO) divides a deferred employment benefit in a dissolution proceeding. *See* I.R.C. § 401(a)(13)(B).

However, in some important respects, death benefits payable under ERISA-governed plans are subject to federal preemption. *See, e.g.*, *MacLean v. Ford Motor Co.*, 831 F.2d 723 (7th Cir. 1987). Changes made by the REA require that a defined-benefit or money-purchase pension plan provide a qualified preretirement survivor annuity for the participant's surviving spouse, I.R.C. § 401(a)(11), unless the spouse consents otherwise, I.R.C. § 417(a). In cases involving defined-benefit plans, the amount required to be paid to the nonemployee spouse exhausts all the benefits. Thus, the employee spouse has no opportunity to name a third party as beneficiary of any portion of the benefits unless his or her spouse consents pursuant to requirements set forth in the Internal Revenue Code and applicable regulations.

Defined-contribution plans, such as profit-sharing and stock-bonus plans, must also provide a preretirement-survivor-annuity benefit unless (1) the participant's death benefit is payable in full to his or her surviving spouse or (2) the surviving spouse consents otherwise and also consents to a designated beneficiary and the participant does not (or may not) elect payment of benefits in the form of a life annuity. I.R.C. § 401(a)(11)(B). Plans subject to the preretirement-survivor-annuity requirement may satisfy that requirement by providing an annuity that is the actuarial equivalent of not less than 50% of the participant's vested account balance at the time of death. I.R.C. § 417(c)(2). Consequently, in connection with defined-contribution plans, if the payments have not begun before the participant's death, the participant is free to dispose of

the remaining 50% of the account balance whether or not the spouse consents if the plan provisions permit such a disposition.

In these circumstances, federal law conflicts with Wisconsin law. Under Wisconsin law, an employee has complete power of disposition over the entire nonmarital property component (subject to the deferred marital property election) and half of the marital property component of the plan.

The REA may preempt the Wisconsin Marital Property Act completely. Even if there is not complete preemption in connection with defined-contribution plans, it seems reasonable and equitable that satisfaction of the spouse's interest under federal law simultaneously satisfies that spouse's marital property interest under the Act because the quantum of the surviving spouse's interest under the Act could never be greater than that provided under federal law, and in some cases could be less. A contrary argument is that the surviving spouse is entitled to receive 50% under federal law, that the balance may still include a marital property component, and that the spouse owns 50% of any such component. *But see* Wis. Stat. § 857.35 (requiring personal representative, other than surviving spouse, to notify surviving spouse of plan and its beneficiary only when personal representative becomes aware that more than 50% of benefits have been paid to third party).

- ***Query.*** May the nonemployee spouse consent to a third-party beneficiary by means other than a marital property agreement? Unlike section 766.61(3)(e) (dealing with life insurance policies), section 766.62 does not specifically permit spousal consents. Will federal law sanctioning consents in connection with ERISA-governed plans preempt any state law to the contrary so that a consent under the REA suffices without an accompanying marital property agreement? The answer should be yes. Clear and uniform rules in connection with naming of beneficiaries are critical to administration of plans under ERISA. *See Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (holding that ERISA preempts state law requiring automatic revocation of a beneficiary designation upon divorce).

I.R.C. § 408(g) states that in connection with IRAs, state community property laws are to be disregarded. However, rather than an example of federal preemption, I.R.C. § 408(g) appears to be a device to administer the tax laws. *See infra* § 9.12.

b. Nonemployee Spouse's Testamentary Power of Disposition When That Spouse Dies First [§ 2.216]

Does a nonemployee spouse have a testamentary power of disposition over any portion of an employee spouse's deferred employment benefits when the nonemployee spouse dies first? *Boggs v. Boggs*, 520 U.S. 833 (1997), an important case that has property law and estate planning consequences and that also resolves a conflict between the Ninth and Fifth Circuits, says no.

In *Boggs*, Dorothy and Isaac Boggs had two sons. Dorothy died in 1979, leaving most of her estate to the sons. Isaac then remarried. At his retirement in 1985 (after his remarriage and six years after Dorothy's death), Isaac received three items: a lump-sum savings-plan distribution that was rolled over into an IRA, stock from an employee stock ownership plan (ESOP), and a monthly annuity. Isaac died in 1989, leaving most of his estate to his second wife, Sandra.

The sons claimed that their mother, Dorothy, had a community property interest in the undistributed benefits when Dorothy died in 1979 and that this interest passed to them under her will. Sandra resisted the sons' claims on the theory that Dorothy had no right to dispose of any interest in the retirement benefits, all of which were governed by ERISA.

The Fifth Circuit determined that ERISA's anti-alienation provision did not apply to Dorothy's community property interest in the retirement benefits, concluding that the transfer of the interest from Dorothy to her sons was not a prohibited assignment or alienation.

The Supreme Court reversed. Considering the spousal annuity first, the Court ruled that, under ERISA, the surviving spouse, unless he or she consents otherwise, is entitled to a joint and survivor annuity. A purpose of ERISA is to ensure that surviving spouses receive a stream of income. These provisions preempt state law claims to the contrary. Otherwise, a predeceasing nonparticipant spouse could divert funds designed to protect a surviving spouse.

Next, the Court turned to the other items received by Isaac at his retirement in 1985. The parties acknowledged that the sons' claims pertained to assets after distribution from the plan, which occurred six

years after Dorothy's death. The court noted, therefore, that this case did not involve the issue whether a nonparticipant spouse would have community claims to assets paid out of plans during marriage and before the nonparticipant's death.

Again the Court rejected the sons' claims. First, the Court pointed out that ERISA does not confer beneficiary status on persons because of marital or dependent status except in specifically delineated instances, such as the joint and survivor annuity and the QDRO. The Court stated that ERISA's silence with respect to a nonparticipant's right to make a testamentary transfer of plan benefits is "powerful support for the conclusion that the right does not exist." *Id.* at 847–48.

Second, the Court noted, ERISA's anti-alienation provision is designed to protect participants and their dependents during retirement years. Testamentary transfers by nonparticipants could defeat that purpose. Thus, the high court concluded that federal preemption precludes a nonparticipant spouse from making a testamentary transfer of the other spouse's retirement benefits governed by ERISA. *Id.* at 854.

The Court left unanswered whether preemption applies to assets distributed from the plan before the nonparticipant spouse's death. The probable answer is no. The ERISA provisions applied by the Court are designed to protect assets while they are in a plan, awaiting distribution at a future date. Thus, if the anti-alienation clause were treated like a spendthrift clause, it would be limited to the alienation of future payments and would not apply to distributions after they are made.

In the absence of a marital property agreement, the issue raised in *Boggs* would not arise in Wisconsin because under sections 766.31(3) and 766.62(5), the nonemployee spouse's marital property interest in a deferred-employment-benefit plan terminates at his or her death if he or she predeceases the employee spouse. In those circumstances, the nonemployee spouse has no interest in such a plan that may be subject to testamentary disposition.

However, a marital property agreement could provide that each spouse owns a "pure" marital property interest in a deferred-employment-benefit plan such that, for purposes of state law, the interest of the nonemployee spouse in the employed spouse's plan would not terminate if the nonemployee spouse predeceased the employee spouse. *See infra* § 7.149. Such a marital property agreement might be entered

into when the nonemployee spouse owns little property other than his or interest in the plan and the spouses hope that the nonemployee spouse will be able to bequeath his or her interest in the plan, thereby using his or her unified credit for federal estate tax purposes, if the nonemployee spouse predeceases the employee spouse. Yet such an agreement simply puts the spouses in the same posture as the spouses in *Boggs*. For discussion of the planning considerations involved, see sections 10.107 and 10.132–.147, *infra*.

c. Sufficiency of Marital Property Agreement or Divorce Settlement Agreement as Waiver of Nonemployee Spouse's Rights [§ 2.217]

Does a marital property agreement or divorce settlement agreement suffice as a waiver of a nonemployee spouse's property rights in connection with plans governed by ERISA and the REA? As noted in section 2.215, *supra*, the REA provides that a surviving spouse must receive certain benefits under a qualified plan following the employee spouse's death unless the surviving spouse specifically waives them. A waiver of benefits acknowledging the effect of the waiver must be in writing and witnessed by a plan representative or a notary public. 29 U.S.C. § 1055(c)(2).

Assume a man names his wife as beneficiary of a deferred-employment-benefit plan and the couple subsequently divorces. The court-approved property settlement provides that each party waives any interest or claim in and to any deferred-employment-benefit plan of the other. The man dies without changing the beneficiary. His will leaves everything to his only child. Must the plan administrator pay the benefit to the named beneficiary, the ex-spouse, pursuant to the plan documents on file or should the plan administrator pay the benefit to the participant's estate because the ex-spouse waived her interest in the plan pursuant to the divorce decree and the man's estate takes because there is no alternate payee named?

Resolving a split among federal courts of appeal and state supreme courts on this issue, the U.S. Supreme Court held in *Kennedy v. Plan Administrator*, 129 S. Ct. 865 (2009) that, in these circumstances, federal preemption under ERISA requires the plan administrator to follow the plan documents and pay the ex-spouse. This is not because, as the plan

administrator argued, the divorce decree amounted to a waiver by the ex-spouse of her right to the benefits and such a waiver is not precluded under the anti-alienation provisions of ERISA. Rather (and despite the waiver), it is because requiring a plan administrator to follow plan documents allows employers to establish a uniform administrative scheme to guide processing of claims and disbursements of benefits. The participant could have named another beneficiary but did not avail himself of that opportunity.

➢ ***Comment.*** What are the implications of this decision for marital property purposes? In an important footnote, the Supreme Court stated that this decision "leaves open any questions about a waiver's effect in circumstances in which it is consistent with plan documents. Nor do we express any view as to whether the Estate could have brought an action in state or federal court to obtain the benefits after they were distributed." *Id.* at 875 n.10.

Clearly, naming a new beneficiary would cut off rights of an ex-spouse. But assume the man in the above case remarried before he died but still failed to name a new beneficiary. Assume also that the man and his new wife are at all times domiciled in Wisconsin and that a portion of the benefit accrued during the second marriage, thereby creating a marital property interest in that portion in the second spouse. Because an important purpose of ERISA is to protect surviving spouses, see discussion of *Boggs*, *supra* § 2.216, it is highly likely that the second spouse, who has not herself made a waiver, has rights that displace the rights of any other person named as a beneficiary. Those rights exceed in value any marital property rights that accrued. Note also that the Supreme Court left open questions concerning pursuit of benefits after the benefits have been paid out of the plan. Thus, even if the benefits are paid out to the ex-spouse pursuant to the plan documents, they could be pursued under ERISA and marital property theories, and once again the issue of the validity of the waiver comes into play.

As another case, assume a second marriage in which the spouses sign a marital property agreement in which each waives rights to the other's property, and one spouse names a child of a prior marriage as beneficiary of his or her qualified plan and then dies survived by the other spouse. The following cases in connection with the validity of waivers may still be relevant.

Pedro Enterprises, Inc. v. Perdue, 998 F.2d 491 (7th Cir. 1993), involved an antenuptial agreement in which each of the parties waived any intestate share and any expectancy that he or she might be entitled to receive in the event of the death of the other party. The court held there was not an effective waiver because the agreement made no reference to pension benefits, and the pension plan involved was not in existence at the date of the marriage.

In *Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003), the issue of waiver was raised in connection with a divorce agreement that contained a revocation of each party's interests in property of the other arising "by reason of their marital relation" and assets of the other party assigned that party by the agreement including "annuities, life insurance policies," and other financial instruments. *Id.* at 943. The waiver did not expressly refer to the husband's employee group term life insurance issued as part of a plan governed by ERISA. Finding first that ERISA preempts all state laws insofar as they may now or hereafter relate to any employee-benefit plan subject to ERISA, the court pointed out that, nevertheless, ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary, and that one can look to the federal common law and state law to determine what constitutes a valid waiver. One formulation, said the court, mandates that a waiver be "explicit, voluntary and made in good faith." *Id.* at 945 (citation omitted). Essentially, when evaluating the effectiveness of a waiver, the court is concerned whether a reasonable person would have understood that he or she was waiving an interest in the proceeds or benefits in question. The court found no effective waiver, putting emphasis on the failure to expressly identify the husband's ERISA regulated employee group term life insurance.

Melton refers to *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), a case involving a settlement agreement in a dissolution based on the terms of the parties' prenuptial agreement. The court in *Manning* said that prenuptial agreements are often too broadly worded to be effective waivers, but the court did not rule out the possibility that an agreement containing an effective waiver could be presented in a future case.

J. State Law [§ 2.218]

Provisions of state or municipal deferred-employment-benefit plans may in effect preempt state community property laws by insisting that

benefits be paid in their entirety to the participants. *See* Reppy & Samuel, *supra* § 2.19, at 74. Plans sponsored by a state or a municipality must be examined with this in mind.

The Wisconsin Marital Property Act may not affect certain benefits payable under retirement plans administered under chapter 40, which deals with certain persons employed by the state of Wisconsin. A document issued several years ago by the Department of Employee Trust Funds (DETF) in question-and-answer form and entitled "Effects of Divorce Judgments on WRS Benefits" stated on page 2:

> Are the Chapter 40, Stats., programs administered by the DETF subject to the Marital Property Act, 1983 Wisconsin Act 186, effective January 1, 1986?
>
> No. There is no mention of Chapter 40 or the DETF in the Act. A longstanding rule of statutory construction followed in Wisconsin states that statutes do not apply to the state unless the state is explicitly included therein by appropriate language.

State ex rel. Department of Public Instruction v. ILHR, 68 Wis. 2d 677, 681–82 (1975).

The statement quoted above does not appear in the current circular dealing with this subject issued by the DETF. *See* DETF, How Divorce Can Affect Your WRS Benefits (May 2004), *available at* http://etf.wi.gov/publications/et4925.pdf.

In *Jackson v. Employe Trust Funds Board*, 230 Wis. 2d 677, 602 N.W.2d 43 (Ct. App. 1999), a state employee named her sister as beneficiary of her state retirement benefits. That designation remained unchanged after her marriage. The surviving spouse claimed a marital property interest in the benefits but failed to assert remedies under the Act within the applicable statutes of limitation. The sister resisted. The issue was whether the DETF could honor a beneficiary designation that transferred marital property to a third party. The court held that the employee spouse had the right to manage and control the benefits, which includes the right to name a beneficiary. Whether a surviving spouse may have rights under the Act, said the court, was a question for another day and another forum.

K. Deferred Marital Property [§ 2.219]

For application of deferred marital property rules to deferred-employment-benefit plans, see sections 2.243 and 12.69, *infra*.

XIII. Marital Property [§ 2.220]

A. In General [§ 2.221]

Deferred marital property is not a classification of property. It is a concept that provides the basis for an elective right granted a surviving spouse under section 861.02.

Deferred marital property exists whenever a spouse (who dies with a Wisconsin domicile) acquires property while married and while chapter 766 did not apply, if that property would have been marital property had chapter 766 then applied. Presumably, property acquired by the decedent spouse during marriage and after the determination date that is traceable to deferred marital property is also deferred marital property. *See* Wis. Stat. § 766.31(8); *see also supra* §§ 2.154 (tracing of predetermination date property), .8 (statutory definition of during marriage).

Deferred marital property is the basis for an election permitted to be made by the surviving spouse. *See* Wis. Stat. § 861.02. In certain cases, the election under section 861.02 may be waived, Wis. Stat. § 861.10, or diminished by a surviving spouse's prior consent, Wis. Stat. § 861.05(1)(c). For an explanation of the full operation of the election, see sections 12.136–.147, *infra*.

Note that under the Act, the deferred marital property concept does not apply at dissolution but only at the death of a spouse survived by the other spouse.

Sections 2.222–.246, *infra*, consider (1) the policy underlying the concept of deferred marital property and the election based on that concept, (2) the definition of deferred marital property, and (3) some examples of deferred marital property.

B. Origin and Underlying Policy [§ 2.222]

The deferred marital property election is designed to avoid constitutional problems attending any effort to alter existing rights in property acquired before the Act first applies to a couple. UMPA §§ 17 cmt., 18 cmt. Thus, the election is postponed until death, which, according to the comments to sections 17 and 18 of UMPA, is an event in which the state's interest in succession of property justifies state intervention.

A second policy underlying the election based on deferred marital property is to protect the surviving spouse of a person who died domiciled in Wisconsin. The Act repealed the statutory one-third elective share previously provided by sections 861.01–.11 (1983–84). *See* 1983 Wis. Act 186, §§ 76–81. Elective rights based on deferred marital property are designed to compensate for this repeal.

This second policy is similarly served when both spouses change their domiciles to Wisconsin from other jurisdictions. For example, spouses who change their domiciles to Wisconsin from a common law state lose the protection furnished by dower, curtesy, or other elective right provided by the law of that common law state. To compensate for the loss of dower, curtesy, or other elective right against the deceased spouse's property resulting from such a change of domicile, the elective right based on deferred marital property is provided to the surviving spouse. The comment to section 18 of UMPA makes this clear. Note, however, that UMPA section 18 provides an *ownership right* in a surviving spouse in contrast to the *elective right* provided under section 861.02. UMPA section 18 provided the basis for the deferred marital property rule in former section 766.77 (repealed by the 1985 Trailer Bill). *See also infra* § 12.2.

California and Idaho first devised the deferred marital property concept; such property is referred to in those states as *quasi-community property*. *See* Cal. Prob. Code § 201.5 (West 1956); Idaho Code §§ 15-2-201 to 15-2-209 (1979). The quasi-community property rule is designed to protect spouses who move to California or Idaho from other jurisdictions. The California Probate Code was amended effective January 1, 1985. *See* Cal. Prob. Code §§ 66, 101, 102 (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. 19 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot).

California retained the quasi-community property rule, but the previous requirement for an election against the will was eliminated by repealing section 201.7 of the California Probate Code (Deering 1974). Several community property states apply quasi-community property concepts at dissolution as well. *See, e.g.*, Cal. Fam. Code §§ 125, 2581 (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. 19 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot); Ariz. Rev. Stat. § 25-318 (West, WESTLAW current through the Sixth Special Session, and legislation effective April 27, 2010 of the Second Regular Session of the Forty-Ninth Legislature (2010)).

California and Idaho extended the quasi-community property concept at death to nonprobate assets. This extension has the effect of preventing arrangements, deliberate or otherwise, that would defeat elective rights limited to probate assets. Thus, in Idaho, the augmented estate concept found in the Uniform Probate Code applies to quasi-community property placed in nonprobate arrangements. *See* Idaho Code §§ 15-2-201 to 15-2-209 (West, WESTLAW current through (2010) Chs. 1-359 and HJRs 4, 5 and 7 that are effective on or before April 12, 2010); *see also* Cal. Prob. Code §§ 66, 101, 102 (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. 19 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot).

C. Definition [§ 2.223]

The election permitted by section 861.02 applies only to property that meets the definition of deferred marital property. Section 851.055 defines *deferred marital property* as follows:

> "Deferred marital property" means any property that satisfies all of the following:
>
> **(1)** Is not classified by ch. 766.
>
> **(1m)** Is not classified as individual property or marital property under a valid marital property agreement, unless the marital property agreement provides otherwise.
>
> **(2)** Was acquired while the spouses were married.
>
> **(3)** Would have been classified as marital property under ch. 766 if the property had been acquired when ch. 766 applied.

➢ ***Historical Note.*** Before section 851.055 was amended by the 1988 Trailer Bill and the legislation enacting the new Probate Code, 1997 Wisconsin Act 188, deferred marital property was defined as "property acquired during marriage and before the determination date which would have been marital property under ch. 766 if acquired after the determination date." The current definition differs from the old definition in two respects. First, the words "while the spouses were married" were substituted for the words "during marriage." Second, references to the determination date were deleted and replaced by the concept of periods when chapter 766 does or does not apply. The new definition is intended to expand the old definition to include periods after the determination date in which one or both of the spouses are not domiciled in Wisconsin. Thus, the phrase "while the spouses were married" used in section 851.055 must not be confused with the definition of during marriage in section 766.01(8). The phrase *while the spouses were married* includes periods when a spouse is not domiciled in Wisconsin. The phrase during marriage does not include such periods. *See supra* § 2.8.

Under the current definition, property must meet four requirements to qualify as deferred marital property:

1. The property is not classified by chapter 766. Thus, the property must have been acquired while chapter 766 did not apply or, presumably, be traceable to property acquired while chapter 766 did not apply. *See* Wis. Stat. § 766.31(8); *see also supra* § 2.154.

2. The property is not classified as individual property or marital property by a marital property agreement.

3. The property must have been acquired while the spouses were married. Property acquired before marriage is not deferred marital property, although such property could become deferred marital property through mixing or other means provided by the Act.

4. It must be the case that the property would have been marital property had chapter 766 applied to the spouses when the property was acquired.

Chapter 766 applies after the determination date and only while both spouses are domiciled in Wisconsin. Deferred marital property must be acquired while the spouses are married and before the actual

determination date. There can be more than one actual determination date. *See* § 2.8, *supra*. An asset acquired (or traceable to an asset acquired) while a couple is married and before an actual determination date is deferred marital property if the asset would have been marital property if, hypothetically, chapter 766 had then applied.

Deferred marital property is a part of the *augmented deferred marital property estate*, a term defined in section 861.02(2)(b) as follows:

> (b) 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 section 861.03(1) to (3).
>
> 2. Decedent's gifts of deferred marital property made during the 2 years before the decedent's death under section 861.03(4).
>
> 3. Deferred marital property of the surviving spouse under section 861.04.

Property in the augmented deferred marital property estate is subject to a surviving spouse's right to elect an amount equal to no more than 50% of the augmented deferred marital property estate. Wis. Stat. § 861.02(1). For details, see chapter 12, *infra*.

➢ ***Example.*** Assume that a couple's determination date is January 1, 1986, and that both spouses are domiciled in Wisconsin at all times. If while married one of the spouses acquired and fully paid for an asset with his or her compensation in the year 1965, that acquisition would have been marital property if chapter 766 had then applied to the spouses' property. If the acquiring spouse dies owning that predetermination date property (or property traceable to it) and is survived by the other spouse, the property is deferred marital property in the decedent's probate estate, which in turn is part of the augmented deferred marital property estate described in section 861.03, subject to the surviving spouse's elective rights under section 861.02, unless those rights were waived under section 861.10. If the decedent spouse had, without his or her spouse's consent, placed the asset acquired in 1965 in a nonprobate arrangement described in section 861.03, the asset would be deferred marital property passing by nonprobate means at the decedent's death, in the augmented

deferred marital property estate, and subject to the election provided by section 861.02.

➢ ***Note.*** Section 851.055(1m), which provides that deferred marital property cannot include property classified as individual property or marital property under a marital property agreement unless that agreement states otherwise, recognizes that property classified by a marital property agreement could be treated as deferred marital property if the agreement so specifies. Committee Note to section 60.

D. Characteristics [§ 2.224]

1. In General [§ 2.225]

Other characteristics of deferred marital property are found in the election set forth in sections 861.02–.06. Some of these characteristics are inherent in a statutory scheme providing an election.

2. Election Pertains Only to Surviving Spouse [§ 2.226]

The election provided in section 861.02 is available only to the surviving spouse. Wis. Stat. § 861.02(1). Thus, a *decedent* spouse has no testamentary power of disposition over deferred marital property assets acquired (or traceable to assets acquired) by the surviving spouse.

Nor does the decedent spouse's estate have elective rights in the surviving spouse's property, although deferred marital property held by the surviving spouse is first used to satisfy the surviving spouse's election if made. Wis. Stat. § 861.06(2)(a). That only the surviving spouse (or that spouse's guardian) may elect under section 861.02 is consistent with the notion in section 18 of UMPA and its comment that the deferred marital property concept is designed to protect the survivor, not the decedent.

The election in section 861.02 is like the quasi-community property concept on which it is based. *See supra* § 2.222. If the nonowner (usually untitled) spouse dies first, the quasi-community property rules do not apply to property owned by the surviving (usually titled) spouse.

See Paley v. Bank of Am. Nat'l Trust & Sav. Ass'n, 324 P.2d 35 (Cal. Ct. App. 1958).

There is one exception to the above. If one spouse murders the other, the operation of the election is essentially reversed so that the deceased spouse has the election and the surviving spouse does not. Section 854.14(3m)(d) specifies that subsections 854.14(2)(c) and (3m)(d) apply to the election of deferred marital property if the deceased spouse was unlawfully killed by the surviving spouse. Section 854.14(3m)(d) provides that if the surviving spouse unlawfully kills the deceased spouse, then the deceased spouse's estate has the right to elect no more than 50% of the augmented deferred marital property estate as determined under section 861.02(2) as though the deceased spouse was the survivor and the surviving spouse was the decedent.

➢ ***Note.*** The section does not use the word "amount" but instead refers to 50%. This is probably unintentional and a court may well hold that the election should be in terms of an amount rather than a fractional share of the assets making up the augmented deferred marital property estate.

3. Interest Is Elective, Not Vested [§ 2.227]

A surviving spouse does not automatically become vested with an interest in deferred marital property at the death of the titled spouse. Rather, the right to an interest in deferred marital property is made elective under section 861.02. This stands in contrast to the system envisioned under section 18 of UMPA and section 766.77 of the Act before the 1985 Trailer Bill.

4. Decedent Spouse Must Die Domiciled in Wisconsin [§ 2.228]

The election provided by section 861.02 does not apply unless the decedent spouse dies domiciled in this state. Wis. Stat. § 861.02(7)(a). Consequently, section 861.02 does not apply to property or property arrangements of a spouse who dies domiciled in a jurisdiction other than Wisconsin.

If a spouse dies domiciled in Wisconsin, the surviving spouse, even if domiciled in another jurisdiction, may make the election under section 861.02 (unless waived under section 861.10).

5. Election Not Applicable If There Is Complete Divestment More Than Two Years Before Death [§ 2.229]

The augmented deferred marital property estate subject to the election provided by section 861.02 does not include gifts of deferred marital property and transfers of certain property rights made more than two years before the decedent's death. Wis. Stat. § 861.03(4).

➢ ***Example.*** Suppose that, before or after chapter 766 applies to the spouses and more than two years before death, a spouse makes an outright gift to a third person of property that was acquired while the spouses were married and while chapter 766 did not apply but that would have been marital property if acquired while chapter 766 applied. Even if the gift exceeds the dollar amounts described in section 766.53, the election provided in section 861.02 is not available for such gift property because it is not property that could become part of the augmented deferred marital property estate.

A result similar to that in the example above obtains when deferred marital property is transferred to irrevocable trusts before or after chapter 766 applies and the transferor spouse does not retain an interest at death described in section 861.03(3). Premiums paid with marital property funds while chapter 766 applies in connection with irrevocable life insurance trusts can pose a problem. *See infra* ch. 10.

E. Examples [§ 2.230]

1. In General [§ 2.231]

The deferred marital property rules are best illustrated by applying them to different kinds of assets. Probate assets are considered first in sections 2.232–.238, *infra*, and then nonprobate asset arrangements are considered briefly in sections 2.239–.245, *infra*. How the rules apply to joint tenancy property is considered in sections 2.254–.260, *infra*. For

purposes of the following examples, the term determination date means the date when chapter 766 first applies to the spouses involved, and unless expressly stated otherwise, it is assumed that both spouses remain domiciled in Wisconsin after their determination date.

2. Probate Assets Generally [§ 2.232]

a. Titled Assets [§ 2.233]

➢ ***Example.*** Assume that a wife fully purchases real estate with her wages while married but before chapter 766 applies; that she takes title in her name; and that she dies while chapter 766 applies, still holding title to the asset and survived by her husband. The asset would have been marital property had chapter 766 applied at the date of its purchase. On the wife's death, the value of the real estate will be included in the augmented deferred marital property estate, against which the husband will have elective rights under section 861.02, unless he waived the election under section 861.10. If the husband had predeceased the wife, however, he would not own any interest in the real estate subject to administration (and would not have acquired any under predetermination date law); thus, he would not be able to dispose of any of the real estate at his death.

b. Accumulated Income [§ 2.234]

Because under the Act all income from any source (with certain exceptions, *see supra* § 2.69, not applicable for purposes of this example) earned or accrued by a spouse during marriage and after the determination date is marital property, income earned or accrued by a spouse while married and while chapter 766 does not apply is potentially deferred marital property at death. A unilateral statement is not retroactive and cannot apply to predetermination date income. *See supra* § 2.75.

➢ ***Example.*** Suppose that before chapter 766 applies a wife inherits stock subject to a dividend reinvestment plan and that her dividends are reinvested in additional shares before chapter 766 applies but while she is married. If the wife predeceases her husband while chapter 766 applies and while domiciled in Wisconsin, the additional

shares (and assets traceable to those shares) acquired before chapter 766 applied and still owned by her at her death are deferred marital property, and their value will be included in the augmented deferred marital property estate, against which the husband will have elective rights under section 861.02, unless he waived elective rights under section 861.10.

c. Assets Mixed Because of Money Expended [§ 2.235]

(1) When Tracing Is Possible [§ 2.236]

➢ ***Example.*** Assume that while married and before chapter 766 applies a wife uses both her salary (which would have been marital property had chapter 766 then applied) and inherited cash (which would have been individual property had chapter 766 then applied) to fully purchase real estate titled in her name. Also assume that records permit tracing to the inherited cash. The component of this mixed asset attributable to the wife's salary is deferred marital property because it would have been marital property if chapter 766 had applied to the spouses' property at the date of acquisition. If the wife predeceases her husband while chapter 766 applies and while domiciled in Wisconsin, still holding title to the real estate (or assets traceable to it), the value of that component will be included in the augmented deferred marital property estate, against which the husband will have elective rights under section 861.02, unless he waived the election under section 861.10. *See infra* § 3.15 (direct tracing of commingled financial accounts).

How much of any appreciation of the real estate in the above example is also deferred marital property is a question considered in sections 3.16 and 3.31, *infra*. Note that the husband has no elective rights against the nonmarital property component that is not deferred marital property.

(2) When Tracing Is Impossible [§ 2.237]

➢ ***Example.*** Assume that while married and before chapter 766 applies, a wife fully purchases an asset, in part with money that would have been marital property if chapter 766 had then applied and in part

with inherited cash. Although she takes title in her name, she retains no evidence to document the sources of payment other than proof of the date of acquisition, and the methods of tracing described in chapter 3, *infra*, are of no assistance. Assume that the wife dies in 1990 domiciled in Wisconsin, still owning the asset, and that her husband survives her. Under section 861.02(2), if the presumption under section 766.31(2) that all property of spouses is marital property is overcome, the property is presumed to be deferred marital property. In this case, the presumption that the asset is marital property is overcome because there is proof that it was acquired before the determination date. However, no proof of the source of funds used to purchase the asset was retained. Thus, under section 861.02(2) the entire asset is presumed to be deferred marital property included in the augmented deferred marital property estate subject to the election in section 861.02 if the husband survives and has not waived the election under section 861.10.

➢ ***Comment.*** The above result may present difficulties to spouses who have not kept records during the full course of their marriage and who did not contemplate when assets were acquired that the existing law would be changed so dramatically.

d. Appreciation [§ 2.238]

The appreciation of predetermination date property is treated in detail in sections 2.149–.153, *supra*.

Substantial appreciation of either spouse's predetermination date property as a result of substantial undercompensated labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity (generally referred to in this chapter as *efforts*) of either spouse applied while married and while chapter 766 did not apply is deferred marital property subject to election at the owner's death if the owner at death (1) has a Wisconsin domicile, (2) still owns the asset (or assets traceable to it) or otherwise made it a part of the augmented deferred marital property estate under section 861.03, and (3) is survived by his or her spouse. *See supra* § 2.152. If the tests of section 766.63(2) are not met, appreciation of predetermination date property as a result of market conditions or effort of either spouse is deferred marital property only if the underlying predetermination date property is deferred marital property; but if the underlying predetermination date property is not

deferred marital property, such appreciation is also not deferred marital property. *See supra* § 2.153. If the appreciation accrues on mixed property, it must be apportioned. Substantial appreciation of either spouse's predetermination date property as a result of substantial undercompensated efforts of either spouse applied during marriage and after the determination date is not deferred marital property; rather, such appreciation is marital property. *See supra* § 2.151.

3. Nonprobate Assets Generally [§ 2.239]

a. In General [§ 2.240]

A spouse may place deferred marital property, in all its manifestations, into many types of nonprobate arrangements involving third parties while retaining an interest. Such arrangements include life insurance policies, deferred-employment-benefit plans, joint tenancies, and various trusts. If the other spouse has not consented to the arrangement, then deferred marital property held in such a nonprobate arrangement is part of the augmented deferred marital property estate subject to the deferred marital property election under section 861.02. *See infra* §§ 12.136–.147 (detailed discussion of deferred marital property estate election, including trust arrangements).

b. Predetermination Date Joint Tenancy Between Spouse and Third Party [§ 2.241]

Whether created before or after the determination date, a joint tenancy created by a spouse or spouses with a third party retains all its traditional joint tenancy incidents to the extent that they differ or conflict with other incidents of classification in chapter 766. Wis. Stat. § 766.60(4)(a). Thus, a surviving third-party joint tenant's right of survivorship is recognized, but deferred marital property in such a joint tenancy and all its appreciation (other than that subject to the other spouse's rights of reimbursement) are potentially part of the augmented deferred marital property estate subject to election under section 861.02.

If marital property is added to a joint tenancy arrangement with a third party created before (or after) the determination date, a gift is made to the third party; the incidents of the joint tenancy prevail, including the

right of survivorship, to the extent that there is a conflict with other incidents of classification in chapter 766, but rights of reimbursement are provided a nontenant spouse who did not act together with the tenant spouse when the addition (gift) was made. *See* Wis. Stat. §§ 766.60(4)(a), .70(6)(c); *see also infra* §§ 2.255, 8.56.

c. Life Insurance Policies [§ 2.242]

The deferred marital property rules apply to life insurance policies and may have retroactive effect because the deferred marital property component of a life insurance policy is potentially part of the augmented deferred marital property estate subject to election under section 861.02. *See* Wis. Stat. § 861.03(2)(c). Consequently, the formulas and rules described in section 2.169, *supra*, must be considered again.

A formula-based system of mixed property is developed in section 766.61 to determine how much of an insurance policy is marital property, depending on such factors as whether premiums are paid before the determination date or during marriage and after the determination date. *See supra* § 2.165 (statutory definition of during marriage). When applying the rules of deferred marital property to spouses who are domiciled in Wisconsin at the Act's effective date or who change domicile to Wisconsin after January 1, 1986, the rules of section 766.61 must be pushed back in time to a hypothetical determination date.

➢ ***Example 1.*** Under section 766.61(3)(a), a policy issued during marriage and after the determination date insuring the life of a spouse who is also the record owner of the policy is classified as marital property regardless of the source of the premiums paid. *See supra* § 2.169. Assume that a policy in the amount of $100,000 was issued in 1975 while the spouses were married, insuring a spouse who is also the record owner and who names a third person as beneficiary. For purposes of simplicity, assume that the spouses always were domiciled in Wisconsin, that they did *not* pay premiums with marital property after December 31, 1985, and that the noninsured spouse did not consent to the designation of the third-party beneficiary. The entire policy proceeds are deferred marital property upon the insured spouse's death (if survived by his or her spouse), regardless of the source of premiums, because the proceeds would have been marital property if chapter 766 had applied to the spouses' property when the policy was issued. Wis. Stat. §§ 851.055, 766.61(3)(a). At the

insured's death (assuming no offsets against the proceeds), the proceeds are part of the augmented deferred marital property estate subject to election under section 861.02. *See* Wis. Stat. § 861.03.

The rules of section 766.61(3)(b), *see supra* § 2.170, are applied retroactively to policies insuring an owner spouse but paid for both before and after marriage occurs.

➢ ***Example 2.*** Suppose that an unmarried man purchased a $100,000 life insurance policy on his life on January 1, 1971, naming a child of a prior marriage as beneficiary (and assume that the child is not named as beneficiary because of a decree, property settlement agreement, etc.). Assume that the man married again on January 1, 1978; first paid a premium from deferred marital property funds on January 1, 1981; first paid a premium from marital property funds on January 1, 1986; and died on January 1, 1991, survived by his second wife, who did not consent to the beneficiary designation. Assume that at all times the spouses were domiciled in Wisconsin. In this example, the policy was in existence for 20 years. It is useful to divide the proceeds into segments in accord with the relevant periods of time involved.

All the proceeds (assuming no offsets against the proceeds) pass pursuant to the beneficiary designation to the child of the prior marriage. Of this amount, one-half ($50,000) represents the time the husband paid premiums from predetermination date property funds that are not deferred marital property. That time period includes 1971–77, when he was single, and 1978–80, when he was married but paid premiums from his predetermination date property funds that are not deferred marital property. The child owns this first portion ($50,000) of the proceeds free of any claim of the surviving spouse. On January 1, 1981, the insured husband first used deferred marital property funds to pay a premium; no marital property funds were used (nor could have been used) until January 1, 1986. As a consequence, one-fourth of the proceeds ($25,000) represents the time from the date the husband first used deferred marital property funds to pay a premium (January 1, 1981) to the date that he first used marital property funds to pay a premium (January 1, 1986). This second portion of the policy is deferred marital property included in the augmented deferred marital property estate; the child receives that portion of the proceeds subject to the surviving spouse's right of election under section 861.02. The final one-fourth of the proceeds

($25,000) is marital property because it represents the time from the date a premium was first paid with marital property funds to the date of the insured husband's death. As a consequence, the surviving spouse may recover $12,500 from the child pursuant to section 766.70(6)(b)1. A failure to claim that property interest constitutes a gift from the second wife to the child. *See infra* ch. 9. The child owns the other $12,500 free of any claim.

➢ ***Practice Tip.*** In circumstances such as those in Example 2 above, an appropriately drafted marital property agreement or written consent by the second wife pursuant to section 766.61(3)(e) could ensure that all the proceeds would be owned outright by the child.

The second example reveals that the formula set forth in section 766.61(3)(b) must be adapted in certain situations. Under the adapted formula, the deferred marital property component should be equal to what would have been the marital property component if chapter 766 had applied when that component was acquired, but with the important limitation that the deferred marital property fraction begins to diminish after a premium is first paid with marital property funds. Accordingly, the deferred marital property component in the policy and proceeds can be computed by multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the time from the date a premium is first paid with deferred marital property funds to the date a premium is first paid with marital property funds, and the denominator of which is the entire period the policy was in effect.

d. Deferred-employment-benefit Plans [§ 2.243]

➢ ***Comment.*** The following discussion does not consider rights of a surviving spouse under ERISA.

The deferred marital property rules apply to deferred-employment-benefit plans. Consequently, the deferred marital property component of a deferred-employment-benefit plan is potentially part of the augmented deferred marital property estate subject to election under section 861.02. *See* Wis. Stat. § 861.03(2)(b).

➢ ***Example 1.*** Assume that while married a husband commenced employment on January 1, 1976, and participated in a deferred-

employment-benefit plan from that date to January 1, 1991. The husband named a child of a prior marriage as beneficiary. Assume that no divorce decree is involved and that the spouses are at all times domiciled in Wisconsin, and ignore the federal rules under the Retirement Equity Act of 1984. With respect to federal preemption, see section 2.215, *supra*. If the second wife survives the husband and had not previously consented to the beneficiary designation, she may elect under section 861.02 to treat two-thirds of the benefit as part of the augmented deferred marital property estate and elect an amount up to one-half in value. She has a former marital property interest in the other one-third, which she can pursue under section 766.70(6)(b)1. *See infra* §§ 8.53–.55.

➢ ***Example 2.*** Assume the facts presented in Example 1, but further assume that the husband, while single, was also employed and participated in the deferred-employment-benefit plan for five years before his marriage, which occurred on January 1, 1976. On these facts, the one-fourth of the benefit representing the five years of employment before marriage is not subject to the wife's elective rights. One-half of the benefit representing the husband's time of employment from January 1, 1976, to January 1, 1986, is part of the augmented deferred marital property estate subject to the second wife's election under section 861.02. She could pursue her former marital property interest in the final one-fourth of the benefit, which represents her husband's time of employment from January 1, 1986, to January 1, 1991, under section 766.70(6)(b)1. The balance is owned by the husband's designated beneficiary.

To determine the deferred marital property component in a deferred-employment-benefit plan, it is necessary to adapt the formula in section 766.62(2). Under the adapted formula, the deferred marital property component should be equal to what would have been the marital property component if chapter 766 had applied to the spouses' property when that component was acquired, but with the important limitation that the deferred marital property fraction begins to diminish after a marital property component arises (at the determination date). Accordingly, the deferred marital property component can be computed by multiplying the entire benefit by a fraction, the numerator of which is the period of employment giving rise to the benefit that occurred while the spouses were married and before the determination date and the denominator of which is the total period of employment.

Section 861.05(1)(e) deals with the reverse order of death, that is, with what the consequences are in connection with the election if the nonparticipant spouse dies first, given that under the augmented approach the assets of both spouses are considered when determining the amount subject to election of the surviving spouse. Under section 861.05(1)(e), the interest of a nonparticipant spouse in a deferred-employment-benefit plan that is also deferred marital property is not part of the augmented deferred marital property estate. The Committee Note explains that since deferred marital property cannot exist within a deferred-employment-benefit plan unless it would have been marital property if chapter 766 had applied at its acquisition, the accompanying terminal-interest rule should also apply as if chapter 766 had applied. Committee Note section 187.

e. Appreciation [§ 2.244]

Generally, the value of property included in the augmented deferred marital property estate is determined as of the decedent's death. *See* Wis. Stat. § 861.05(2)(a); *see also* Wis. Stat. § 861.05(2)(b)–(d) (exceptions to this rule). This rule catches all appreciation, regardless of source, on deferred marital property included in the augmented marital property estate. However, not all appreciation of predetermination date property that is deferred marital property in nonprobate arrangements involving third parties is also deferred marital property. Hence, determination of a decedent's augmented deferred marital property estate may require a case-by-case analysis. For example, substantial appreciation of deferred marital property in nonprobate arrangements as a result of substantial undercompensated spousal efforts applied during marriage and *after* the determination date is not deferred marital property within the meaning of section 851.055 and hence should not be part of the augmented deferred marital property estate. Rather, such appreciation, like an addition of marital property to the arrangement, is subject to (1) the other spouse's remedies under provisions such as section 766.70(6)(b) and (c), and (2) the dollar amounts applicable to gifts under section 766.53. *See infra* § 8.45; *see also supra* § 2.8 (statutory definition of during marriage).

➢ ***Query.*** Assume that identifiable predetermination date property that is not deferred marital property is used to fund a nonprobate arrangement involving a third party. If there is substantial appreciation as a result of substantial undercompensated spousal

efforts applied *before* the determination date, will that appreciation be included in the augmented deferred marital property estate? The answer is yes. *See* Wis. Stat. §§ 851.055, 861.05. The appreciation is deferred marital property in which the spouse retained an interest. Because it is deferred marital property, it is subject neither to the dollar amounts with respect to gifts under section 766.53 nor to the remedy provisions of subsections 766.70(6)(b) and (c).

Whether it accrues before the determination date or during marriage and after the determination date, appreciation (other than substantial appreciation that results from substantial undercompensated spousal efforts) of identifiable predetermination date property that is not deferred marital property is also predetermination date property that is not deferred marital property. Consequently, it is not subject to a section 861.02 election.

f. Accumulated Income [§ 2.245]

A number of the arrangements described in section 861.05 might permit the accumulation of income while spouses are married and before the determination date. Generally, accumulated income is deferred marital property to the extent that it would have been marital property if acquired during marriage and after the determination date. *See supra* § 2.8 (statutory definition of during marriage). With certain exceptions, section 861.05 states that deferred marital property is valued as of the date of, or immediately before, the decedent's death. The word *valued* presumably includes unwithdrawn (and, in most cases, reinvested) income. The unilateral statement permitted by section 766.59 is not available because such a statement is prospective only and cannot be made effective before the determination date.

F. Move from Common Law State [§ 2.246]

The deferred marital property concept and the election in section 861.02 are designed in part to protect surviving spouses from disinheritance after spouses change their domiciles to Wisconsin from common law jurisdictions after January 1, 1986. *See supra* § 2.222. In Wisconsin, the Act eliminates the right to elect one-third of a decedent's net probate estate. *See supra* § 2.222. In addition, if both spouses change their domiciles to this state from a common law jurisdiction, the

surviving spouse loses the protection furnished him or her by dower, curtesy, or other elective right provided by the law of that common law state. If only one spouse changes domicile to Wisconsin, see section 13.15, *infra*.

➢ ***Example.*** Assume that a couple changes domicile from a common law state to Wisconsin. In the absence of elective rights protecting a surviving spouse, the wife has no rights upon her husband's death to elect a share of the property accumulated in her husband's name during their marriage in the common law jurisdiction if her husband chooses to will all his property to a third party. In such a case, the wife's rights are limited to her marital property interests accumulated after the change of domicile to Wisconsin.

To make up for the loss of elective rights resulting from a change of domicile to Wisconsin and the Act's elimination of the right to elect a share of a decedent's property, the deferred marital property election under section 861.02 is provided for surviving spouses.

Thus, assets accumulated in another jurisdiction that would have been marital property under Wisconsin's approach if acquired during marriage and after the determination date are deferred marital property subject to a surviving spouse's elective rights under section 861.02. *See supra* § 2.8 (statutory definition of during marriage). These elective rights have the greatest impact when spouses change domicile from a common law state to Wisconsin. The impact is much less if the change in domicile is from a community property jurisdiction to Wisconsin. However, income accumulated by a spouse while married in an American-rule community property state, where income from separate property is separate, is apparently potentially deferred marital property subject to election after a change of domicile to Wisconsin. In Wisconsin, such income would have been marital property if acquired during marriage and after the determination date.

XIV. Optional Forms of Holding Property [§ 2.247]

A. In General [§ 2.248]

Section 766.60 establishes optional forms of holding property. These are not classifications under the Act.

B. Marital Property in "or" Form or "and" Form [§ 2.249]

Spouses may hold marital property in a form that designates the holders by the words "(*name of one spouse*) or (*name of other spouse*) as marital property." Wis. Stat. § 766.60(1). Spouses may also hold marital property in an "and" form. Wis. Stat. § 766.60(2). The primary difference between the two forms involves rights of management and control. *See infra* ch. 4. Use of either form does not, in itself, create a survivorship interest; if survivorship is desired, the words "survivorship marital property" should be used instead of "marital property." *See* Wis. Stat. § 766.60(5)(a); *see also infra* § 2.250.

C. Survivorship Marital Property [§ 2.250]

If the words "survivorship marital property" are used instead of "marital property" on a document of title in either of the forms described in section 766.60(1) or (2), *see supra* § 2.249, the marital property so held is survivorship marital property. Wis. Stat. § 766.60(5)(a). Whether a spouse holding marital property in his or her own name may unilaterally reclassify the property to survivorship marital property is discussed in section 4.28, *infra*.

Except as provided in a marital property agreement, if a document of title, instrument of transfer, or bill of sale expresses an intent to establish a joint tenancy exclusively between spouses after the determination date, the property is survivorship marital property. Wis. Stat. § 766.60(4)(b)1.a. It apparently makes no difference whether the assets used for this purpose were originally individual property, predetermination date property, or marital property.

A joint tenancy exclusively between spouses that is given to the spouses by a third party after the determination date is survivorship marital property unless the donor provides otherwise. Wis. Stat. § 766.60(4)(b)2. As to the characteristics of joint tenancies created between spouses, given to spouses by third parties, or created between spouses and third parties, see sections 2.253–.260, *infra*.

Homestead property acquired after the determination date will, in most cases, be survivorship marital property. *See infra* § 2.251.

The characteristics of survivorship marital property are described in section 766.60(5)(a). On the death of a spouse, that spouse's ownership rights in the property vest solely in the surviving spouse by nontestamentary disposition at death; therefore, the first spouse to die may not dispose at death of any interest in survivorship marital property.

The decedent's interest in survivorship marital property vests in the surviving spouse free of the claims of the deceased spouse's unsecured creditors. Wis. Stat. § 859.18(4)(a)1. A mortgage, security interest, or lien on the property does not defeat the right of survivorship. The surviving spouse takes the property subject to the mortgage, security interest, or lien. Wis. Stat. § 766.60(5)(b).

A judgment lien on the decedent's interest in survivorship marital property does not defeat the right of survivorship. Wis. Stat. § 766.60(5)(c). If execution of the judgment lien was issued before the spouse's death, the surviving spouse takes the decedent's interest subject to the lien. *Id.* If execution of the lien on the decedent's interest in survivorship marital property was not issued before death, the surviving spouse takes the decedent's interest free of the lien. *Id.* If the judgment lien is on both spouses' interests in the survivorship marital property and all the spouses' property was available under section 766.55 to satisfy the obligation involved, apparently the surviving spouse takes the property subject to the lien even if execution was not issued before the decedent's death. *Id.*

➢ ***Query.*** If property held as survivorship marital property is sold, are the proceeds also survivorship marital property? In the absence of a marital property agreement so declaring, it appears that survivorship marital property cannot exist unless there is a document of title and the document of title includes both spouses' names and the words "survivorship marital property." In the absence of those words on the check (or assets into which the proceeds are invested), the proceeds are marital property without survivorship. There are exceptions for homesteads (which are subject to special rules, *see infra* § 2.251) and expressions of intent on certain documents of title (or transfer) to create joint tenancies between spouses. *See* Wis. Stat. Ann. § 766.60(4)(b) Legis. Council Note—1985 Act 37, §§ 124 to 126 (West 2009) (ability of one spouse to unilaterally destroy right of survivorship in survivorship marital property); *see also infra* § 4.60.

D. Homestead Property [§ 2.251]

Section 766.605, a provision with no counterpart in UMPA, provides that a homestead acquired after the determination date in a transaction exclusively between spouses is survivorship marital property if no intent to the contrary is expressed in the instrument of transfer or a marital property agreement. To avoid confusion, husbands and wives should refer to their homestead property as a "homestead" on the deed. If a husband and wife wish to take the property as joint tenants, they will have to do so by marital property agreement. *See* Wis. Stat. Ann. § 766.60(4)(b)1.a. Legis. Council Note—1985 Act 37, §§ 124 to 126 (West 2009).

The crucial moment is when the homestead is "titled" at the time of acquisition. Wis. Stat. Ann. § 766.605 Legis. Council Notes—1991 Act 301, § 21 (West 2009). If the title is in the names of both spouses, the homestead is survivorship marital property. If the title is in only one spouse's name, there is no element of survivorship even if marital property assets were used to acquire the homestead. Whether a homestead titled in the name of only one spouse is classified as marital property depends on the source of the funds used to acquire the homestead.

There is some uncertainty about the status of homestead property when it is no longer used as a homestead. Presumably, it retains its attributes of the survivorship marital property form of holding because under section 766.605 those attributes are determined at the time of acquisition.

A homestead may be reclassified under section 766.31(10). Wis. Stat. § 766.605. Thus, a homestead may be reclassified by gift, conveyance signed by both spouses, or marital property agreement. In addition, a spouse can waive homestead rights under a marital property agreement. *Jones v. Estate of Jones*, 2002 WI 61, 253 Wis. 2d 158, 646 N.W.2d 280.

E. Concurrent Forms of Ownership [§ 2.252]

1. In General [§ 2.253]

As originally enacted, section 766.60 of the Act (optional forms of holding property; survivorship ownership) was based on UMPA section 11, which stated that spouses may hold property in any form permitted by law, including a concurrent form of holding. The comment to UMPA section 11 explained that a concurrent form was consistent with the underlying difference under UMPA between ownership and the integrated matters of holding and management and control. This comment caused confusion in Wisconsin about whether a joint tenancy, acquired with marital property funds, between a husband and wife remained marital property, possibly subject to probate when the first spouse died and to the reach of creditors under the family-purpose doctrine, or whether it was, in fact, a joint tenancy with all the characteristics set forth in section 700.17.

The 1985 Trailer Bill attempted to resolve the confusion. First, section 700.17 (classification and characteristics of certain concurrent interests) was amended by adding a reference to section 766.60(4)(b), which establishes rules for an attempt to create joint tenancies and tenancies in common exclusively between spouses after the determination date by means of a title document. Second, section 766.60(4)(a) was changed to clarify the character of joint tenancies and tenancies in common created exclusively between spouses before the determination date and between a spouse or spouses and third parties created before or after the determination date. Section 766.60(4)(a) provides:

> Spouses may hold property in any other form permitted by law, including but not limited to a concurrent form or a form that provides survivorship ownership. Except as provided in [section 766.60(4)(b)] and except with respect to any remedy a spouse has under this chapter, whether a tenancy in common or joint tenancy was created before or after the determination date, to the extent the incidents of the tenancy in common or joint tenancy conflict with or differ from the incidents of property classification under this chapter, the incidents of the tenancy in common or of the joint tenancy, including the incident of survivorship, control.

Section 766.60(4)(b) deals with the attempt to create joint tenancies or tenancies in common exclusively between spouses after the

determination date by document of title, instrument of transfer, or bill of sale; consequently, those forms of ownership are not governed by section 766.60(4)(a). All other joint tenancies and tenancies in common involving a spouse are governed by section 766.60(4)(a). Except for remedies a spouse has under chapter 766, when the incidents of property classification in chapter 766 conflict with the traditional incidents of common or joint tenancies described in section 766.60(4)(a), the traditional incidents of the common and joint tenancies control. Therefore, before considering examples of the application of section 766.60(4)(a), it is useful to review some of the differences between joint-tenancy property, tenancy-in-common property, and marital property.

1. Inherent in a joint tenancy is the right of survivorship. There is no right of survivorship for tenancy-in-common property or marital property. However, when a document of title is involved, a survivorship feature may be added to marital property to create survivorship marital property. *See* Wis. Stat. § 766.60(5)(a). Also, a homestead acquired exclusively between spouses is survivorship marital property unless a contrary intent is expressed in the instrument of transfer. Wis. Stat. § 766.605; *see supra* § 2.251.

2. Either spouse may unilaterally convey a one-half interest in a joint tenancy other than a homestead to a third party. (The joint tenancy is then converted to a tenancy in common.) Similarly, either spouse may unilaterally convey his or her interest in a tenancy in common other than a homestead to a third party. A spouse may not unilaterally convey an interest in marital property. A spouse with management and control may sell a portion of a marital property asset, but the proceeds or portion remaining after the sale is still marital property. The ability to unilaterally sever the survivorship feature of survivorship marital property is discussed in section 2.257, *infra*.

3. A spouse must observe the good-faith duty when dealing with marital property. Wis. Stat. § 766.15(1). Unless there is a marital property component, there is no such good-faith duty for joint-tenancy or tenancy-in-common property.

4. During cotenants' lifetimes, an unsecured creditor of a debt-incurring tenant can reach one-half of the joint tenancy or the debtor spouse's undivided interest in tenancy-in-common property. A creditor who extended credit in the interest of the marriage or family can reach all

marital property, including all survivorship marital property, while both spouses are living. *See* Wis. Stat. § 766.55(2)(b).

5. At the death of a joint tenant, the surviving joint tenant owns the entire asset free of the claims of the deceased joint tenant's unsecured creditors. An unsecured creditor of a deceased owner of a tenancy-in-common interest can reach the deceased's undivided interest in his or her probate estate. By contrast, when an owner of marital property dies, an unsecured creditor who extended credit in the interest of the marriage or family can reach all the marital property at the death of the first owner, not just the deceased's interest. *See* Wis. Stat. §§ 859.18(2), 766.55(2)(b). As to the rights of unsecured creditors of a deceased spouse in connection with survivorship marital property, see section 2.257, *infra*.

6. The lien of a docketed judgment (based on an obligation described in section 766.55(2)) against one spouse encumbers all the marital property real estate held by the incurring spouse, and the lien continues to encumber the property on the death of either spouse. *See infra* § 4.54. (The lien of a docketed judgment based on an obligation described in section 766.55(2) incurred by one spouse does not encumber marital property real estate held by the nonincurring spouse unless the nonincurring spouse is named as a defendant in the action for which the judgment is rendered and certain tests in section 806.15(4) are met. *See* Wis. Stat. § 806.15(4).) As to judgment liens and survivorship marital property, see section 2.250, *supra*. The lien of a docketed judgment against a spouse who owns a tenancy-in-common interest in real estate encumbers the undivided interest of that tenant in common during life and at death but does not encumber the other spouse's interest. The lien of a docketed judgment against a spouse who is a joint tenant creates a lien on the debtor spouse's interest in joint-tenancy real estate; the lien does not extend to the other joint tenant's interest. If the debtor spouse dies before the judgment is executed, that spouse's interest disappears. Therefore, the lien, if not executed, also disappears; the surviving spouse, whose interest extends to the entire asset, owns all the real estate free and clear of the judgment lien. *Northern State Bank v. Toal*, 69 Wis. 2d 50, 230 N.W.2d 153 (1975).

7. As to adjustment in basis at the death of the first spouse to die, see section 9.29, *infra*.

➢ ***Note.*** The discussion in sections 2.254–.260, *infra*, does not deal with accounts at financial institutions governed by chapter 705. For a discussion of such accounts, see sections 2.262–.264, *infra*.

2. Joint Tenancies and Tenancies in Common Created Before Determination Date [§ 2.254]

Two types of joint tenancies and tenancies in common involving a spouse may be created before the determination date: (1) joint tenancies and tenancies in common exclusively between spouses and (2) joint tenancies and tenancies in common created between a spouse or spouses and a third party. With both types, the incidents of the joint tenancy or tenancy in common control if they conflict with or differ from the incidents of property classification under chapter 766 (apart from a nontenant spouse's remedies that may exist in the second type). Wis. Stat. § 766.60(4)(a). In short, the statutory incidents of such preexisting joint tenancies and tenancies in common set forth in section 700.17 are preserved, including the right of survivorship, regardless of the classification of property held in the tenancy. See Wis. Stat. Ann. § 766.60(4)(a) Legis. Council Note—1985 Act 37, §§ 124 to 126 (West 2009). Such tenancies could presumably be reclassified by marital property agreement. Assuming no such reclassification, the question of mixing must be considered. *See infra* § 3.26.

➢ ***Example 1.*** Assume that a husband and wife domiciled in Wisconsin purchase property as joint tenants in 1976 subject to a mortgage. Assume that the husband uses his wages (marital property) after January 1, 1986, to pay the mortgage. Also assume that the enhancement of equity creates an ownership interest as opposed to a right of reimbursement. *See infra* § 3.41. Is the enhancement of the equity classified as marital property, survivorship marital property, or joint-tenancy property? It is marital property (thereby creating a mixed asset), but to the extent the incidents of ownership of marital property conflict with or differ from the traditional incidents of ownership of joint tenancy, the incidents of joint tenancy control, regardless of the classification of the property held in the tenancy. *See* Wis. Stat. Ann. § 766.60(4)(a) Legis. Council Note—1985 Act 37, §§ 124 to 126 (West 2009). Because traditional incidents of joint tenancy control, the right of survivorship is recognized, and the surviving joint tenant owns the entire asset free and clear of claims of

the deceased spouse's unsecured creditors, even credit extended in the interests of the marriage or family. Wis. Stat. § 859.18(4)(a)2. Unlike marital property, no portion of the asset is subject to probate administration in the estate of the first tenant to die.

If the incidents of marital property classification under chapter 766 do not conflict with or differ from the incidents of joint tenancy or tenancy in common, the incidents of marital property control, as illustrated in the following example:

➢ ***Example 2.*** Assume that an asset with a marital property component (added during marriage and after the determination date) held in a joint tenancy created exclusively between the spouses before the determination date is sold during marriage after the determination date, and the sale proceeds are deposited in an account in one spouse's name. *See supra* § 2.8 (statutory definition of during marriage). In the absence of a gift, the proceeds are apparently marital property to the extent of the marital property component that existed immediately before the sale.

➢ ***Query.*** When a joint tenancy involves a mixture of marital and nonmarital property, will there be an adjustment in basis of the entire marital property component for income tax purposes on the death of the first tenant spouse to die? For discussion of federal and Wisconsin basis issues when community property is held in joint tenancy, see section 9.28, *infra*.

➢ ***Example 3.*** Assume that a joint tenancy is created between a husband and a third party while he is married but before the determination date. Assume that the husband uses his wages during marriage, both before and after the determination date, without his wife's consent, to retire a mortgage on the property. If the husband dies first, the third party owns the entire asset. To the extent that the equity was enhanced by use of the husband's wages before the determination date, deferred marital property is created and is part of the augmented deferred marital property estate subject to election by the surviving spouse under section 861.02. The payment of the mortgage with the husband's wages after January 1, 1986, also enhanced the equity in the property. That enhancement is marital property but it passes to the third party pursuant to the rules applicable to joint tenancies. Section 766.60(4)(a) refers to remedies

provided to the other spouse. Thus, the enhancement of the equity is treated as a gift by the husband to the third party, subject to the wife's rights of reimbursement under section 766.70(6)(c). *See infra* ch. 8.

➢ ***Example 4.*** Assume the same facts as in Example 3, except that no gift is made; the husband (using marital property) and the third party contribute equally to the joint tenancy; the property is sold; and the husband and the third party split the proceeds. The husband's share of the proceeds is presumably marital property because no gift was made. If the husband dies before the property is sold so that the third party becomes the owner of the entire interest, the wife has a remedy under section 766.70(6)(c). If the third party dies first, the husband obtains title to the entire interest; presumably, one-half is marital property, and the other half received as a gift from the third party is the husband's individual property.

3. Joint Tenancies and Tenancies in Common Created After Determination Date Between Spouse or Spouses and Third Party [§ 2.255]

➢ ***Example.*** Assume a joint tenancy or a tenancy in common is created between a spouse or spouses and a third party after the determination date. It is not likely that such a tenancy would include deferred marital property at the death of a spouse, but it is a possibility. The nontenant spouse has remedies of reimbursement under section 766.70(6)(c) if marital property is placed in such an arrangement and the spouses did not act together in the creation of the tenancy.

4. Attempt to Create Joint Tenancies and Tenancies in Common Exclusively Between Spouses After Determination Date [§ 2.256]

a. Joint Tenancies [§ 2.257]

If a document of title, instrument of transfer, or bill of sale expresses an intent to establish a joint tenancy exclusively between spouses after the determination date, the property is survivorship marital property

under section 766.60(5). Wis. Stat. § 766.60(4)(b)1.a. In the absence of a marital property agreement requiring a different result, such an attempt to create traditional joint-tenancy property fails. It apparently makes no difference whether the property used for this purpose was originally individual, marital, or predetermination date property; the result is survivorship marital property. Because it is survivorship marital property, at the death of the first spouse to die the decedent's interest in the property vests by nontestamentary disposition in the surviving spouse. *See supra* § 2.250.

➢ ***Note.*** Because of the Act, section 700.19(2) (pertaining to joint tenancies between spouses) loses most of its significance. Section 700.19(2) provides that if persons named as owners in a document of title, transferees in an instrument of transfer, or buyers in a bill of sale are described as husband and wife, or are in fact husband and wife, they are joint tenants unless the intent to create a tenancy in common is expressed in the document, instrument, or bill of sale. Section 700.19(2) is generally limited to property acquired by spouses before January 1, 1986. Section 700.19(2) applies to acquisitions by spouses after January 1, 1986, only if chapter 766 does not apply when the property is acquired. For example, chapter 766 would not apply at the date of acquisition if, on that date, at least one of the spouses is domiciled outside Wisconsin.

A joint tenancy exclusively between spouses that is given to both spouses after the determination date by a third party is survivorship marital property unless the donor provides otherwise. Wis. Stat. § 766.60(4)(b)2.

➢ ***Note.*** Section 700.19(2) might, at first glance, appear to require a different result. Section 700.19(2) provides that if persons named as owners in a document of title, transferees in an instrument of transfer, or buyers in a bill of sale are described as husband and wife, or are in fact husband and wife, they are joint tenants unless the intent to create a tenancy in common is expressed in the document, instrument, or bill of sale. Section 700.19(2) applies, however, only to (1) property acquired by spouses before January 1, 1986, and (2) property acquired by spouses after January 1, 1986, while chapter 766 does not apply (e.g., because one or both of the spouses is domiciled outside Wisconsin).

Spouses who wish to create joint tenancies with the traditional incidents of joint tenancy after the determination date may do so by marital property agreement. Wis. Stat. Ann. § 766.60(4)(b) Legis. Council Note—1985 Act 37, §§ 124 to 126 (West 2009). It appears that a marital property agreement is the only way spouses may create traditional joint tenancies after the determination date.

A creditor is not adversely affected by the creation of a joint tenancy by marital property agreement unless the creditor has received the requisite notice under sections 766.55(4m) and 766.56(2)(c). Wis. Stat. Ann. § 766.60(4)(b)1. Legis. Council Notes—1991 Act 301, § 20 (West 2009). Consequently, in the absence of such a notice, a surviving joint tenant does not own the asset free and clear of the claims of the deceased spouse's unsecured creditors who extended credit in the interests of the marriage or family if, absent a marital property agreement, the asset would have been marital property or property of the obligated spouse.

As a matter of property law, the most significant differences between a joint tenancy as defined under section 700.17 and survivorship marital property involve rights of severance, creditors' rights during the marriage, and the basic nature of the two types of property interests.

A joint tenant (of other than a homestead) may unilaterally destroy the right of survivorship (for example, by conveying a one-half interest in the joint tenancy). In contrast, the spouse's ability to unilaterally destroy the right of survivorship in survivorship marital property other than a homestead depends first on the form in which the property is held (that is, whether in the "and" or the "or" form, *see supra* §§ 2.249, .250), and second on whether the entire item is transferred (if a spouse transfers only a portion of the survivorship marital property, the remaining portion is still survivorship marital property). *See* Wis. Stat. Ann. § 766.60(4)(b)2. Legis. Council Note—1985 Act 37, §§ 124 to 126 (West 2009); *see also infra* § 4.60.

At the death of a spouse with an interest in survivorship marital property or a joint tenancy, the survivor owns the entire asset free of the claims of the deceased spouse's unsecured creditors, even those claims incurred in the interest of the marriage or family. Wis. Stat. § 859.18(4)(a)1., 2. During marriage, however, a creditor who extended credit to one spouse in the interest of the marriage or family may reach all survivorship marital property, Wis. Stat. § 766.55(2)(b), but only half

of a joint tenancy, *Northern State Bank v. Toal*, 69 Wis. 2d 50, 230 N.W.2d 153 (1975).

As to differences in the basic nature of these two types of property interests, see section 9.30, *infra*.

For tax purposes, only one-half of a joint tenancy is subject to an adjustment in basis at the death of the first spouse to die, whereas all survivorship marital property should receive an adjustment in basis. *See infra* § 9.31.

b. Tenancies in Common [§ 2.258]

If a document of title, instrument of transfer, or bill of sale expresses an intent to establish a tenancy in common exclusively between spouses after the determination date, the property is marital property. Wis. Stat. § 766.60(4)(b)1.b. In the absence of a marital property agreement requiring a different result, such an attempt to create a traditional tenancy in common fails. It apparently makes no difference whether the property used for this purpose was originally individual, marital, or predetermination date property; the result is marital property.

Under section 766.60(4)(b)2., a tenancy in common exclusively between spouses that is given to the spouses by a third party after the determination date is marital property unless the donor provides otherwise.

- ***Note.*** Section 700.18 provides that "[t]wo or more persons named as owners in a document of title, transferees in an instrument of transfer or buyers in a bill of sale are tenants in common, except as otherwise provided in s. 700.19 or ch. 766." Chapter 766 applies otherwise through section 766.60(4)(b)2. Section 700.19(2) applies only if the title document specifies a joint tenancy or describes the tenants as husband and wife—but even then section 700.19 is of extremely limited application, because it applies to acquisitions of titled assets by spouses after January 1, 1986, and then only if chapter 766 does not apply when the property is acquired (e.g., because one or both of the spouses is domiciled outside Wisconsin).

Spouses who wish to create tenancies in common with the traditional incidents of tenancy in common may do so by marital property

agreement. Wis. Stat. Ann. § 766.60(4)(b)1. Legis. Council Note—1985 Act 37, §§ 124 to 126 (West 2009). It appears that a marital property agreement is the only way spouses may create traditional tenancies in common after the determination date.

A creditor is not adversely affected by the creation of a tenancy in common by marital property agreement unless the creditor has received the requisite notice under sections 766.55(4m) and 766.56(2)(c). Wis. Stat. Ann. § 766.60(4)(b)1. Legis. Council Notes—1991 Act 301, § 20 (West 2009). Without such notice, therefore, a creditor who extended credit in the interest of the marriage or family is not limited to the undivided interest of the debt-incurring spouse but may seek recovery from both halves of the property if, in the absence of a marital property agreement, the asset would have been either marital property or property of the obligated spouse.

Tenancy-in-common property is quite similar to marital property in many respects, including the ownership right in each half at death and the tenant's ability to dispose of 50% of the asset at death. Moreover, since 1985, the Wisconsin intestacy statutes have not distinguished between marital property and tenancy-in-common property (if there are no children from a prior marriage). The two forms of property do differ with respect to (1) creditors, *see supra* § 2.253, (2) conveyancing during the marriage, *see infra* § 2.260, and (3) the laws of intestacy if there are children from a prior marriage, *see* Wis. Stat. § 852.01(1)(a).

With respect to the last point dealing with intestacy, 2005 Wisconsin Act 216, section 65, created new section 852.01(1)(a)2.b. This new section deals with tenancy-in-common property held equally and exclusively by spouses, the interest of the deceased spouse passes by intestacy, and the deceased spouse has children by a prior marriage. The Committee Note to section 65 explains that the amendment makes treatment of such tenancies parallel to the treatment of marital property. Thus, the surviving spouse keeps his or her half, and the other half belonging to the decedent passes to his or her children. Before the amendment, says the Committee Note, there was the possibility that the surviving spouse could not only retain his or her half but also claim one half of the decedent's interest. *Id.* The amendment does not expressly deal with a decedent's interest in a tenancy in common that is in proportions other than equal or that involves ownership of a third party.

c. Comparison [§ 2.259]

The planner must be aware of the different consequences that flow from (1) an acquisition by a document of title, instrument of transfer, or bill of sale that expresses an intent to create a joint tenancy exclusively between spouses after the determination date and (2) an acquisition by a document of title, instrument of transfer, or bill of sale that expresses an intent to create a tenancy in common exclusively between spouses after the determination date. In the first case, without a marital property agreement, survivorship marital property results; the incident of survivorship obtains, and certain creditors of the first spouse to die may not reach the asset. In the second case, without a marital property agreement, marital property results; there is no survivorship between the spouses, one-half of the asset is subject to probate when the first spouse dies, and the creditors who have extended credit for family-purpose obligations can reach both halves of the asset upon the death of the first spouse to die.

d. Language on Documents of Title Expressing Intent to Create Spousal Joint Tenancies or Tenancies in Common [§ 2.260]

Section 700.19(1) provides that creation of a joint tenancy is determined by the intent expressed in the document of title. Any of the following constitutes an expression of such intent: "as joint tenants," "as joint owners," "jointly," "or the survivor," "with right of survivorship," or any similar phrase except one similar to "survivorship marital property." Wis. Stat. § 700.19(1).

Section 700.19(2) (which applies to joint tenancies between spouses) is generally limited to acquisitions of titled assets exclusively between spouses before January 1, 1986. Section 700.19(2) applies to acquisitions of titled assets by spouses after January 1, 1986, only if chapter 766 does not apply when the property is acquired. For example, chapter 766 would not apply at the date of acquisition if, on that date, at least one of the spouses is domiciled outside Wisconsin.

Section 766.60(4)(b)1. states that, except as provided in a marital property agreement, if an intent is expressed in a document of title, instrument of transfer, or bill of sale to create either a joint tenancy or a

tenancy in common exclusively between spouses domiciled in Wisconsin after the determination date, the property is survivorship marital property or marital property, respectively. *See supra* §§ 2.257–.258. This provision raises a question about the language needed on a document of title to express an intent to create a joint tenancy or a tenancy in common exclusively between spouses after the determination date. What if a document of title simply states "H and W as husband and wife"? If a homestead is involved, it is survivorship marital property. Wis. Stat. § 766.605. Assuming a homestead is not involved, that language on a document of title would create a joint tenancy under section 700.19(2) if the property was acquired before January 1, 1986. For property acquired after January 1, 1986, however, section 700.19(2) is inapplicable unless chapter 766 did not apply when the property was acquired. In addition, the hypothetical language described does not conform to any of the expressions catalogued in section 700.19(1) as sufficient to create a joint tenancy. However, the language described meets the definition of a tenancy in common under section 700.18. Does the hypothetical language express an intent to create a tenancy in common? If it does, that language creates marital property by virtue of section 766.60(4)(b)1.b. If not, the asset acquired may retain the classification of the property used to make the acquisition.

F. Accounts Between Husband and Wife [§ 2.261]

1. In General [§ 2.262]

Joint accounts are not joint tenancies. Rather they are governed by chapter 705, which deals with multiple-party and agency accounts offered by financial institutions. Chapter 705 and its relationship with the Act are discussed in sections 2.263 and 2.264, *infra*.

2. Joint Accounts [§ 2.263]

A joint account is an account, other than a marital account, payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship. Wis. Stat. § 705.01(4). Section 705.01(4) provides that a joint account also means any account established with the right of survivorship on or after January 1, 1986, by two parties who claim to be husband and wife, that is payable on request to either or both of the parties. *Id.*

There is a presumption that a joint account belongs, during the lifetime of all parties, to the parties without regard to the proportion of their respective contributions to the sums on deposit or to the number of signatures required for payment. Wis. Stat. § 705.03(1). The application of any sum withdrawn from a joint account by a party to the account is not subject to inquiry by any person, including any other party to the account, except that the spouse of one of the parties may recover under section 766.70 if conditions prescribed by section 766.70 are met. *Id.* At the death of a party, the account presumptively belongs to the surviving party or parties. Wis. Stat. § 705.04(1).

On the last point, *Hall v. Jung (In re Estate of Jung)*, 2000 WI App 151, 237 Wis. 2d 853, 616 N.W.2d 118, is instructive. The husband and wife executed a marital property agreement that declared, among other things, that a certain annuity was the husband's individual property. The agreement made no promises about who the beneficiary of the annuity contract had to be nor did it deal even in a general way with disposition of property at the death of a party. The husband also executed a will leaving all his individual property to his children of a prior marriage.

The annuity contract stated, however, that the wife was the co-annuitant and that upon the husband's death, the co-annuitant became the owner of the annuity. When the husband died, the wife and the children of the prior marriage all claimed the annuity. The court found that the agreement merely classified the property, and that terms of the annuity contract controlled its disposition. Thus, the annuity passed to the wife as a nonprobate transfer under section 705.20(1)(c) and, in addition, and with the same result, as a joint account under section 705.04.

Provisions protecting financial institutions are provided under section 705.06. Language sufficient to create a joint account is set forth in section 705.02.

Will nonmarital property cash be reclassified as marital property cash upon deposit into a joint account held exclusively by the spouses? Will it retain its classification after a withdrawal from the account? These questions are dealt with in several cases decided by Wisconsin Court of Appeals. As a result of these decisions, the answers are in a process of development.

In two cases, *Fowler v. Fowler*, 158 Wis. 2d 508, 518, 463 N.W.2d 370 (Ct. App. 1990), and *Lloyd v. Lloyd (In re Estate of Lloyd)*, 170

Wis. 2d 240, 269, 487 N.W.2d 644 (Ct. App. 1992), the court equated joint accounts with joint tenancies in analyzing whether assets are reclassified upon deposit into a joint account. Citing *Fowler*, 158 Wis. 2d at 518, with approval, the court in *Lloyd* stated: "Although a joint account is a statutory creation as opposed to a true common law joint tenancy, at least one Wisconsin case appears to equate the two." 170 Wis. 2d at 256 n.4.

In *Lloyd*, for example, the court stated that a postdetermination date transfer of assets of any classification—whether individual property, predetermination date property, or marital property—into a joint account exclusively between spouses "changes the character of the ownership interest in the entire property into marital property." *Id.* at 269 (citing *Fowler*, 158 Wis. 2d at 518). As a result, tracing is irrelevant. The court also held that marital property cash later withdrawn from the account retains its classification as marital property. *Id.* at 269–70. By the same reasoning, property placed into a joint account before the determination date while spouses are married is deferred marital property.

➢ ***Comment.*** The court in *Lloyd* said that when a joint account or a joint tenancy is created, each party has an equal, undifferentiated interest in the whole of the property. *Id.* at 269. This is certainly true of joint tenancies. Joint accounts, however, are governed by chapter 705. Each spouse has access to a joint account and may withdraw all the funds in that account unilaterally. *See* Wis. Stat. § 705.01(4). In connection with a joint tenancy as defined in section 700.17(2), a spouse may unilaterally sever a joint tenancy into a tenancy in common but may not appropriate all the property or the entire proceeds of sale. Creation of a joint account is not a completed gift. A completed gift occurs upon a withdrawal by a party of an amount more than the amount that party contributed to the account.

In a subsequent case, *Kobylski v. Hellstern (In re Estate of Kobylski)*, 178 Wis. 2d 158, 503 N.W.2d 369 (Ct. App. 1993), the court of appeals, in a significant footnote, corrected what it referred to as the impression left by *Lloyd* that an analysis of the character of an asset must be performed under section 766.63, the mixing statute. *Id.* at 173–74 n.7. Instead, said the court, analysis (described as a "character/gift/donative intent inquiry") should be made under section 766.31(10), which expressly recognizes that a spouse may reclassify property by gift. If there is no gift, tracing may be done under section 766.63.

➢ ***Comment.*** Two inferences may be drawn from the *Kobylski* footnote discussed above: First, in the absence of donative intent, there is no automatic reclassification of property upon deposit of funds into a joint account. The funds could be reclassified by inability to trace, however. Second, if there is donative intent, there is a reclassification into marital property. This means that if individual property is deposited into a joint account with donative intent, a completed gift of one-half of the property occurs whether or not there are withdrawals.

For a case in which donative intent could not be proved, see *Gardner v. Gardner*, 190 Wis. 2d 217, 236–39, 527 N.W.2d 701 (Ct. App. 1994), a dissolution proceeding in which the court stated that the account was a temporary storage facility.

A lengthy and well-reasoned opinion with analysis limited to divorce cases is that of *Derr v. Derr*, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170. The opinion focuses on donative intent, saying:

> We think it apparent that "character" terminology just adds a layer of haze to a topic that is already sufficiently complicated. Why not cut to the quick and use the term "donative intent" when talking about donative intent? No reason comes to mind and, therefore, in this opinion we will, when possible, avoid the terms "character" and "loss of character" and instead speak directly in terms of donative intent.

2005 WI App 63, ¶ 24, 280 Wis. 2d 681.

The court explained that, as a question of fact, donative intent is consistent with the general law of gifts, which requires an intent to give on the part of the donor. Some situations create a rebuttable presumption of donative intent, and the court identified the following four such situations:

1. Transferring nondivisible property to joint tenancy;

2. Depositing nondivisible property into a joint bank account;

3. Using nondivisible property to make purchases for the family; and

4. Using nondivisible property funds to make payments on a mortgage debt that was incurred to acquire jointly owned real estate. *Id.* ¶¶ 35–38.

The court drew a distinction between donative intent and *identity*, stating that donative intent reclassifies a part or all of an asset, depending on the scope of the donor's intent, while identity is a function of tracing. Assets can be of a mixed character without regard to donative intent although commingling of assets might suggest a donative intent. The court explained that tracing is used to describe the identity inquiry in marital property cases and that *Lloyd*, 280 Wis. 2d 681, could be read to suggest that the nature of the identity/tracing inquiry is the same in both marital property and divorce contexts. Noting that *Gardner v. Gardner*, 190 Wis. 2d 216, 527 N.W.2d 701 (Ct. App. 1994), on the other hand, may suggest the identity inquiry is somewhat different in the marital property context, the court limited its analysis to divorce cases. *Derr*, 2005 WI App 63, ¶ 24 n.7, 280 Wis. 2d 681.

After carefully defining the terms, the court applied a donative intent inquiry in *Derr*, a case in which the husband received an apartment building by gift from his parents, then subsequently used it as collateral to obtain a loan, the proceeds of which were used for general marital purposes. The issue was whether repayment of the loan from marital property cash converted some or all of the originally nondivisible inherited building into divisible property for purposes of divorce. The court said no, relying on the fact that the loan payments did not increase the net value of the building. Rather, the marriage received $300,000 in loan proceeds equally matched by $300,000 in debt. The court contrasted this situation with a situation in which a building's net value was increased with payments from marital property cash on a mortgage that finances acquisition or improvement of a building. Moreover, the court drew a distinction between simply putting the building at risk by using it as collateral and the situations listed above, such as using inheritance proceeds or other forms of nondivisible property to fund accounts for the benefit of the marriage. The former, they concluded, did not create a presumption of donative intent to give the building to the marriage, while the latter would have.

In *Steinmann v. Steinmann*, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145, the Wisconsin Supreme Court considered a marital property agreement that classified certain assets as individual property of a party and also provided that upon a dissolution, assets classified as a party's

individual property would remain the property of that party. During the marriage certain of these individual property assets were titled into joint tenancy. The court noted that *Derr* involved the transmutation of nondivisible property acquired by gift or inheritance and that in *Steinmann* the nondivisible property at stake was created by marital property agreement. The court held that the principles of transmutation in *Derr* are not limited to nondivisible property acquired by gift or inheritance but apply to all types of nondivisible property, even that classified as individual property by a marital property agreement. The court then applied the basic principles of *Derr* and said that titling individual property into joint tenancy transmutes the property from nondivisible to divisible property if there is donative intent, and that the act of titling in joint tenancy raises a presumption of donative intent. Ultimately, the court found that the presumption was not rebutted even though the only testimony on the point came from the spouse denying that intent. The clear implication is that the reasoning of *Steinmann*, applied in a dissolution, will also apply in connection with marital property under the Act. Thus, titling individual property into a joint tenancy will transmute the property into marital property if there is donative intent, and it will be difficult to rebut the presumption that the mere act of titling in joint tenancy supplies that intent.

3. Marital Accounts [§ 2.264]

The Act created section 705.01(4m), which establishes the right to create a new kind of account, a *marital account*, between parties who claim to be husband and wife. This is an account without the right of survivorship, because if the right of survivorship is added, the account is a joint account. Wis. Stat. § 705.01(4m), (4); *see supra* § 2.263. A marital account must be payable on request to either or both of the parties, and it must be designated as a marital account. Wis. Stat. § 705.01(4m). During both parties' lifetimes, the account belongs to them without regard to the proportion of their respective contributions to the sums on deposit or to the number of signatures required for payment. Wis. Stat. § 705.03(3).

If a husband and wife create a marital account, then upon the death of either of them and in the absence of a marital property agreement, after deducting payments and certifications made under section 404.405, the survivor owns 50% of the net sums on deposit, and the decedent's estate owns the other 50%. Wis. Stat. § 705.04(2m). If a marital account has

payable-on-death (P.O.D.) beneficiaries, then upon the death of either spouse, the surviving spouse owns 50% of the sums on deposit, and the P.O.D. beneficiaries named by the deceased spouse own the other 50%, subject to confirmation of the beneficiaries' rights under sections 865.201 and 867.046. Wis. Stat. § 705.06(1)(d).

A spouse who is a party to the account may withdraw from it, although with respect to the application of the funds, the other spouse may recover under section 766.70 if the conditions prescribed by section 766.70 are met. Wis. Stat. § 705.03(3). Aside from this latter remedy, a marital account functions like a joint account during the lifetime of both spouses and like a tenancy in common at death since there is no right of survivorship. Provisions protecting financial institutions are found at section 705.06. Language sufficient to create a marital account is set forth in section 705.02.

- ***Query.*** How is property classified after it is withdrawn from a marital account? Assume that a wife deposits $1,000 of marital property into a marital account and withdraws it one day later. Is it marital property? The answer should be yes. The general rule is that all property of spouses is marital property unless classified otherwise. Wis. Stat. § 766.31(1). To allow one spouse to deposit funds in such an account and by later withdrawing it reclassify the funds is to allow unilateral reclassification of marital property. Neither the Act nor chapter 705 permits such reclassification.

- ***Note.*** Cases dealing with joint accounts, such as *Lloyd*, 170 Wis. 2d 240, and *Kobylski*, 178 Wis. 2d 158, *see supra* § 2.263, should not apply to marital accounts. Marital accounts have an attribute of tenancies in common in that, at death, the decedent spouse may dispose of only one-half of the account.

In cases in which there is more than one P.O.D. beneficiary and one of them predeceases a decedent spouse, the 50% interest owned by the deceased spouse passes to the surviving P.O.D. beneficiaries without regard to claims of the issue of the predeceasing P.O.D. beneficiary. Wis. Stat. § 705.06(1)(c). If all P.O.D. beneficiaries predecease the deceased spouse, 50% of the sums in the account are payable to the surviving spouse and the other 50% to the estate of the deceased spouse without regard to claims of the issue of a predeceasing P.O.D. beneficiary. *Id.*

XV. Federal Preemption [§ 2.265]

A. In General [§ 2.266]

Federal laws governing ownership of certain assets may preempt state law. The Supremacy Clause—Article VI, Clause 2 of the U.S. Constitution—is invoked when state and federal law conflict, and application of state law would frustrate the objectives of the federal program. *See McCarty v. McCarty*, 453 U.S. 210, 218 (1981). Such conflict occurs with certain retirement plans, as discussed in sections 2.211–.217, *supra*.

A surviving spouse has no claim under state community property laws for a portion of a National Service Life Insurance policy (a type of policy previously available to certain military-service personnel and qualified veterans). *See Wissner v. Wissner*, 338 U.S. 655 (1950). Similarly, Social Security benefits are not subject to state marital and community property laws. *See Luna v. Luna*, 608 P.2d 57 (Ariz. Ct. App. 1980); *Hillerman v. Hillerman*, 167 Cal. Rptr. 240 (Ct. App. 1980). Also, one authority states that although the separate or community property character of ownership of U.S. savings bonds is determined by state law, the extent of the spouses' dispositive power over the bonds is controlled by two U.S. Supreme Court decisions under the Supremacy Clause. *See* McClanahan, *supra* § 2.4, at 371; *see also Yiatchos v. Yiatchos*, 376 U.S. 306 (1964); *Free v. Bland*, 369 U.S. 663 (1962).

B. Copyrights and Patents [§ 2.267]

1. In General [§ 2.268]

Federal preemption issues arise in connection with a spouse's rights under state marital (or community) property law in copyrights and patents obtained by the other spouse. The U.S. Constitution provides that to promote the progress of science and useful arts, authors and inventors should have the exclusive right to their respective writings and discoveries for a limited period of time. U.S. Const. art. I, § 8, cl. 8.

2. Copyrights [§ 2.269]

The Copyright Act of 1976, 17 U.S.C. §§ 101–914, is a federal statute providing protection in the copyright area to any creation expressed in tangible form. It was not until 1987 that a court dealt with the relationship between the federal law of copyright, particularly the Copyright Act, and the state law of community property.

Worth v. Worth, 241 Cal. Rptr. 135 (Ct. App. 1987), concerned a husband who wrote and published several books, including two books on trivia. In a 1982 divorce decree, the spouses agreed to divide the royalties from those books equally. In 1984, the ex-husband filed an action in federal court against the producers of the board game "Trivial Pursuit," alleging copyright infringement. Thereafter, the ex-wife sought an order declaring that she was entitled to one-half of any proceeds derived from the lawsuit. The ex-husband resisted the wife's claim on the theory that under the Copyright Act, a protected work "vests initially in the author or authors of the work," 17 U.S.C. § 201(a), and thus belonged only to the author. He argued that this rule is mandated by federal law and preempts all state law to the contrary. The court disagreed.

First, the court noted that under California law any artistic work created during marriage constitutes a community property asset and that, if an artistic work is a community property asset, it must follow that the copyright itself obtains the same status. *Worth*, 241 Cal. Rptr. at 136–37. The court referred to 17 U.S.C. § 201(d)(1), which provides for the transfer of a copyright by contract "or by operation of law." The court concluded that although the copyright vested initially in the ex-husband, the copyright was then automatically transferred to both spouses by operation of California law. *Id.* at 137. Thus, there was no irreconcilable conflict between state and federal law that would compel a conclusion that state law was preempted.

The Fifth Circuit Court of Appeals further developed the law in this area in *Rodrique v. Rodrique*, 218 F.3d 432 (5th Cir. 2000). The district court, 55 F. Supp. 2d 534 (E.D. La. 1999), had held that division of a copyright under state law interferes with federal policy and disagreed with the decision in *Worth* that half ownership in the copyright could be transferred by operation of a state community property law to the non-author-spouse. The district court suggested a possible solution, however; the author-spouse could retain and exercise sole management and control

of the copyright, but state law could transfer or divide the right to receive royalties. The district court declined to adopt that approach, because it felt congressional action was needed.

The Fifth Circuit Court of Appeals adopted the solution suggested by the district court, but disagreed that further legislation was needed on the point and therefore, reversed. Thus, the author-spouse retains management and control over the copyright, but the economic benefits belong to the community while it exists. In a footnote, the court said it was cognizant of the *Worth* court's transfer approach, i.e. its holding that a copyright vests initially in the author spouse but is then automatically transferred by operation of state community property law to the community. The court of appeals said:

> Our approach is consistent yet analytically distinct; the author-spouse alone (at the time of creation and at all times thereafter, absent voluntary transfer of the copyright) is vested with the § 106 exclusive "fundamental rights"; those rights are never automatically transferred to the community. The *fruits* of the copyright, nevertheless, are community property at the "very instant" they are acquired.

218 F.3d at 438 n.26. The exclusive fundamental rights referred to above include reproduction adaptation, publication, performance and display.

3. Patents [§ 2.270]

The analysis of how federal preemption affects copyrights may also be relevant to patents, but no cases have been found as of this writing.

XVI. Miscellaneous Property Interests [§ 2.271]

A. Equitable Interests [§ 2.272]

The definition of *property* in section 766.01(15) includes equitable interests vested or contingent. Thus, whether a contingent interest may ripen into possession is a matter of valuation. Is it necessary to classify a spouse's equitable interests in a trust created by a third person for that spouse's benefit? Any equitable interest that a spouse receives from a third person is a gift to that spouse from a third person and is, therefore,

the donee-spouse's individual property if it is received during marriage and after the determination date. Wis. Stat. § 766.31(7)(a); *see supra* § 2.8 (statutory definition of during marriage). A distribution of principal or income from the trust created by the third person is also that spouse's individual property. Wis. Stat. § 766.31(7)(a).

B. Contract Rights [§ 2.273]

1. Private Annuities [§ 2.274]

The classification of a private annuity is potentially complex. Typically, a private annuity is an arrangement whereby an individual transfers property to an individual, a corporation, or another entity not in the business of selling annuities in exchange for the transferee's promise to make periodic payments to the transferor at fixed amounts for the rest of the transferor's life. Private annuities are generally acquired in exchange for appreciated property that is usually a capital asset. If the annuity is measured by the transferor's life, payments may cease at the transferor's death, whether the transferor dies before, on, or after the date established as his or her normal life expectancy.

Often, annuities consist of three elements: (1) a return of capital; (2) a return for the appreciation on the item transferred; and (3) an income element. The taxation of private annuities is a complex subject and often involves prorating annuity payments between adjusted basis in the property, capital gain, and ordinary income. For a discussion of the taxation of private annuities, see John A. Warnick, *Private Annuities*, Tax Mgmt. (BNA) 805 (1994).

If marital property is exchanged for the annuity, the entire annuity obligation and the payments received are marital property. If, for example, the annuity is for a term certain and the transferor dies during the term and is survived by his or her spouse, one-half of the unpaid obligation is owned by the surviving spouse as that spouse's interest in former marital property.

If, however, individual or predetermination date property is transferred in exchange for the annuity, the return of capital is individual or predetermination date property. The appreciation is individual or predetermination date property, depending on the source of the appreciation. *See supra* §§ 2.90–.95. In the absence of a unilateral

statement, marital property agreement, or court decree to the contrary, the income is marital property to the extent it is earned or accrued during marriage and after the determination date. *See supra* § 2.8 (statutory definition of during marriage).

The more complex question is whether each element should be prorated as each payment is made. This is particularly relevant if the annuitant dies at an age younger than that considered to be his or her normal life expectancy. A court might follow the income tax analysis of annuities, prorate the elements of an annuity payment as received, and classify the elements according to that analysis. Whether classification should be based on an income tax analysis can be debated. The tax law allocates a portion of each annuity payment to ordinary income to minimize deferral of income for tax purposes. As an economic matter, it is arguable that each payment should be considered first a return of capital followed by a payment for the element of appreciation followed by income. Under the latter analysis, if the transferor died before receiving value equal to the fair market value of individual property transferred but after receiving an amount in excess of his or her original cost, no income would have been received; the return of capital would be individual property, and the payment received for the appreciation would be marital or nonmarital property, depending on the source of the appreciation. On the other hand, the income tax analysis has merit because it protects the other spouse's marital property interest in the income, an interest that the transferor puts at risk under an economic analysis if the annuity is based on life expectancy. As for the classification of the asset acquired by the purchaser, see section 3.25, *infra*.

2. Installment Obligations [§ 2.275]

Installment obligations should be contrasted with annuities, *see supra* § 2.274. Installment obligations are usually for a fixed term and are payable regardless of the transferor's death. Installment obligations often consist of three elements: a return of capital; appreciation; and income, if a capital asset is involved.

If the asset sold is marital property, the entire obligation and all payments received are marital property.

If the asset sold is nonmarital property, the consideration attributable to the return of capital is nonmarital property. The consideration attributable to appreciation is nonmarital property or marital property, depending on the source of the appreciation. *See supra* §§ 2.90–.95. In the absence of a unilateral statement, marital property agreement, or court decree to the contrary, the income is marital property only to the extent it is earned or accrued during marriage and after the determination date. *See supra* § 2.8 (statutory definition of during marriage).

- ***Query.*** Assume that the transferor dies during the installment term. Must each payment be prorated among the three elements, or should the installments be treated first as a return of capital, then appreciation, and finally income? The three elements should be prorated pursuant to the terms of the contract with the result that some portion of each payment is attributable to interest income.

3. Land Contracts [§ 2.276]

Classification issues may arise in connection with land contracts, particularly in situations in which the vendee spouse has an equitable interest and the marriage terminates before all payments are completed under the land contract and before title to the real estate involved is conveyed to the vendee spouse. It is likely that a "buying-in" approach will be adopted in connection with land contracts under the Act since that approach is often used in connection with properties purchased subject to a mortgage. *See infra* § 3.25. Under the analysis in connection with properties subject to a mortgage, the equity in the contract is classified by tracing, if possible, to the classification of the assets used to make the purchase. If tracing is not possible, the equity is marital property under the presumption favorable to marital property. *See* Wis. Stat. § 766.31(2). If, for example, a purchaser dies with amounts as yet unpaid for the property, the equity is classified as stated, and presumably the amounts paid by the successor in interest to the property are credited to that successor's account and classified in accordance with the classification of the property used by the successor in interest. It is likely that a similar analysis will be followed for property purchased under a land contract, even though title is not conveyed until all installments have been fully paid. For different approaches, see section 3.31, *infra*.

4. Covenant Not to Compete [§ 2.277]

Payments under a covenant not to compete may well be analyzed as income replacements so that to the extent they replace income lost during marriage and after the determination date they are marital property, and to the extent they replace income during other periods, they are nonmarital property. However, a Washington case dealt with a covenant in connection with stock acquired by a spouse before marriage but sold during marriage. The same selling spouse then increased his earnings through new employment. The payments under the covenant, even though made during marriage, were held to be that spouse's separate property. *In re Marriage of Gillespie*, 948 P.2d 1338 (Wash. Ct. App. 1997). A covenant that restricts earnings during marriage might be characterized differently.

XVII. Assets That Are Difficult to Classify [§ 2.278]

A. In General [§ 2.279]

At dissolution, some rights may be divided that are not assets classified under the Act. For example, courts in many community property and common law states have considered whether professional degrees and licenses, along with the accompanying professional goodwill, are property rights, and, if so, how they are to be valued and divided at dissolution.

B. Professional Degrees, Licenses, and Tenure [§ 2.280]

Generally, cases involving professional degrees or licenses arise after a spouse has either provided support for the other spouse or run the household and raised the children while the other spouse obtained a degree. Some cases arise shortly after the other spouse obtains the degree, but they can also arise years later after the other spouse has become established in his or her profession. In the latter case, the value of a degree is often overlooked, and more attention is paid to the goodwill generated by the degree-earning spouse's business. *See* McClanahan, *supra* § 2.4, at 124 (Supp. 1989). A useful summary of the law on this point, with a synopsis of cases and an excellent bibliography, is available. *See id.* at 120–38. Most of the cases hold that degrees and

licenses are not property, with the courts trying to achieve equity by fashioning solutions on a case-by-case basis. *Id.*

In Wisconsin, *Haugan v. Haugan*, 117 Wis. 2d 200, 343 N.W.2d 796 (1984), involved a dissolution that occurred shortly after a husband obtained a medical degree while being supported by his wife. At dissolution, the couple had little property. Under these circumstances, the court said that the degree, in a sense, was the marriage's most significant asset. *Id.* at 207. Although the court never stated that the degree was property, it held that a compensatory award should be made to the wife so she could participate in the husband's enhanced earning capacity. Techniques for valuing the contribution are set forth in the opinion. *See id.* at 211–15.

In view of *Patterson v. Board of Regents*, 119 Wis. 2d 570, 581, 350 N.W.2d 612 (1984), which held that tenure is a property right requiring due process protection, cases may evolve in which tenure is considered an economic factor at dissolution.

- ***Query.*** At the death of a spouse who is a professional, his or her professional goodwill or value in connection with a degree terminates, of course. What if the other spouse dies first, however? Presumably, there is no property interest in a license or degree that may be disposed of at death by the predeceasing spouse.

C. Professional Goodwill [§ 2.281]

The notion of professional goodwill as property is distinct from the notion of a license as property because goodwill is generated from an existing professional entity having assets and history. Some period of operation is needed to provide goodwill, but once that history exists, goodwill may be valued along with other assets, according to courts in other jurisdictions. *See* McClanahan, *supra* § 2.4, at 138–44 (Supp. 1989). In Wisconsin, however, at least one court refused either to assign value to professional goodwill or to treat it as a separate property interest, saying the goodwill could not be sold or transferred and was merely a promise of future earning capacity. *Holbrook v. Holbrook*, 103 Wis. 2d 327, 351, 309 N.W.2d 343 (Ct. App. 1981). *But see Hauge v. Hauge*, 145 Wis. 2d 600, 606, 427 N.W.2d 154 (Ct. App. 1988) (estopping denial of consideration of goodwill in valuation process after testimony was given on goodwill's value).

A subsequent Wisconsin case, *Lewis v. Lewis*, 113 Wis. 2d 172, 180, 336 N.W.2d 171 (Ct. App. 1983), held that a buy-sell agreement between partners that established a value for a withdrawing partner's interest, including an amount for professional goodwill, established a concrete method of liquidating value; thus, a circuit court could use the entire purchase amount as a guide in valuing the spouse's partnership interest.

Note that the nonparticipant spouse enjoys an interest in a professional corporation, although he or she may not engage or participate in management or control of that asset. *See* Wis. Stat. § 180.1911(1). However, the nonparticipant spouse may not invoke the add-a-name remedy in section 766.70(3). Wis. Stat. § 766.70(3)(b).

D. Fame [§ 2.282]

Can fame be considered an asset? For example, can the reputation of a rock star whose name may lead to endorsements be considered an asset? Apparently, no cases have considered this matter, but commentators have. *See* Reppy & Samuel, *supra* § 2.19, at 199, and articles cited therein.

XVIII. Reclassification of Property [§ 2.283]

A. By Agreement [§ 2.284]

The comment to section 3 of UMPA indicates "early and emphatically" that analysis of the classification sections of UMPA should not begin before noting that spouses may create their own classification system by marital property agreement. *See* Wis. Stat. § 766.17(1) (section similar to UMPA section 3). It is "clearly intended" under UMPA that contractual variances be possible with respect to classification of spouses' property generally, including life insurance and deferred employment benefits, and with respect to marital dissolution and disposition at death. UMPA § 3 cmt. The classification systems that may be adopted are virtually unlimited. Thus, spouses, by marital property agreement, may treat all or certain of their assets as individual property, marital property, solely owned property as if unmarried, joint-tenancy property, or tenancy-in-common property; indeed, the spouses could adopt the property law system of another state, or that which

existed in Wisconsin before January 1, 1986. For more about marital property agreements, see chapter 7, *infra*.

B. By Gift [§ 2.285]

1. In General [§ 2.286]

Spouses may reclassify their property by gift. Wis. Stat. § 766.31(10). Thus, after the determination date, one spouse may make a gift of his or her interest in an item of marital or nonmarital property to the other spouse and, by doing so, reclassify the item to the donee spouse's individual property. *Id.* A spouse may also give an item of his or her individual or predetermination date property to himself or herself and his or her spouse as marital property or survivorship marital property.

If one spouse gives property to the other spouse and intends when the gift is made that the property be the donee spouse's individual property, the income from the property is the donee spouse's individual property unless the donor's contrary intent regarding the classification of income is established. *Id.*

➢ ***Practice Tip.*** Presumably, the burden of proving such contrary intent is on the donor spouse or persons claiming through the donor spouse. From a planning standpoint, it is desirable to clarify in writing the donor spouse's intent regarding such income when a gift is made.

➢ ***Query.*** Documentation of a donor spouse's intent to make a gift and the donee spouse's acceptance of the gift may be advisable. Neither section 766.31(10) nor any other provision of the Act defines the word *gift*. However, section 766.31(10) begins with the plural *spouses* ("Spouses may reclassify their property by gift…."). Does this wording imply that both spouses must participate in a reclassification by gift from one spouse to the other in some affirmative manner that goes beyond the requirements of a completed gift under general law applicable to gifts? General law applicable to gifts requires donative intent and delivery by the donor, as well as termination of the donor's dominion over the subject of the gift and transfer of dominion to the donee. *Giese v. Reist (In re Estate of*

Reist), 91 Wis. 2d 209, 218, 281 N.W.2d 86 (1979). Going beyond these requirements would presumably involve a written declaration of gift signed by both spouses with delivery of at least one original of the declaration to the donee spouse.

A close reading of section 766.31(10) does not support the notion that such additional participation is needed to complete the gift. Section 766.31(10) states that spouses may reclassify their property not only by gift and marital property agreement, but also by conveyance, written consent under section 766.61(3)(e) (concerning life insurance policies), or unilateral statement. The last two methods of reclassifying property may be unilateral and do not require participation by both spouses. Thus, the word "spouses" at the beginning of section 766.31(10) is simply used in reference to the property that either or both of the spouses may own and does not, of itself, impose a requirement of joint participation beyond that required by pre-Act law.

Nevertheless, the requirements of a completed gift between spouses should also be analyzed in light of the type of property interest involved and, if a marital property interest is involved, in light of which spouse, the donor spouse or the donee spouse, has management and control of the asset. *See infra* §§ 2.287–.288.

2. Nonmarital Property [§ 2.287]

A spouse who owns individual property owns all interests in the property and has total management and control over it. *See supra* § 2.108. During marriage, a spouse's predetermination date property is treated as if it were individual property, and the spouse who owns it has total management and control over it. *See supra* § 2.145. Consequently, a gift by one spouse of his or her interest in nonmarital property (either individual or predetermination date property) to the other spouse with the intent to reclassify the property as the donee's individual property is no different from a gift by one spouse of his or her solely owned property to the other spouse under pre-Act law. Meeting the requirements of pre-Act law (that is, general rules applicable to gifts) completes the gift.

A more complex situation arises when one spouse wishes to reclassify by gift his or her individual or predetermination date property to the marital property of both spouses.

➢ ***Example.*** Assume that a spouse owning real estate as his or her individual property simply executes a new deed containing the words "as marital property" after his or her name, records the deed, and advises the donee spouse of the transfer, but retains possession of the deed. Assume that there is donative intent but that the other spouse does not join in the conveyance. Has a gift to the other spouse been completed? Arguably, the retention of management and control means there is no transfer of dominion.

Section 766.31(10) permits spouses to reclassify their real property by a conveyance (as defined in section 706.01(4)) signed by both spouses. (Section 766.31(10) also provides that spouses may reclassify a security as defined in section 705.21(11) by an instrument signed by both spouses that conveys an interest in the security.) Thus, spouses owning real estate as joint tenants or tenants in common may reconvey the property to themselves as marital property or survivorship marital property or as one spouse's individual property. Also, if nonmarital property real estate is titled solely in one spouse's name, that spouse may reclassify the real estate to both spouses' marital property if the other spouse joins in the conveyance.

In the example posed above, however, only the titled spouse participated in the conveyance. Nonetheless, reclassification can be accomplished if all the elements of a gift are satisfied. Wis. Stat. Ann. § 766.31(10) Legis. Council Committee Notes—1987 Act 393 (West 2009). Presumably, all the elements of a gift are satisfied in the example even though the donor spouse retained management and control. Under the Act's management and control system, the titled spouse manages and controls marital property; that result does not change even if both spouses participate in the conveyance described. Moreover, the deed itself confirmed a change in ownership interests. In the circumstances posed, a gift should occur to the extent required for a reclassification under section 766.31(10).

➢ ***Practice Tip.*** Until the above analysis is confirmed by a court or by act of the legislature, spouses may wish to use a conveyance or a marital property agreement to ensure that a reclassification has occurred.

3. Marital Property [§ 2.288]

Since a titled spouse acting alone may reclassify nonmarital property by gift to the other spouse, a spouse with sole title to an item of marital property should be able to reclassify his or her interest in the property to the other spouse's individual property. In this kind of case, delivery of the document of title may be essential to complete the gift. The donee need not participate in the transfer, however, other than to accept the gift and take dominion over it.

When dealing with an interest in marital property, lack of management and control may pose a problem.

- ***Example.*** Assume one spouse alone has title to an asset classified as marital property and the other spouse (the untitled spouse) wishes to give his or her interest in the marital property asset to the titled spouse. How does the spouse without management and control manifest donative intent and effect delivery of his or her interest in the asset that is already titled in the donee spouse's name? A gift of real estate requires a conveyance by the untitled spouse meeting the requirements of section 706.02; since a conveyance must be used, the titled spouse may wish to participate in the conveyance so as to meet the literal requirements of section 766.31(10). Such participation is arguably unnecessary because, even under a common law analysis, all the requisite elements are met: there is donative intent, and dominion and control are vested in the donee. That the donor never had control should be irrelevant. *See supra* § 2.286. In any event, it may be prudent for the donor spouse to document the gift by executing and delivering a deed of gift rather than to rely on an oral expression of gift.

In cases involving untitled assets, questions may arise about the intent to make a gift and to reclassify the property. For example, in *O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. Ct. App. 1980), a case involving the definition of marital property as that term is used at divorce in the common law state of Kentucky, a doctor purchased expensive jewelry with his salary and delivered possession of the jewelry to his wife. The trial court excluded these items from marital property susceptible to division at divorce. The appellate court reversed, indicating that the husband's salary was certainly marital property, the jewelry when purchased did not lose that status, and mere change of possession did not

affect the nature of the property. The court also noted that the husband had testified that he purchased the items as an investment, hoping the jewelry would appreciate in value and could ultimately be converted to cash when needed for the children's education. The court further noted that there was no agreement between the spouses that these items would be the wife's separate property.

In Washington, a community property state, a different result was reached in *Johnson v. Dar Denne*, 296 P. 1105 (Wash. 1931). There, a wife bought diamond rings, apparently using "proceeds from her efforts." The court found that the rings were the wife's separate property by gift from her husband. This finding was based on comparatively slight evidence, principally the husband's prior statement that he had given the rings to his wife. For a similar case and result under pre-Act law, see *Potts v. Garionis*, 127 Wis. 2d 47, 377 N.W.2d 204 (Ct. App. 1985).

Issues involving reclassification by gift may also arise with certain expenditures or a change of title, especially in dissolution proceedings. Wisconsin's Act does not create presumptions in the gift context. Some other community property states, however, have developed such presumptions, which should be examined with caution before they are applied in Wisconsin. In California, for example, a judicially created presumption stated that unless an agreement between the parties specified that the contributing party was to be reimbursed, a spouse who used his or her separate property for community purposes intended a gift to the community. *Epstein v. Epstein*, 592 P.2d 1165 (Cal. 1979) (citing *See v. See*, 415 P.2d 776 (Cal. 1966)). This presumption was criticized because donative intent appeared to be imputed unless the donor spouse could obtain the donee spouse's agreement that the expenditure was not a gift. *See* Reppy & Samuel, *supra* § 2.19, at 44–45. On January 1, 1984, section 4800.2 of the former California Civil Code (West Supp. 1990) (now Cal. Fam. Code § 2640) took effect and reversed the result in *Epstein*, to the extent that, in dissolution proceedings, a spouse's contribution of separate property to the acquisition of community property must be reimbursed unless the contributing spouse made a written waiver of reimbursement. *See Perkal v. Perkal*, 250 Cal. Rptr. 296 (Ct. App. 1988).

In some community property jurisdictions, there is a presumption of a gift to the community when one spouse expends separate funds to acquire property, reciting co-ownership with the other spouse. *See, e.g.*,

Sommerfield v. Sommerfield, 592 P.2d 771, 774 (Ariz. 1979). *But see Bowart v. Bowart*, 625 P.2d 920 (Ariz. Ct. App. 1980). It is questionable that this presumption will apply in Wisconsin. *See infra* § 3.39. Some Wisconsin courts, however, have held that using inherited property to acquire property as joint tenancy or changing title by gift of inherited property to joint tenancy results in a change in the character of the assets involved, thus subjecting the assets to division at dissolution. *See Bonnell v. Bonnell*, 117 Wis. 2d 241, 246–47, 344 N.W.2d 123 (1984); *Trattles v. Trattles*, 126 Wis. 2d 219, 226, 376 N.W.2d 379 (Ct. App. 1985); *Weiss v. Weiss*, 122 Wis. 2d 688, 694, 365 N.W.2d 608 (Ct. App. 1985); *see also Derr v. Derr*, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170; *supra* § 2.263.

Whether reclassification by gift is a concept relevant only to interspousal gifts, and not to gifts to third parties made by spouses acting together, may be a question of little practical significance. Whether a gift by spouses to a third party is viewed as a reclassification of property (the better view) or as a divestment by both spouses of all their property interests in the asset given, the result is the same: the third party owns the property free and clear of the donating spouses' property interests. If, during marriage, only one spouse with management and control makes a completed gift of an item of marital property to a third person, the gift is complete from the moment of transfer. Wis. Stat. § 766.51(4). The property is then owned by the third party, and the spouse who did not act together with the donating spouse in the transaction has various remedies, including the right to reclaim the property from the third party donee if the gift exceeds the dollar amounts set forth at section 766.53. Wis. Stat. § 766.70(6)(a); *see infra* §§ 4.41, 8.45. A spouse who does not act together with the donating spouse has various rights of recovery for gifts to third parties of assets classified as marital property completed at the death of a spouse and for gifts made in joint tenancy form. *See* Wis. Stat. § 766.70(6)(b), (c); *see also infra* § 8.45.

➢ ***Query.*** What happens if one spouse, in effect, gives marital property to both the other spouse and a third party? Assume, for example, that a wife with management and control and donative intent makes a completed gift of marital property real estate to her husband and her unmarried son as tenants in common of an undivided one-half interest each, and her husband acts together with her in the transaction. In such a case, the husband's marital property interest in the real estate is reclassified by section 766.31(10) to an undivided interest as a tenant in common and is his individual property. The

undivided one-half interest owned by the wife's son is his solely owned property (not individual property because the son is unmarried). Regarding trusts, see sections 2.98–.104, *supra*.

C. By Unilateral Statement [§ 2.289]

Although section 766.31(10) uses the term *reclassify*, in fact a spouse may by unilateral statement *classify* as individual property income accruing from his or her nonmarital property after the effective date of the statement. Wis. Stat. § 766.59(1). For more detail, see sections 2.70–.82, *supra*.

D. By Written Consent [§ 2.290]

The spouses may reclassify life insurance policies and property used to pay premiums on such policies, or both, by written consent under section 766.61(3)(e). Wis. Stat. § 766.31(10); *see supra* § 2.177. The spouses may not use written consents to reclassify other types of property. *See* 1985 Trailer Bill Supplemental Nontax Note to section 766.61(3)(e); *see also supra* § 2.119.

E. By Decree [§ 2.291]

In connection with certain remedies available to a spouse under the Act, certain court decrees can reclassify property from one classification to another. *See supra* §§ 2.105, .119; *see also infra* § 8.31.

F. By Mixing When Tracing Is Impossible [§ 2.292]

Property may be reclassified because of a spouse's inability to trace the property. If, for example, nonmarital property cash is so mixed with marital property cash that it later becomes impossible to trace the nonmarital component, the nonmarital property cash is reclassified as marital property cash. Wis. Stat. § 766.63(1); *see infra* § 3.15.

G. By Attempt to Create Joint Tenancy or Tenancy in Common [§ 2.293]

An asset may be reclassified as marital property with or without survivorship. If, for example, after the determination date in connection with a nonmarital property asset, a document of title, instrument of transfer, or bill of sale expresses an intent to establish a joint tenancy or tenancy in common exclusively between spouses, the nonmarital property asset is reclassified as survivorship marital property or marital property, respectively, unless a marital property agreement provides for a different result. Wis. Stat. § 766.60(4)(b)1.a., b.; *see supra* §§ 2.257, .258.

H. By Acquisition of Homestead [§ 2.294]

Nonmarital property assets used to acquire a homestead exclusively between spouses after the determination date are reclassified as survivorship marital property if no intent to the contrary is expressed on the instrument of transfer. Wis. Stat. § 766.605; *see supra* § 2.251.

I. By Placement of Assets in Joint Account [§ 2.295]

Transferring nonmarital property funds into a spousal joint account governed by chapter 705 after the determination date may reclassify the funds as marital property. If the transfer occurs while spouses are married but before the determination date, the funds may be deferred marital property. For further discussion, see section 2.263, *supra*.

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Mixing and Tracing

I. Methods and Consequences of Mixed Property [§ 3.1]

A. Mixed Property [§ 3.2]

1. In General [§ 3.3]

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 Wisconsin Marital Property Act], presumes that all property of spouses is marital property. Wis. Stat. § 766.31(2). The Act permits a spouse to own individual property and predetermination date property, but it imposes the burden on the owner

spouse to establish that the property is not marital property. Wis. Stat. § 903.01. The comment to Section 4 of the Uniform Marital Property Act (UMPA), *reprinted infra* appendix A, the act upon which the Wisconsin Marital Property Act is based, states that the presumption that all property of spouses is marital property is a general presumption; when "there is adequate proof to overcome the general presumption, then the proof will prevail and classification will be otherwise."[1]

To complement the general presumption of marital property classification, the Act contains two provisions relating to mixed property. These provisions state that property can become mixed in two ways. First, mixing marital property, e.g., cash or assets, "with property other than marital property reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced." Wis. Stat. § 766.63(1). For example, depositing both a spouse's marital property wages and the proceeds from security transactions involving individual property into a single account at a financial institution results in mixing. Mixing also occurs when marital property wages are used to pay an individual obligation on a mortgage note secured by individual real estate.

The second way property can become mixed under the Act involves substantial labor of either spouse performed during marriage on property other than the marital property of either spouse. This creates marital property, because in Wisconsin the economic benefits of substantial appreciation resulting from substantial labor inure to the spouses as marital property. Wis. Stat. § 766.63(2). Thus, the

> [a]pplication by one spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity or managerial activity to either spouse's property other than marital property creates marital property attributable to that application if both of the following apply:
> (a) Reasonable compensation is not received for the application.
> (b) Substantial appreciation of the property results from the application.

Wis. Stat. § 766.63(2).

[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. Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

The general presumption and the accompanying mixing rules cause all property of a married couple to become marital property absent proof to the contrary (such as segregated assets or accurate records) or a contrary classification by a marital property agreement. Marital property agreements are considered in chapter 7, *infra*.

The 1988 Trailer Bill, 1987 Wisconsin Act 393 [hereinafter 1988 Trailer Bill], included two new ways of creating mixed property, which were necessary because of the change in the Act's definition of "during marriage." This change means that the Act does not apply after one or both spouses change their domicile to a jurisdiction other than Wisconsin.

First, the Act provides that an insurance policy issued after the determination date, which designates the insured as the owner, is marital property regardless of the classification of the property used to pay premiums on the policy. Wis. Stat. § 766.61(3)(a)1. The 1988 Trailer Bill added a provision to the effect that if, following issuance of an insurance policy insuring the life of a spouse after the determination date, the insured or the insured's spouse is at any time not domiciled in Wisconsin, the ownership interest and proceeds of the policy become mixed property. Wis. Stat. § 766.61(3)(c)2. The individual property component of the ownership interest and proceeds is determined by multiplying the entire interest by a fraction, the numerator of which is the period during marriage and after the determination date that the policy was in effect and the denominator of which is the entire period that the policy was in effect. *Id.*

Second, an interest in a deferred-employment-benefit plan may also become mixed property because of a change in domicile. A deferred employment benefit attributable to a spouse's employment after the determination date is mixed property if, after the determination date and during the period of employment, the employee spouse or the other spouse is at any time not domiciled in Wisconsin. Wis. Stat. § 766.62(1)(b). The marital property component of that mixed property is calculated by multiplying the entire benefit by a fraction, the numerator of which is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator of which is the total period of employment. *Id.*

2. Mixing Deferred Marital Property [§ 3.4]

The Act's provisions regarding mixed property expressly apply only to marital property mixed with either (1) property having another classification or (2) the application of labor after the determination date by one spouse to property other than marital property of either spouse. Wis. Stat. § 766.63. The 1985 Trailer Bill, 1985 Wisconsin Act 37 [hereinafter 1985 Trailer Bill] added a provision that if the presumption that all property of spouses is marital property is overcome, the property is presumed to be deferred marital property. Wis. Stat. § 861.02(2). For example, if a spouse dies in 2010 owning 100 shares of XYZ, the presumption that the XYZ shares are marital property can be overcome if the stock certificate is dated before the determination date, but the property is then presumed to be deferred marital property. In attempting to rebut this second presumption, do the mixed property rules apply?

In a situation in which property that would have been marital property (deferred marital property) is mixed with property that would have been individual property, is the mixed asset reclassified as deferred marital property unless the component that would have been individual property can be traced? What about labor applied by a spouse before the determination date to property that would have been individual property if acquired after the determination date; is any substantial appreciation resulting from that labor classified as deferred marital property?

Although the Act is silent on mixing involving deferred marital property, applying the mixing rules is logical and effectuates the intent of the Act and the presumption of deferred marital property. Thus, all the techniques discussed in this chapter for tracing individual property and predetermination date property components from marital property also apply in segregating individual property and predetermination date property that would have been individual property from predetermination date property that would have been marital property.

B. Reasons Spouses May Wish to Avoid Mixing Property and to Retain Individual and Predetermination Date Property Classifications [§ 3.5]

1. In General [§ 3.6]

Mixing individual and predetermination date property with marital property can reclassify the individual and predetermination date property to marital property. There are many reasons a spouse may wish to retain individual property and predetermination date property, both during the ongoing marriage and at its termination. Some of the significant reasons are discussed below.

2. During the Marriage [§ 3.7]

1. Individual property (other than that reclassified by marital agreement) and predetermination date property are not subject to obligations—whether contract or tort—incurred by the other spouse, except obligations imposed by the doctrine of necessaries. By contrast, marital property is subject to such obligations if the obligations are incurred in the interest of the marriage or the family. Wis. Stat. § 766.55(2)(b).

2. Gifts of individual property and predetermination date property to third persons are not restricted. Gifts of marital property are restricted as to amount unless the spouses act together in making the gift. Wis. Stat. § 766.53.

3. If one spouse is subject to a bankruptcy proceeding, the other spouse's individual property and predetermination date property is not part of the debtor's estate. All marital property is.

4. A spouse has no duty of "good faith" in dealing with his or her own individual property or predetermination date property. There is such an obligation in dealing with either marital property or nonmarital property of the other spouse. Wis. Stat. § 766.15.

5. Individual property and predetermination date property may be used as collateral to obtain funds for nonmarital purposes or to improve other individual property. If marital property is used to improve individual property, the mixing rules apply and the individual property may be reclassified. Wis. Stat. § 766.63. For example, suppose a spouse has inherited a building worth $100,000 and wishes to make a $50,000 addition to it while maintaining the classification as individual property. This is possible if other individual property is available to be used as collateral for a loan or sold, with the proceeds being used to pay for the addition. If part or all of the addition is paid for using marital property, however, the mixing rules apply.

3. At Termination of the Marriage [§ 3.8]

1. Property received by gift or inheritance (which would be individual property) is not divided at dissolution of a marriage unless failure to do so would cause a hardship. Marital property and all other nonmarital property is subject to division. Wis. Stat. § 767.61.

2. A specific bequest of individual property to a third party transfers the entire asset. A specific bequest of marital property transfers only half the asset because the surviving spouse owns the other half; the beneficiary and surviving spouse are tenants in common. Wis. Stat. § 861.01(1)–(2).

On the other hand, there are reasons a spouse who holds individual and predetermination date property may wish to change the classification of such property to marital property. The spouse may want to obtain the general objectives of equality, obtain specific objectives such as permitting the other spouse to have greater access to credit, or obtain a full adjustment to the tax basis of an asset upon the death of the first spouse.

II. Comparison of the Act with UMPA [§ 3.9]

The Wisconsin rules regarding mixed property contain one significant difference from UMPA. Wisconsin's Act provides that substantial uncompensated labor expended by one spouse on *either* spouse's property, other than marital property, creates marital property. Wis. Stat. § 766.63(2). By contrast, UMPA section 14 applies this rule only to

substantial uncompensated labor by one spouse on the *other* spouse's individual property. *See infra* § 3.44.

III. Tracing Situations and Methods [§ 3.10]

A. General Rules about Tracing Property [§ 3.11]

1. UMPA and Commentators [§ 3.12]

A spouse uses tracing to establish the classification of an asset. If tracing is not possible, the presumption of marital property determines the classification of the subsequently acquired assets. Tracing is used in two situations: first, in cases in which an asset that was individual or predetermination date property is not retained to classify the subsequently acquired asset; second, in cases in which individual or predetermination date property is mixed with marital property to determine the proportionate ownership.

The comment to section 14 of UMPA provides that "tracing [will] necessarily be done under the appropriate tracing rules of an adopting state." The comment states that these rules will build on the already existing solutions in probate and dissolution proceedings. For a summary of the procedures in the other community property jurisdictions, the comment cites W.S. McClanahan, *Community Property Law in the United States* §§ 6:7, 6:8 (1982); and William A. Reppy, Jr. and Cynthia A. Samuel, *Community Property in the United States* 113–300 (2d ed. 1982). For further discussion of tracing rules, the comment also cites Uniform Commercial Code section 9-306 (1962) (Wis. Stat. § 409.306).

The first step in tracing is to determine the particular property's classification at a particular point in time, such as at the date of marriage, date of inheritance, or date of acquisition. An asset may be marital property, individual property, predetermination date property, or mixed property in which the components can be identified. Note that the burden of proving that an asset is other than marital property is on the spouse asserting a different classification. To sustain the burden of proof in bankruptcy, the party claiming that an asset is not marital property must prove by the fair preponderance of the evidence that the nonexistence of the presumed fact is more probable than its existence. *Ludwig v. Geise (In re Geise)*, 132 B.R. 908 (Bankr. E.D. Wis. 1991).

When classifying an asset purchased over time, the funds used for the down payment must be classified, as well as the funds obtained from purchase-money debt. Reppy & Samuel, *supra*, at 91–97. If the debt is not classified, all the appreciation is allocated to the down payment, which is ordinarily smaller than the initial debt. This result is inequitable if the down payment and debt have different classifications.

For some purposes, it is necessary to subdivide the Act's property classifications. For example, in a divorce property division, only property acquired by gift and inheritance is excluded from division. This is narrower than the category of individual property, because individual property includes additional property, such as property owned by a spouse before marriage. As another example, predetermination date property that would have been marital property if acquired after the determination date is subject to the deferred marital property elections at death. Wis. Stat. §§ 861.02–.03. However, deferred marital property rules do not apply to predetermination date property that would have been individual property. Consequently, a spouse may want to separately trace the two types of predetermination date property and the various components of individual property.

Section 766.63 expressly provides that if property is mixed, the property is entirely reclassified to marital property if the nonmarital property component cannot be traced. If the components of the mixed property *can* be traced, does the spouse's contribution of marital property funds result in the spouse having an ownership interest in the asset or only a right to reimbursement of the amount contributed? If a spouse contributes substantial labor, does an ownership interest result or only a right to reasonable compensation for the services rendered? The question is relevant both for asset mixing and labor mixing. For example, if a spouse acquires a residence before marriage and makes mortgage payments and real estate tax payments from earned income during marriage, is part of the residence marital property? As a second example, if a spouse uses his or her labor to build an addition to an inherited cottage, does the cottage become partly marital property?

There are two theories for dealing with this issue:

> [T]he two theories diverge when it comes to the valuation of the community's claim against separately owned stock that has appreciated by virtue of a spouse's time and effort. The "reimbursement" theory provides that the stock, as it appreciates, remains the separate property of the owner

> spouse. Under this theory, the community is entitled to reimbursement for the reasonable value of the time and effort of both or either of the spouses which contributed to the increase in value of the stock. The "community ownership" theory, on the other hand, holds that any increase in the value of the stock as a result of the time and effort of the owner spouse becomes community property.

Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984). Although a community property state may prefer one theory, all the community property states besides Wisconsin use both. *See* Reppy & Samuel, *supra*, at 80–82. Thus, a state may apply the ownership theory for some assets and the reimbursement theory for other assets.

The question is which alternative, if any, is favored in Wisconsin. The Act indicates a preference for having the marital component in mixed property be an ownership interest. This conclusion is not stated directly in the Act, but may be inferred from certain provisions in the Act and is consistent with the usual preference in other community property jurisdictions. Reppy & Samuel, *supra*, at 77–111. For instance, section 766.63(1) uses the term "component," which implies that both parts have an equal interest. This is the result only if the interests are ownership interests. The statute further states that if tracing is impossible, a reclassification occurs. A reclassification is a change in ownership interest. *Id.* Section 766.63(2), dealing with a spouse's labor in connection with either spouse's property other than marital property, states that such labor creates marital property. In addition, when marital property is used to reduce a debt, this is defined as "acquiring" property. Wis. Stat. § 766.01(1). Finally, the conclusion that the marital component is an ownership interest is also consistent with the comment to section 14 of UMPA, which considers an "increased value resulting from payments on liens on property" as an example of a type of mixed property. The contribution of marital property is not a loan subject to reimbursement, with or without interest.

This section sets forth general rules about tracing property. When cash or assets of two classifications (i.e., marital property and nonmarital property) are used to acquire an asset, an issue arises as to the classification of the asset. There are two alternatives: (1) each spouse will obtain an ownership interest based on the classification of funds contributed to the acquisition; or (2) one spouse will own the asset as his or her nonmarital property and the other spouse will be entitled to reimbursement for the amount of marital property funds contributed

toward the acquisition. All other community property states use both the ownership and reimbursement techniques, and it is likely Wisconsin will also use both. Which alternative is applied depends on applicable law and the facts presented.

In considering whether Wisconsin courts would prefer one alternative, the Act appears to favor the creation of an ownership interest rather than a right of reimbursement. Professor William A. Reppy, Jr., has written an article about mixed property under the Act in which he questions whether the Act indicates a preference for the creation of an ownership interest instead of a right of reimbursement. *See* William A. Reppy, Jr., *Calculating the Spousal Interests in "Mixed" Property Cases Under Wisconsin's Marital Property Act*, Law. Marital Prop. F., Sept. 1990, at 17. Reppy concludes that section 766.63(1) is as likely to imply a reimbursement right as the creation of an ownership interest.

In most situations, the analysis in this book and in Reppy's article would compel the same conclusion. For instance, it appears that Reppy agrees that in an asset initially purchased with funds having different classifications, proportionate ownership interests are created. For example, if a residence is purchased for $100,000, using $20,000 of individual property funds and $80,000 of marital property funds, the residence is classified 20% as individual property and 80% as marital property.

However, if an asset is purchased before marriage and is improved, or a debt is reduced using marital property funds, the analysis herein and the article may compel different conclusions.

For example, assume that a residence is purchased for $100,000 before marriage, with $20,000 used for the downpayment and a mortgage note executed for the remaining $80,000. The $80,000 mortgage note is satisfied using marital property funds. If an ownership interest is created, an 80% interest in the residence will be classified as marital property, including an 80% interest in any appreciation or depreciation in the value of the asset. If a right of reimbursement is created, the residence is entirely classified as individual property and the owner is obligated to reimburse the spouses' marital property for the $80,000 of marital property funds used to reduce the indebtedness. There are no Wisconsin decisions under the Act dealing with this issue, although the analysis in this book suggests there is a preference for the creation of an ownership interest.

Reppy's article first reviews those portions of the Act that create an ownership interest by specific provision, section 766.63(2) (regarding the application of labor) and sections 766.61 and 766.62 (regarding interests in life insurance policies and deferred employment benefits). Reppy dismisses section 766.63(2) as a basis for finding a preference for an ownership interest in section 766.63(1) on the ground that it is one of the specific directives in the Act for an ownership interest and thus is not appropriate for such analogy.

Reppy next considers the analysis in this book favoring an ownership interest and addresses the definition of *acquiring* under section 766.01(1), which "includes reducing indebtedness on encumbered property." He sets forth examples and concludes that it is illogical to treat the satisfaction of a debt as creating an ownership interest because of this definition. The examples involve windfall appreciation in the value of property shortly after the satisfaction of a debt and, it is submitted, do not support a conclusion adverse to the creation of an ownership interest.

If the debt in Reppy's examples had been a mortgage obligation, the satisfaction of that obligation using funds having a different classification than the asset would create an ownership interest consistent with the classification of the funds used. If there was a subsequent windfall gain, all persons having an ownership interest would share proportionately in that gain. This is the holding of *Moore v. Moore*, 618 P.2d 208 (Cal. 1980), which is cited with approval in this book and by Reppy.

The decision in *Moore* also holds that the use of community property for the annual payment of real estate taxes, interest on the mortgage debt, and insurance premiums did not create an ownership interest in the community. Because Reppy cites the decision with approval, it appears that he also agrees with this part of the decision. *Moore* is presumably authority for the conclusion that payment of ordinary maintenance and repair expenses, including annually recurring real estate taxes, does not create an ownership interest. There may, however, be a right of reimbursement. Even though the real estate tax is a lien against the real estate from January 1, the removal of the lien apparently does not create an ownership interest. The Wisconsin Court of Appeals has also held that payment of real estate taxes does not create a divisible interest in the property. *Plachta v. Plachta*, 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984).

Reppy's examples involved a judgment lien and a real estate tax lien. The judgment lien was unrelated to the real estate and the real estate tax lien covered a number of delinquent years. The analysis in this book does not resolve whether satisfaction of these obligations creates an ownership interest. The definition of acquiring refers to "encumbered property." These liens appear to encumber the property; thus, the literal reading of the statute supports the view that the satisfaction of the obligation creates an ownership interest. On the other hand, to obtain an ownership interest by virtue of the failure to pay real estate taxes currently and not obtain an ownership interest when the tax is timely paid seems anomalous. Likewise, a judgment creditor's election to obtain satisfaction from a parcel of real estate instead of from other assets also does not seem to justify the creation of an ownership interest from one spouse's discharge of the obligation. A strong argument can be made that only encumbrances incurred by the consensual action of one or both spouses should cause changes in classification of an asset based on the satisfaction of a debt.

Whether the definition of acquiring shows a preference for creating an ownership interest does not require answering the issue raised by Reppy's examples. The definition clearly provides that the satisfaction of a mortgage obligation creates an ownership interest. This is specifically mentioned as "an important means of building assets" in the comment to UMPA section 1. Reppy's statement that the definition does not provide direction regarding purchase-money mortgages does not appear to be a logical conclusion based on his examples. The definition supports the conclusion that traced interests in property pursuant to section 766.63(1) are ownership interests.

Reppy does not respond to the use of the terms "component" and "reclassification" in section 766.63(1). A *component* is defined in the Act as the interest that must be traced if the entire asset is not to be classified as marital property. *Webster's Unabridged Dictionary* (Random House CD-ROM, 1999) defines *component* as "a constituent part." The definition is consistent only with an ownership interest. Reppy does not discuss the fact that a failure to trace causes a reclassification. A reclassification is a change of ownership. Significantly, the comment to UMPA section 14 also appears to prefer an ownership interest. *See* UMPA § 14.

Reppy next considers Wisconsin law before the Act. The cases cited do not support the proposition that Wisconsin has adopted a rule favoring

a claim for reimbursement rather than a buy-in remedy in its pre-Act dissolution and probate cases, being the type of cases referenced in the comment to UMPA section 14. The two cases cited by Professor Reppy for the proposition that a claim for reimbursement is preferred are neither dissolution nor probate cases and do not involve spouses.

Gerndt v. Conradt, 117 Wis. 15, 93 N.W. 804 (1903), concerned two unrelated parties who purchased a machine as equal tenants in common for $150. Both parties contributed equally to the payment of the first $100. The remaining $50 was payable pursuant to the terms of a promissory note due three years after the date of purchase. When the note became due, for reasons not explained in the decision, only one of the parties paid the final $50 purchase price, and that party retained possession of the machine. After the machine had been owned for 15 years, the owner in possession sold it for $75. The assignee of the other owner brought an action to recover one-half of the sale price. The court held that the party who paid the additional amount had a right of contribution from his co-owner and that once that amount had been received, the co-owner was entitled to one-half of the sale price.

For unrelated parties, an ownership interest is established at the time of acquisition and does not change based on satisfaction of purchase-money debt in subsequent years. Each co-owner has a cause of action against the other if the obligation is not paid proportionately. Accordingly, this case is not analogous to marital property classification.

The second case cited by Reppy is *Scheiner v. Arnold*, 142 Wis. 564, 126 N.W. 17 (1910), in which a parcel of real estate had been held by the wife in her name. During the 15-year marriage, the husband used his funds to satisfy real estate taxes and a mortgage debt against the property. The wife died intestate, and because she had children from a prior marriage, the husband received no property either as curtesy or under the intestate laws then in effect. The property therefore passed to her heirs from her prior marriage. The husband subsequently acquired a one-fifth interest in the property from two of these heirs. The remaining heirs brought this action against the husband to partition the property and to obtain rent from him for his use of the property subsequent to the wife's death. The husband counterclaimed to recover the amounts he had paid on the mortgage and for real estate taxes during the marriage. The husband did not make this claim in the wife's probate proceeding.

The court held that when the husband used his funds to improve the wife's property, there was a presumption that gift had been made from the husband to the wife. Because there had been no agreement for repayment, the husband's counterclaim was dismissed. This result is not inconsistent with the analysis in this book. In all cases in which funds of one classification are used to improve an asset of another classification, the first question is whether a gift occurred. Only after it has been determined that no gift was intended can the contribution of those funds be found to change the classification of a portion of the asset.

Therefore, neither *Gerndt* nor *Scheiner* supports the conclusion that pre-Act Wisconsin cases favor finding a right to reimbursement rather than an ownership interest.

Reppy next cites *Lacey v. Lacey*, 61 Wis. 2d 604, 213 N.W.2d 80 (1973), as a case in which he asserts that a hybrid remedy was fashioned by the court. Before marriage, the wife purchased a parcel of real estate using funds borrowed from her father and from a third party. The wife made payments on this debt for the period before the marriage. After the marriage, payments were made for an additional 23 months from an account that included the spouses' pooled earnings. The property was then sold. In the divorce action, the issue was what portion of the proceeds should be allocated to the wife.

Citing the *Lacey* court's opinion that "the value of the wife's equity in the land contract as for [sic] the date of the marriage" was nondivisible and had to be confirmed to the wife, Reppy argues that a hybrid division of the asset was created. Reppy, *supra*, at 20 (quoting *Lacey*, 61 Wis. 2d at 608). But this is not a hybrid remedy; rather, it is one mandated by the Wisconsin divorce law then in effect, which provided that a spouse should receive all property owned by the spouse before marriage and all property acquired solely by the spouse's efforts. Thus, in all divorce cases it was first necessary to ascertain and value the property owned by the wife before the marriage. The case treats changes in the value of the property after the marriage differently because the divorce law so required. (Reppy notes the statutory difference in a footnote but states that the case still has precedential value when a spouse adds inherited property to a mixed asset. However, the Wisconsin Court of Appeals rejected reliance on the *Lacey* analysis in *Torgerson v. Torgerson*, 128 Wis. 2d 465, 470, 383 N.W.2d 506 (Ct. App. 1986).)

In his analysis of *Lacey*, Reppy also states that at the moment of marriage, the wife "lost the right to claim as her nondivisible property any further natural increase" in its value. Reppy, *supra*, at 20. This is not the holding. In fact, she was given the full value of the property through the time the debt was satisfied. The court held that the husband had a duty to support the wife and that his duty included a responsibility to provide a residence. The court found that the payments made from the pooled earnings during the term of the marriage were approximately equal to the amount the husband would have been required to pay as rent to satisfy that obligation if the wife had not already owned the property. Therefore, the court found that the payments could be considered as made from the wife's property alone.

Reppy concludes his article by suggesting that the Arizona approach utilized in *Drahos v. Rens*, 717 P.2d 927 (Ariz. Ct. App. 1985), should be considered for adoption in Wisconsin. *Drahos* follows the decision in *Honnas v. Honnas*, 648 P.2d 1045 (Ariz. 1982), discussed in section 3.41, *infra*. To implement the *Honnas* decision, the Arizona court adopted the formula used in *Marsden v. Marsden*, 181 Cal. Rptr. 910 (Ct. App. 1982), which is also discussed in section 3.41, *infra*. Arizona does not recognize the creation of an ownership interest through satisfaction of debt as part of its community property law. At divorce, Arizona attempts to permit both spouses to share in the appreciation in the value of an asset when community property has been used to improve a spouse's separate property by creating an equitable lien. Reppy indicates that this is a desirable method, because it leaves management and control with the titled spouse and limits creditors' access to the asset.

In Wisconsin, management and control already follows title under the Act. Wis. Stat. § 766.51. A creditor's ability to reach an asset may be different if no change in classification occurs by the payment. However, the spouse is likewise unable to obtain access to credit, which was one of the primary goals of the Act. The equitable lien approach can fairly treat the spouses at dissolution, but it does not give the nontitled spouse property to will at death and it does not give the nontitled spouse an ownership interest during the marriage that could be used to obtain access to credit and remedies. If the preferable policy is to allow both spouses to share in the appreciation or depreciation in the value of an asset based on the respective contributions of funds to the acquisition of that asset, then it appears that the creation of an ownership interest will more completely provide this result than the equitable lien approach utilized in Arizona.

Although Reppy also concludes that the analysis in this book "implicitly directs use of the 'buy in' approach in situations not specifically addressed by some other statutory provisions," Reppy, *supra*, at 19, the analysis in this book concludes that there is a preference only. Section 3.29, *infra*, also analyzes specific instances in which reimbursement appears to be the appropriate remedy. When marital property funds are applied to acquire, improve, or maintain an asset, Wisconsin courts should adopt the view that the marital component created in the mixed property is generally an ownership interest; reimbursement of the amount contributed is appropriate in some cases involving mixed property, and in some de minimus or maintenance situations neither ownership nor reimbursement is appropriate.

2. Wisconsin Divorce Approach [§ 3.13]

In determining the tracing rules previously applied in Wisconsin, the tracing of gifts and inherited property for purposes of property division in a divorce proceeding must be considered. Under the Wisconsin divorce statute, property received by inheritance or gift is normally excluded from property division. Wis. Stat. § 767.61. However, no reported decisions have specified the proof necessary to trace gifts and inherited assets. The courts have considered issues of proof, though, in connection with the appreciation of property received by inheritance or gift. Such natural appreciation is excluded from division, absent substantial labor contributing to the appreciation by the other spouse. *Plachta*, 118 Wis. 2d 329. No reported decision has analyzed what constitutes a substantial contribution. The courts have also considered whether the identity of a gift or inherited asset can be determined when its character has been transmuted. *Bonnell v. Bonnell*, 117 Wis. 2d 241, 344 N.W.2d 123 (1984); *Finley v. Finley*, 2002 WI App 144, 256 Wis. 2d 508; *Trattles v. Trattles*, 126 Wis. 2d 219, 376 N.W.2d 379 (Ct. App. 1985); *Weiss v. Weiss*, 122 Wis. 2d 688, 365 N.W.2d 608 (Ct. App. 1985). Putting gifts or inherited funds in joint tenancy has been held to cause a transmutation of character in which the property lost its status as inherited. *Id.* Likewise, the use of funds for household expenditures, household furnishings, and mortgage reduction on a jointly owned residence has been held to cause a loss of status. *Trattles*, 126 Wis. 2d 219. Even a temporary deposit in a joint account creates a rebuttable presumption of an intent that inherited funds be used for marital purposes and are thus transmuted to marital property. *Finley*, 2002 WI App 144, 256 Wis. 2d 508. These decisions do not clarify what tracing rules are

acceptable. However, the requirements appear strict when the original asset has been disposed of and a new asset has been acquired.

The requirements for establishing the identity of a gift or inherited asset were considered in *Brandt v. Brandt*, 145 Wis. 2d 394, 427 N.W.2d 126 (Ct. App. 1988). Income on gifts and inherited property is divisible. *Arneson v. Arneson*, 120 Wis. 2d 236, 355 N.W.2d 16 (Ct. App. 1984). In *Wierman v. Wierman*, 130 Wis. 2d 425, 387 N.W.2d 744 (1986), the court held that when a spouse receives an interest in a partnership by gift, the partnership's assets do not become divisible property if they are not managed by one of the spouses. The court did not distinguish between the partnership's ordinary income and its principal.

In *Lendman v. Lendman*, 157 Wis. 2d 606, 460 N.W.2d 781 (Ct. App. 1990), the court considered the divisibility of appreciation in the value of stock in a closely held business. The appreciation had occurred through the corporation's reduction of the indebtedness it had incurred when it purchased a business. The husband, who used inherited funds to acquire the stock in the corporation, was the principal employee of the corporation. The court held that the appreciation was not "purchased with funds acquired" by inheritance as required by the property division statute. The corporate income was generated through the husband's labors. This was considered to be income; following *Arneson*, appreciation paid for by income is divisible property. The *Lendman* court's analysis of income retained in a corporation is different from that both under the Act and utilized by courts in other jurisdictions. Wis. Stat. § 766.63(2); *see also infra* § 3.47.

In *Fowler v. Fowler*, 158 Wis. 2d 508, 463 N.W.2d 370 (Ct. App. 1990), the wife inherited stock in AT&T. As part of the company's divestiture, she received stock in regional telephone companies. She participated in dividend-reinvestment programs for those companies and thereby purchased additional stock. Her father also gave her cash gifts during the marriage that were deposited in either a joint checking account or in a savings account in the husband's name. Stock in her sole name was purchased using funds from those accounts.

The court held that the stock in the regional telephone companies was part of the property received by gift. It was not income on the AT&T stock, but rather substituted securities. On this basis, the court distinguished *Lendman*. The character remained the same because all the stock was titled in the wife's sole name. In addition, there was no actual

or constructive donative intent. The stock purchased pursuant to the dividend-reinvestment programs, however, was an asset purchased with income. Following *Arneson*, the court held that such stock is not property acquired by gift or inheritance. Finally, depositing the cash gifts in the joint checking account changed the character of that property, making it divisible. The amounts deposited in the savings account in the husband's sole name were commingled with funds representing the husband's wages and other earnings and the wife's salary. The circuit court's finding that these funds were so commingled as to lose their identity was sustained on appeal.

Shreve v. Shreve, No. 91-0635, 1991 WL 285884 (Wis. Ct. App. Nov. 5, 1991) (unpublished opinion not citable per section 809.23(3)), concerned a personal-injury settlement the husband had received during the marriage. The husband deposited the settlement into a joint bank account to be used for ordinary living expenses. At the same time he arranged to have a portion of his salary placed in retirement accounts. At the time of the divorce the husband claimed that the balance in the retirement accounts reflected the personal-injury settlement and should not be part of the divisible property. He also claimed that he had used the funds to obtain a tax advantage for the family. The court held that when the settlement funds were placed in the joint bank account and used for ordinary expenses, they were transmuted from separate property into divisible property. The funds in the retirement accounts were from the husband's income and not from the personal-injury settlement. Thus, the retirement account was divisible.

Friebel v. Friebel, 181 Wis. 2d 285, 510 N.W.2d 767 (Ct. App. 1993), involved distributions from two trusts created by the wife's father. The first trust required mandatory distribution of the net income to the wife and gave the trustee discretion to distribute the trust corpus to her. The trust corpus was scheduled to be distributed to the wife in specified shares upon her attaining certain ages, none of which occurred before the divorce. The wife also had the right to withdraw from the trust $10,000 of each lifetime gift made by her father to the trust, but she never exercised this right and it lapsed. A capital gain had been realized in the trust and the taxation of that capital gain was reported on the parties' personal income tax returns. The capital gain was not, however, distributed to the wife.

The issue before the court was whether the net income distributed to the wife and the capital gain on which tax had been paid was income

subject to division in the divorce. The court held that income on property received by gift is only divisible when the party has the right to control the investment of the asset producing that income. In this case, the trustee had control over the investment of the trust assets. Thus, the court found that the funds received as a distribution of the net income were property received by gift and not subject to division. The court also found the capital gain was not divisible. Even if the gain had been distributed, it would have been property received by gift consistent with the court's analysis of the net income distributed from the trust. Thus, all property received as a distribution from a trust was property received by gift.

The father also created a second trust funded with cash and real estate. His wife and all his children were the beneficiaries. The trustee of the second trust had the discretion to pay income to the trust beneficiaries but never exercised this discretion. During the marriage, this trust terminated and the wife received a cash distribution.

After the wife received the distributions of net income, she created an investment account with a corporate trustee that remained in existence for four years. All the net income distributed from the trust was deposited in this account, as were the funds received upon termination of the second trust. During the four-year period, the investment account earned investment income of $11,000, realized capital gains of $4,000, and generated unrealized gains of $4,000. The issue before the court was whether, by leaving the investment income in the account, the entire account had become so commingled as to make it divisible. Resolution depended on whether the wife had retained the identity of the funds as property received by gift. The court held that "[c]ommingling is not per se fatal to the exempt status of a gift; rather the inquiry is whether the gifted component can be valued." *Id.* at 299. "All the assets deposited into [wife's] account were gifts to her except readily determinable income generated by the account." *Id.* This income, even if it includes the realized and unrealized capital gain, was only five percent of the value of the account. "We conclude that the entire account was not tainted by and so commingled with the five per cent of divisible property as to convert the remainder of the account into divisible property." *Id.*

The wife conceded that all withdrawals from the account were of her property received by gift, and she agreed to divide the total income remaining in the account. This stipulation maximized the amount of divisible property. The court of appeals remanded the property division

to the circuit court with directions that the lower court resolve, among other issues, whether the realized and unrealized gains in the account were, in fact, income or instead appreciation resulting from general economic conditions such as inflation.

The treatment of the property distributed from the trust as property acquired by gift (regardless of whether it was income or capital gain of the trust) is consistent with the classification of such distributions under the Marital Property Act in section 766.31(7)(a).

Derr v. Derr, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170, is an attempt to clarify and reconcile the discussions in prior cases regarding identity and character. The court determined that tracing, not identity, was the correct term for the required inquiry. Similarly, the analysis that courts had sometimes termed *change in character* was changed to *donative intent*, which the court stated is directed at determining the owning party's *subjective* donative intent. "When an owning spouse acts in a manner that would normally evince an intent to gift property to the marriage, donative intent is presumed, subject to rebuttal by 'sufficient countervailing evidence.'" *Id.* ¶ 33. The court stated that its prior decisions had identified the following situations that create a rebuttable presumption of donative intent:

1. Transferring nondivisible property to joint tenancy;

2. Depositing nondivisible funds into a joint bank account;

3. Using nondivisible funds to make purchases for the family, such as expending the funds to acquire property, goods, or services that are normally used for the mutual benefit of the parties; and

4. Using nondivisible funds to make payments on a mortgage debt that was incurred to acquire jointly owned real estate.

Under the Wisconsin Marital Property Act, these enumerated actions are also likely to change presumptively individual property to marital property.

At the time of the parties' divorce in *Wright v Wright*, 2008 WI App 21, 307 Wis. 2d 156, 747 N.W.2d 690 (review denied), stock in Fall River Group, a closely held business, was titled in the name of the husband, Charles. He also held securities and a money market account at

a brokerage firm. He asserted during the divorce proceeding that each of these assets was gifted property and was not divisible. His wife, Linda, contended that Charles had not adequately established that the stock in the closely held business was gifted property, that the retained earnings of the business were divisible property, or that the appreciation in value of the business during the marriage resulted from Charles's efforts.

With respect to the brokerage account, Linda contended that the stock in the account could not reliably be traced to an original gifted asset and that the funds in the money market account had been transmuted through commingling into divisible property. With respect to each of these assets, the burden of proving the property was nondivisible lay with Charles, because he was the party arguing that the property was exempt. To satisfy that burden, he needed to establish the original gifted or inherited status of the property and that the property's character and identity had been preserved. A character inquiry examines whether the owner spouse intended to donate nondivisible property to the marriage, and an identity inquiry involves tracing the asset. With respect to the stock in Fall River Group, the corporate secretary testified that the shares owned by Charles were the same shares originally gifted to him by his father and grandmother before the marriage. The parties had stipulated that these shares had not changed since six years before the marriage took place, in 1984. The circuit court found the shares were gifted property. The circuit court also found that there was no evidence that Charles at any time evinced a donative intent to transfer the stock into the marital estate. Thus, the circuit court held, Charles satisfied his burden as to both the character and identity of the asset.

At this point, the burden of proof shifted to the nonowning spouse to establish that the property was divisible. Linda contended that there was no evidence introduced as to the value of the stock at the time the property was transferred to Charles or at the date of marriage and that without that knowledge it was necessary to treat the entire asset as divisible property. The circuit court held that this was really a question regarding whether the appreciation in the value of the stock during the marriage had resulted from the efforts of either spouse during the marriage. Only if the appreciation had resulted from effort by a spouse would the court need to know the beginning value so as to determine the amount of appreciation. Charles was a director of the business and was involved in the retention of the individual who ran the corporation's day-to-day operations. He stayed current on the company's financial results. The circuit court rejected this argument, finding that Charles was not

responsible for the appreciation in the company stock or the success of the company. The circuit court found that the appreciation resulted from the skills of the individual hired to run the day-to-day operations of the business. After 1982, Charles was not involved in running the business's day-to-day operations and he was not experienced in running a foundry. He had not actively managed the business or personally caused any appreciation in the stock's value.

Linda's final argument regarding the Falls River Group stock was that the retained earnings of the business were divisible. Insurance proceeds that replaced a business asset were the source of the retained earnings on the company's books. The circuit court found that when insurance proceeds arise from the loss of an asset they are not divisible, whereas when they compensate for a loss of income they are divisible. In this case, because the insurance proceeds were from the loss of an asset, the circuit court held that they were not divisible.

With respect to the money market account, Charles acknowledged that $82,000 of divisible dividends were deposited in the account. In addition, testimony showed that additional cash was deposited in the account between 1998 and 2005, which Charles claimed was from distributions from two other gifted trusts. The amounts distributed, however, did not match up precisely to the amounts actually deposited in the money market fund. Charles testified that it was highly possible that marital funds were also deposited into the account. The circuit court held that the money market account maintained its gifted status, because there were no withdrawals from the account during the marriage, the $82,000 of dividends could be taken out of the account and divided, and the deposit did not taint the entire account.

The court of appeals affirmed all of the circuit court's findings with respect to the Fall River Group stock. Because Charles had not been able to explain each of the money market deposits that took place during the marriage, the court of appeals held that he had not satisfied his burden to establish the character and identity of the gifted asset and thus the entire account was divisible property to be divided equally between the parties. The court of appeals did not explain why the original balance in the account at the time of marriage or in 1998 was not to be allocated exclusively to Charles, even though it had been agreed those amounts were gifted property.

3. Deposit of Nonmarital Property into a Joint Account [§ 3.14]

A question exists whether a deposit of nonmarital property funds into a joint account governed by section 705.02 changes the classification of the funds deposited to either marital property or survivorship marital property. The first inquiry is whether a joint account created under section 705.02 is a traditional joint tenancy. The Act is clear that if, after the determination date, spouses attempt to create a traditional joint tenancy exclusively between themselves, they do not, in fact, create a joint tenancy; rather, the property is classified as marital property and held as survivorship marital property. Wis. Stat. § 766.60(4)(b)1.a. The Wisconsin statute causing this result is not part of UMPA. The Note to the Wisconsin Act explains that the property is so classified for simplicity and because the classification arguably represents what most spouses will intend when they attempt to establish a joint tenancy after the Act is in effect. 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 57 [hereinafter 1985 Trailer Bill Original Nontax Note to § xxx.xx or 1985 Trailer Bill Supplemental Nontax Note to § xxx.xx, as appropriate]. The Note further states that if the spouses wish to have the traditional incidents of joint tenancy, they may do so by marital property agreement. *Id.* The Note also explains that "the most significant difference between joint tenancy and survivorship marital property is that a joint tenant may unilaterally destroy the right of survivorship (for example, by conveying his or her interest in the joint tenancy)," while that is not true for survivorship marital property unless it is held in the "or" form. *Id.*

In determining whether a joint account is a traditional joint tenancy, one must consider the statutory characteristics of a joint tenancy and a joint account. The characteristics of a joint tenancy are set forth in section 700.17(2):

> Each of 2 or more joint tenants has an equal interest in the whole property for the duration of the tenancy, irrespective of unequal contributions at its creation. On the death of one of 2 joint tenants, the survivor becomes the sole owner; on the death of one of 3 or more joint tenants, the survivors are joint tenants of the entire interest.

A joint tenant acting alone may not transfer more than his or her interest in the traditional joint tenancy.

The rule regarding lifetime ownership of a joint account is set forth in section 705.03(1), and the right of survivorship is set forth in section 705.04(1). The rules regarding lifetime ownership of a joint account are different from the rules that apply to a traditional joint tenancy. Section 705.03(1) provides that "the application of any sum withdrawn from a joint account by a party thereto shall not be subject to inquiry by any person, including any other party to the account and notwithstanding such other party's minority or other disability," except that the spouse of one of the parties may recover under section 766.70. Any party to a joint account may transfer the entire amount in that account. For this same reason, the creation of or addition to a traditional joint tenancy by one spouse is a gift to the cotenant, while a deposit to a joint account is not a gift until the nondepositing spouse withdraws funds from that account. But see *Lloyd v. Lloyd (In re Estate of Lloyd)*, 170 Wis. 2d 240, 487 N.W.2d 647 (Ct. App. 1992), discussed below.

The conclusion of this analysis is that a joint account under chapter 705 is not a traditional joint tenancy. Further support for this conclusion may be found in the 1992 Trailer Bill (1991 Wisconsin Act 301) [hereinafter 1992 Trailer Bill], which amended the statutory terminable opt-in and opt-out agreements. The agreements as originally enacted contained provisions on joint tenancies but did not specifically refer to joint accounts. It was therefore uncertain whether the agreements eliminated the survivorship aspect of a joint account. The 1992 Trailer Bill changed the statutory form of agreement to expressly provide that the agreements' provisions do not affect the survivorship feature on a joint account under section 705.04(1). Wis. Stat. § 766.588(1)(d)2., (c)1.

➢ ***Note.*** Links to the 1992 Trailer Bill and other acts amending the Wisconsin Marital Property Act are available in appendix B, *infra*.

The second inquiry is whether the deposit of nonmarital property funds to a statutory joint account causes the funds to become marital property, even though the joint account is not a traditional joint tenancy and is therefore not subject to the mandatory survivorship marital property rule of section 766.60(4)(b)1.a. If the deposit reclassified the funds deposited, it would be consistent with the divorce decisions holding that the deposit of gifts or inherited funds into a joint account changes the character of the funds from gifts and inherited property into

divisible property. *Fowler v. Fowler*, 158 Wis. 2d 508, 463 N.W.2d 370 (Ct. App. 1990). *But see Zirngibl v. Zirngibl*, 165 Wis. 2d 130, 477 N.W.2d 637 (Ct. App. 1991). On the other hand, under section 766.63(1), the funds remain nonmarital if a spouse can trace the nonmarital property component in an account.

Two Wisconsin decisions have addressed this issue with inconclusive results. In *Lloyd*, 170 Wis. 2d 240, the husband periodically moved funds into and out of joint accounts in the name of the husband and wife. As a consequence, the wife had a right to withdraw the funds deposited into the joint accounts. The circuit court held that the deposit of predetermination date property funds into the joint accounts caused the funds to become classified as marital property. The circuit court did not apply tracing rules to determine whether the nonmarital component of the commingled account could be identified because, under its analysis, this tracing was not relevant.

The court of appeals cited this book for the applicable property law rules but used a character analysis in determining the classification of the funds in the joint accounts. The court used the rules applicable at divorce. The court held, "[t]he transfer of separately owned property into joint tenancy changes the character of the ownership interest in the entire property into marital property." *Lloyd*, 170 Wis. 2d at 269. The court adopted the divorce standard and ruled that for a spouse to retain the ownership of an asset as nonmarital property, the asset must retain its character and identity as nonmarital property. Although the court discussed the rules regarding both joint accounts and tracing, it elected not to apply the rules. Instead, the court found that a change of character occurred when the deposit of funds occurred. As a result of this analysis, the court did not distinguish between traditional joint tenancies and chapter 705 joint accounts and did not consider section 766.60(4)(b)1.a. Likewise, the court did not consider this a mixing case.

The second decision is *Kobylski v. Hellstern (In re Estate of Kobylski)*, 178 Wis. 2d 158, 503 N.W.2d 369 (1993). Before the marriage, the wife held certificates of deposit (CDs) that were her nonmarital property. In 1986, one $10,000 CD matured, and the wife deposited the proceeds into a joint bank account. In 1988, $9,000 of that amount was used to purchase a vehicle titled in both names. The testimony of the surviving husband was that the $9,000 was a loan to him, which he agreed to repay on demand if the wife should ask for it.

After the wife's death, her estate sought to recover the $9,000 from the husband.

The court of appeals stated that the circuit court denied recovery "because the funds were drawn from a joint NOW account and the vehicle was titled in both spouses' names." *Id.* at 189. The court of appeals instead held that the wife's request for repayment was a condition of the obligation, and because the wife never requested repayment during her lifetime, the vitality of any claim expired with her.

In analyzing the case, the court of appeals cited this book for the applicable property law rules. The court did not analyze the significance of the fact that the automobile was titled in both names or the significance of the deposit of the predetermination date funds in the joint account. The court of appeals considered the court's analysis in *Lloyd* and stated the following:

> In *Lloyd*, we also performed a character analysis. *Lloyd*, 170 Wis. 2d at 257–60, 487 N.W.2d at 653–54. Character addresses the manner in which the parties have chosen to title or treat the asset. When determining the character of an asset, the donative intent of the owner of the nonmarital property is an issue. *Id.* at 259, 487 N.W.2d at 654.
>
> Because our character analysis in *Lloyd* was performed in the context of a mixing claim under sec. 766.63, Stats., our decision in *Lloyd* leaves the impression that a character analysis is conducted under that statute. Although it would not affect the result in *Lloyd*, we wish to undo that impression here. As we have already noted, a different statute, sec. 766.31(10), Stats., expressly recognizes that a spouse may reclassify individual property to marital property by gift. Therefore, any character/gift/donative intent inquiry under a character analysis is performed under sec. 766.31(10)—not sec. 766.63, the mixed property statute. Here, [the husband] makes no claim of gift by [the wife]. Thus, our analysis, like the probate court's, is limited to a tracing/identity analysis under sec. 766.63(1).

Id. at 173–74 n.7. It appears the correct analysis is that only tracing is required to maintain the classification of nonmarital funds deposited in a joint account. Normally, one must determine if a gift occurred. However, the deposit in a joint account of nonmarital funds is not a completed gift because the depositing spouse may withdraw the entire amount deposited. If no gift occurred, the issue in section 766.63, as stated by the court, is one of tracing.

B. Commingled Financial Accounts [§ 3.15]

1. In General [§ 3.16]

In trying to determine the source of an asset being classified, it is not uncommon to find that funds have passed through an account at a financial institution. Frequently, that account has received deposits of funds with different classifications, and expenditures have been made for different purposes. The courts in other community property states have developed methods for identifying and preserving the separate property (analogous to individual property in Wisconsin) in such accounts. Because of the Act's deferred marital property rules, unless classification is accomplished by marital property agreement, married persons residing in Wisconsin before the effective date must trace the sources of their existing assets to avoid subjecting them to election at the owning spouse's death. Wis. Stat. § 861.02(2)(a).

What are the rules for tracing an asset to determine its classification? Under the common law in Wisconsin, tracing was infrequent, and no clear rules developed. Tracing primarily occurred in divorce actions involving gifts and inherited assets. The decisions recognized that commingling inherited assets with other assets could result in a loss of the asset identity. *See, e.g.*, *Finley*, 2002 WI App 144, 256 Wis. 2d 508; *Trattles*, 126 Wis. 2d 219; *Anstutz v. Anstutz*, 112 Wis. 2d 10, 331 N.W.2d 844 (Ct. App. 1983).

In developing new rules in Wisconsin for tracing assets to determine their classification, it will be helpful to analyze the decisions of the other community property states. It must be remembered, however, that many of the decisions have arisen in a divorce context in states that divide only community property. Wisconsin does not limit division at divorce to marital property. Thus, when Wisconsin courts consider the decisions in the other community property states, they may adopt less demanding standards to overcome the presumption of marital property.

2. Direct Tracing [§ 3.17]

a. General Rules [§ 3.18]

Direct tracing is the most accurate method of tracing in community property states. The acquisition of each asset involves the payment of money, the exchange of another asset, or the incurrence of an obligation. In community property states, the source of the money or asset exchanged or the classification of the obligation incurred determines the classification of the asset acquired. Reppy & Samuel, *supra* § 3.12, at 114. To maintain individual property through direct tracing, it is necessary to have records of each transaction from the time an individual asset is acquired until the marriage terminates or a creditor raises the issue.

The general rule in other community property states is that if precise tracing becomes impossible at any point in an asset's history, the asset is transformed to community property. Given the Act's presumption that all property of spouses is marital property unless shown otherwise, the same rule appears to be true in Wisconsin. *See* Wis. Stat. § 766.31(1)–(2); *see also Wright*, 2008 WI App 2, 307 Wis. 2d 156.

With regard to commingled accounts, the other community property states have developed methods that satisfy the tracing requirement. For example, a ledger identifying each deposit and each expenditure will generally satisfy the tracing requirement in the other community property states. If one account is used for both individual and marital property deposits, the classification must appear in the ledger and each expense must be identified as pertaining to an individual or marital obligation. Reppy & Samuel, *supra* § 3.12, at 113–14.

In Wisconsin, unless a unilateral statement is executed, the spouse must not only record each deposit and each expenditure but must also maintain a record of income earned on individual property and predetermination date property and deal with marital property in the same manner as earned income. Wis. Stat. § 766.31(4). Direct tracing also may be accomplished by relying on agents or using an investment account or trust. Whether a particular direct-tracing technique has been established can be determined by asking whether the source of the amount used to acquire each asset can be directly ascertained. Reppy & Samuel, *supra* § 3.12, at 113–14.

Direct tracing constitutes actual proof of the classification from the initial receipt of the funds to the point at issue. Such proof will generally take the form of documents. Transactions involving deceased individuals should not be affected by the rule in sections 885.16 and 885.17 excluding certain evidence of such transactions. In Wisconsin, direct tracing should be acceptable in all situations. See *Fowler*, 158 Wis. 2d 508, a divorce case that involved the identity of funds that the wife had acquired by gift and that were then deposited in a savings account in the husband's sole name, which also contained funds from other sources. The court held the gifted funds were not traceable and lost their identity through commingling.

In *Ludwig v. Geise (In re Geise)*, 132 B.R. 908 (Bankr. E.D. Wis. 1991), the bankruptcy court used direct tracing to determine which assets in an individual retirement account (IRA) and an investment account were marital property and which assets were individual property. After tracing the dividends received and retained in each account, the court determined that the marital property assets were part of the bankruptcy estate.

The court also analyzed the balance in a personal checking account. The bankruptcy trustee successfully claimed that the balance in the spouse's checking account was marital property because the nondebtor spouse's salary had been deposited into the account during the marriage. It does not appear from the decision that any attempt was made to trace the various funds deposited in and expended from that account. The court found that the nonmarital funds were transmuted into marital property.

b. Illustrations [§ 3.19]

Direct tracing is illustrated in *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973), in which the question was whether two savings certificates were community property. When the marriage took place, the husband had two savings accounts in his sole name. In one account, the only deposits that were made during the subsequent six-year term of the marriage consisted of the interest earned on the account balance. This interest increased the account from $9,500 to $10,453.81, at which time a withdrawal was made to create a $10,400 savings certificate. The only prior withdrawal was in the exact amount of the interest previously credited to the account. The court held that the $9,500 originally on

deposit was directly traced and was the separate property of the husband. The balance was community property.

The second certificate of deposit was in the amount of $16,000. Of this, $6,000 came from joint accounts consisting exclusively of community funds. The question related to the remaining $10,000. As to that amount, the husband had a separate account of $9,570.27 at the time of marriage. Between the date of the marriage and the date on which the certificate was taken out, numerous deposits and two withdrawals were made. Of the total $7,740.34 deposited to the account, $1,140.34 came from interest on the account balance and the remaining $6,600 had an unknown source. Of the two withdrawals during the period, the first equaled the total interest earned to that date and the second was in the amount of $4,985.91. After the $10,000 withdrawal was made to purchase the certificate, the account balance was $1,886.71. The court held that because there was no evidence to trace the separate funds initially on deposit in the account, any conclusion about the property's status would require speculation. The entire $16,000 certificate was therefore held to be community property.

If, however, a positive balance had remained after subtracting from the account balance at the date of marriage ($9,570.27, individual property) the withdrawal with the unknown purpose ($4,985.91) and the subsequent deposits with an unknown source (i.e., $6,600), the balance would have been sufficiently traced to the individual property of the decedent spouse. This result follows the approach used for the first account. *See Harris v. Ventura*, 582 S.W.2d 853 (Tex. Ct. App. 1979); *see also Snider v. Snider*, 613 S.W.2d 8 (Tex. Ct. App. 1981) (no writ).

The court of appeals used this type analysis in *Dins v. Dins*, No. 90-1588, 1991 WL 121043 (Wis. Ct. App. May 8, 1991) (unpublished opinion not citable per section 809.23(3)). The wife inherited funds from two relatives. She deposited the funds in a money-market account titled solely in her name. The husband claimed that by allowing the interest earned on the funds to remain in the account and by also depositing into the account the fee she received as personal representative of one of the estates, the wife had transmuted the inherited money to divisible property. He also claimed that other deposits of marital property funds in excess of $18,000 were made to the account.

The circuit court held that the wife was entitled to be reimbursed for loans she had made to the family and that such reimbursement was the

basis for the other deposits to the account. The court also held that the wife had accounted for the source of every deposit to the account and given credit to the penny for all repayments made. The court held that the funds retained their inherited character. Because the title to the account was never changed and donative intent was never established, the court held that the funds in the account in the amount of the inheritance had been preserved as nondivisible property.

In *Lloyd*, 170 Wis. 2d 240, the husband had accounts in his sole name and also in joint tenancy with a third party on the determination date. During the marriage, the balance in a number of the accounts did not decline. The court of appeals found that in each of these accounts, the balance on deposit on the marriage date was traceable and remained the husband's nonmarital property.

3. Family-expense Doctrine [§ 3.20]

When direct tracing is impossible, the other community property states use the family-expense doctrine to permit some separate property to be identified and retained in a commingled account. The family-expense doctrine is predicated on a presumption that community funds are spent for family items, such as those for necessaries and to satisfy support obligations, even though separate funds are also available. Reppy & Samuel, *supra* § 3.12, at 119. Thus, if a spouse proves that family expenses exceeded community income when an asset was acquired, the spouse establishes that the property was purchased with separate funds. *See v. See*, 415 P.2d 776 (Cal. 1966). It is not necessary to directly prove that community funds were used to satisfy the obligation. The conclusion arises from the presumption. *See Washington Community Property Deskbook* (Wash. State Bar Ass'n 3d ed. 2003) [hereinafter *Washington Deskbook*] (discussion of acceptance technique).

The circuit court must determine whether sufficient evidence has been introduced to satisfy the requirements of the family-expense doctrine. In this respect, the timing of the withdrawal in relation to the date of marriage or the date of deposit of individual funds is relevant. *Peterson v. Peterson*, 595 S.W.2d 889 (Tex. Ct. App. 1980) (writ ref'd n.r.e.); *In re Marriage of Cupp*, 730 P.2d 870 (Ariz. Ct. App. 1986).

The court summarized the family-expense doctrine in *Hicks v. Hicks*, 27 Cal. Rptr. 307 (1962):

> When community expenses are paid from a bank account in which both community and separate funds have been deposited, it is presumed that they have been paid from the community funds therein … . [I]f at the time of such payment, no community funds are on deposit and, for this reason, the payment is made from the separate funds therein, the latter will be reimbursed therefor from subsequent deposits of community funds. [I]n the event the amount of community expenses paid from the composite account exceeds the amount of community funds deposited therein, the balance of the money deposited, whether remaining in the account or transmuted to another form, is separate property.

Id. at 317. In *Hicks*, the family-expense doctrine was applied to a luxurious standard of living. The issue was whether the assets purchased through a bank account, as well as the remaining balance in the account, were the husband's separate property or whether, at divorce, the wife was entitled to one-half of the funds deposited in the account because the husband could not specifically account for the expenditure of the assets.

The parties were married for eight years, and the husband had accumulated a substantial amount of separate property before the marriage. During the marriage, the husband maintained a personal bank account, into which he deposited and from which he withdrew both community and separate funds. At the time of divorce, $2,500 remained in that account. The testimony showed that during the term of the marriage, there were deposits into the account of $557,124.71. Of that amount, $546,545.93 could be traced. Of the traced amount, $267,580.81 were deposits of separate property, and the remaining $278,965.12 were deposits of community property. The difference between total deposits during the marriage and traceable amounts was $10,578.78; because that amount had been acquired during marriage and the source could not be identified, it was presumed to be community property.

The court found there were withdrawals from the account for separate purposes in the total amount of $172,931.80, leaving $94,649.01 of deposits of separate funds in excess of withdrawals. The community expenditures for improving the community or joint-tenancy property, retiring community or joint-tenancy debts, and paying federal income taxes on the husband's salary and bonuses amounted to $125,085.81.

The community deposits exceeded the community expenses by $164,459.09.

The total family living expenses during the marriage were $434,460, which substantially exceeded the community deposits available for their satisfaction. This amount was proved through an exhibit showing the payees of all checks drawn on the bank account during the marriage, along with a detailed analysis of the expenditures for one month of each year of the marriage. During this period, the wife had no separate source of income.

The court held that separate funds do not lose their character as such when commingled with community funds in a bank account, as long as the amount of separate funds can be ascertained. Whether funds deposited as separate funds continue to be on deposit when a withdrawal is made from the bank for the purpose of purchasing a specific property, and whether the intention is to withdraw only the separate funds from a commingled account are questions of fact. Evidence that establishes the availability of sufficient separate funds for separate purposes supports an inference that the owner of the funds used them for such purposes. *Id.* at 158.

Thus, applying the family-expense doctrine, the court in *Hicks* held that the assets acquired by the husband during marriage were purchased with his separate property and that the balance remaining in the account at the time of the marriage's dissolution was also the husband's separate property. The family expenses more than exhausted the community deposits that were unaccounted for.

The family-expense doctrine was also applied in *Mix v. Mix*, 536 P.2d 479 (Cal. 1975). In *Mix*, however, the schedule of funds and expenditures introduced in evidence showed only the sources of separate funds, the expenditures for separate property purposes, and the balance of separate property funds after the expenditures. The issue was whether real and personal property titled in only the wife's name was her separate property.

The wife was an attorney, and the husband was a musician and part-time teacher. At the time of the marriage, the wife owned several assets, including income-producing property, a residence, a life insurance policy, and separate bank accounts. After the marriage, the husband closed his separate account and the parties used a joint account into

which they deposited all their earnings as well as the wife's income from her separate property. Five years after they were married, the wife opened a separate account in her own name into which she deposited most of her income, both from her law practice and from her various investments. (In California, where the case arose, earned income is community property, while income on separate property is separate.)

The schedule introduced into evidence established that in all but one of the years the parties were married, separate property receipts exceeded separate property expenditures, leaving a balance of separate funds. In the one year in which a deficit did occur, it was not sufficient to exhaust the balance of separate funds carried forward from prior years. The husband contended that the schedule was flawed because the entries of receipts and expenditures of separate property were not tied to any specific bank account and thus showed merely the availability of separate funds, not the actual expenditure of separate funds for the enumerated separate purposes.

The court agreed that, by itself, the schedule was wholly inadequate to meet the test presented in *Hicks*. However, the court found the schedule was not the only evidence on this issue. The wife testified that the schedule was a true and accurate record of the receipts and expenditures that passed through various bank accounts and that it accurately corroborated her intention throughout the marriage to make the expenditures for separate property purposes from her separate property, notwithstanding the use of the balance of her separate property for general family expenses.

The appellate court found (as had the circuit court) that sufficient tracing had occurred to establish that all the real and personal property in the wife's name alone was her separate property. This result was reached even though the amount of family expenses was never established. The court relied on the corollary presumption that "[e]vidence establishing the availability of sufficient separate funds for separate purposes supports an inference that the owner thereof used such funds for such purposes." *Hicks*, 27 Cal. Rptr. 307 at 316; *see also See*, 415 P.2d 776.

In re Marriage of Pearson-Maines, 855 P.2d 1210 (1993), concerned the wife's ownership of a parcel of residential real property before the marriage. The property was destroyed by fire during the marriage, and the wife received an insurance reimbursement for the loss. After these

funds were received, the residential real estate was rebuilt. The wife maintained a detailed record of the expenditures made to rebuild the property. The insurance proceeds had been deposited into a bank account into which both spouses' earned income was deposited. The issue was whether the funds expended from that account to rebuild the property had been so commingled as to make tracing impossible, thereby converting the entire value of the residence to community property.

To maintain an asset as separate property, the funds must be both traced and identified. The court held that the insurance proceeds took the character of the property insured and, therefore, were the wife's separate property when initially received. "The presumption is that if there are both separate and community funds and there are sufficient separate funds from which the payments can be made, then the payments will be presumed made from such separate funds." *Id.* at 1214. The court held that the wife's records of the precise expenditures made for the construction of the new residence and her records regarding the other deposits and withdrawals from the account sufficiently traced the use of the insurance funds to have that portion of the property classified as her separate property.

The court noted that a different result would occur if the insurance proceeds had been used to purchase some asset unrelated to the wife's separate property. In that case, the community property presumption would apply and the separate nature of the new asset could not be established unless the community funds were shown to be dissipated. It is not clear why this would automatically be the result if the same detailed records were maintained.

The family-expense doctrine is most often used to trace funds having a different classification through commingled accounts. For example, assume the following checking account transactions:

		Balance
1. Deposit W's salary	4,000	
2. Deposit W's individual stock proceeds from sale of ABC	3,000	7,000
3. Check to gas company	100	6,900
4. Check for mortgage	1,000	5,900
5. Deposit W's dividend on individual security	200	6,100
6. Check to plumber	300	5,800
7. Check to cash	100	5,700
8. Deposit checking account interest	100	5,800
9. Check for real estate taxes	2,000	3,800
10. Check for charge card	500	3,300
11. Check for W's purchase of stock XYZ	2,800	500

Is the XYZ stock the wife's (W's) individual property or marital property? That depends on whether W can trace the purchase proceeds of XYZ to the proceeds received from the sale of ABC. Direct tracing is impossible because W did not record the source of funds for each transaction, but the family-expense doctrine can be applied.

The first step is to determine the extent of the individual property. If W has not executed a unilateral statement, the only deposit of individual property is the $3,000 of sale proceeds from ABC. If W did execute a unilateral statement, then W's $200 dividend and a portion of the checking account interest is also individual property. The account interest must be allocated between the interest attributable to marital property funds in the account and that attributable to individual property funds.

The next step is to consider the withdrawals from the account. Under the family-expense doctrine, the presumption is that marital property funds are spent for family items. The checks for the gas company bill, real estate taxes, plumber, and mortgage are family-expense items if incurred for residential real estate used by the family. However, if the expense is incurred for investment real estate, that property must be classified. For example, if the mortgage payment was made for a rental property that was the individual property of W, the part of the payment that was principal would be presumed made from nonmarital funds if those funds were available in the account because it would increase W's

equity. The interest portion would be presumed made from separate funds, if available, because it would be an expense in connection with the maintenance of individual property. The checks for the gas company, the plumber, and the real estate taxes would undergo similar treatment if they represent expenses incurred for W's individual property. The identification of the items purchased with the charge card is unknown, and there is no presumption based on the check's payee. To classify these withdrawals as family expenses, additional testimony or evidence must be introduced as to the use of the funds.

Assuming that no such evidence is introduced and that W did not execute a unilateral statement, the amount of individual property available to purchase XYZ is $3,000 minus the $600 withdrawals for cash and the charge card payment, less the expenses in connection with the real estate if it is W's individual property. Because W's funds remaining at the time of purchase of XYZ are less than the purchase price, W has only a pro rata ownership of XYZ stock. W's individual component, however, has been sufficiently identified to satisfy the mixing statute's tracing requirements. The same result would be reached by subtracting family expenses from marital property deposits.

The family-expense doctrine provides sufficient certainty for the Wisconsin courts to use it in classifying property. Moreover, the doctrine is equitable, and the courts could avoid having all expenditures required to maintain a luxurious lifestyle come from the marital property by limiting the expenditures that are permitted as expenditures of marital property. The limit could be set by the expenses included under the family-purpose doctrine, *see infra* chapter 5.

4. Recapitulation of Community Income and Expense [§ 3.21]

Some community property states extend the family-expense doctrine to permit commingled property to be sorted out through recapitulation of the total community income and expenses. Under this approach, if a spouse proves that total community expenses exceed community income, all acquisitions are separate property. The theory looks to the aggregate number of dollars rather than to the details of each transaction during the term of the marriage.

Reimbursement occurs automatically when recapitulation is used: if a community expense is in fact paid with separate funds because no community funds are available, the expense is charged to the community when the aggregate totals are determined. This result will occur even though the spouses never had an agreement regarding the reimbursement. Reppy & Samuel, *supra* § 3.12, at 119.

Idaho, Arizona, and New Mexico use the recapitulation method. In *Houska v. Houska*, 512 P.2d 1317 (Idaho 1973), the court determined the net income from all sources that would be community property and then deducted from it all the community living expenses to determine the community's share of commingled investments, including cash, livestock, crops, and farm vehicles. In *Moore v. Moore*, 379 P.2d 784 (N.M. 1963), the court approved an approach of analyzing the income of the community in each year and deducting amounts spent on community purposes and on the other spouse's separate property. *See also Porter v. Porter*, 195 P.2d 132 (Ariz. 1948); *Josephson v. Josephson*, 772 P.2d 1236 (Idaho Ct. App. 1989).

Not all jurisdictions accept the recapitulation method, however. For example, it was considered and rejected by the California Supreme Court in *See*, 415 P.2d 776. In that case, the husband received total wages in excess of $1 million during marriage. He maintained two accounts from which expenditures were made and into which commingled community and separate property funds were deposited. Direct tracing was impossible because he had not maintained the necessary records. The court held that the husband could have maintained his separate property by not commingling community and separate funds. According to the court, once a spouse commingles assets, he or she assumes the burden of keeping records adequate to establish the part of the commingled aggregate that is separate property. Only when tracing is impossible through no fault of the spouse may recapitulation of the total community expenses and income throughout the marriage be used to establish the classification of the property.

The court in *See* explained why the family-expense doctrine was acceptable and recapitulation was not. Under the family-expense doctrine, a spouse may prove that all the community income was in fact exhausted by family expenses, and thus, that any assets that were purchased were purchased with separate funds. The recapitulation theory instead disrupts the community property system and transforms the interest of the non–wage-earning spouse into an inchoate expectancy, to

be realized only if at the termination of the marriage the community income during the marriage is found to have exceeded the community expenditures. The fact that a spouse uses his or her separate property to maintain a standard of living that cannot be maintained with community resources alone does not entitle that spouse to reimbursement from subsequently acquired community assets to make whole his or her separate property. Such reimbursement is permissible only if the spouses have an agreement between the parties to that effect.

Thus, in California, separate property is reduced to the extent it is used for family expenditures at a time when there is no remaining community property to satisfy the obligations. A subsequent deposit of community property provides no reimbursement absent an agreement between the spouses.

In Wisconsin, more liberal tracing rules may be adopted with regard to assets acquired and transactions that occurred before the determination date, because at the time of the transaction there is no reason for either spouse to maintain records that would permit direct tracing. Thus, even if recapitulation is rejected for transactions after the determination date, it may be approved for transactions before that date.

5. Maximum Marital Benefit [§ 3.22]

If historical records are not available to determine the individual property component of a commingled account, it is still possible to establish some property as individual by limiting the marital component to the maximum benefit it could have realized. This theory assumes that all undocumented family expenses are satisfied from individual property even though they could properly be satisfied from marital property. A further assumption is that all the marital property is invested in the assets remaining at death or dissolution. The difference between the total value of the remaining assets and the value of the marital property component of those assets is individual property. This approach should be accepted in Wisconsin because all doubts are resolved in favor of a marital property classification.

One case in which a court used this maximum-marital-benefit approach is *Duncan v. United States*, 247 F.2d 845 (5th Cir. 1957). The decedent, a resident of Texas, owned a number of securities in his sole name, had a credit balance at a brokerage firm, and had a balance in an

account at a financial institution. His widow contended that this property was community property in which she was entitled to share. During the marriage the total community property available for investment was $16,737.19, an amount that was ascertained from the decedent's income tax returns. The income was reduced for contributions and taxes shown on the returns, but no reduction was made for living expenses paid during the marriage, even though they were presumptively community disbursements. The assets at the husband's death had a value of $81,688.84. The bank account included deposits of all earned income as well as the income from the decedent's separate property. The securities were purchased using funds from that account.

The court held that when the facts conclusively demonstrate that even if every cent of community funds was invested, the figure would still amount to only a fraction of the cost of the property acquired, then the presumption that all the couple's property is community property has no factual basis and is overcome. That does not necessarily mean, however, that all the property must be classified as separate property. The community is entitled to the property that was in fact purchased with the available community funds. The court held that the community funds available went ratably into each security purchased.

Under the pro rata ownership approach used in *Duncan*, investments that result in losses need not be attributed to the community. For example, suppose $10,000 of community funds and $10,000 of separate funds are available for investment and that a spouse invests $5,000, all of which is subsequently lost. Under such circumstances, courts normally would not allocate any part of the investment to the community but would allocate it to the separate property and leave $10,000 of community funds in existence. *See, e.g.*, *Succession of Ferguson*, 84 So. 338 (La. 1920). See also the discussion of *Friebel v. Friebel*, 181 Wis. 2d 285, 510 N.W.2d 767 (Ct. App. 1993) at section 3.13, *supra*.

6. De Minimis Commingling [§ 3.23]

Another approach used to segregate and retain individual property is to establish that the amount of marital property commingled with the individual property was insignificant. UMPA § 14 cmt. The comment states that courts should not permit a serious injustice to result from mixing a minimal amount of marital property with a substantial amount of other property. *See Washington Deskbook*, *supra* § 3.20 (approves de

minimis commingling rule); *see also* Reppy & Samuel, *supra* § 3.12, at 128 ("It has often been declared that when a small amount of community property becomes commingled with a large sum of separate funds, uncommingling by tracing being impossible, the total mass is separate property rather than community."). There is no reason for Wisconsin to deviate from this view.

A Wisconsin court refused to employ equitable tracing techniques in a divorce case. In *Brandt v. Brandt*, 145 Wis. 2d 394, 427 N.W.2d 126 (Ct. App. 1988), the court of appeals was required to rule on whether certain assets acquired by inheritance could be identified at the time of divorce and, therefore, could not be included in the estate subject to division.

The couple was married in 1952. Over the course of the marriage, the parties had nearly 30 separate investment, savings, and checking accounts at several different institutions. In 1963, the wife received a substantial inheritance and placed it in an investment account in her name at a brokerage firm. She gave her husband a power of attorney that authorized him to manage the account. The proceeds from the account were used during the marriage for family purposes, gifts, reinvestment, and deposit to the parties' various accounts. During the marriage, the husband received income from his employment and also received approximately $100,000 by gift and inheritance. There were a number of deposits to the wife's investment account from salaries, gifts, other inheritances, and the other joint and sole accounts. Funds regularly flowed into, out of, and back and forth among the accounts.

The issue before the court was whether the balance in the wife's investment account was inherited property. Among other arguments raised by the wife to support her position that the balance constituted inherited assets was her claim that the mixing was de minimis. As such, she asserted that either the entire balance should be classified as inherited property because the mixing was minor or the value of the amount inherited should be allocated to her as inherited property. The brief submitted on behalf of the wife cited to this section of the book.

The court held that "[c]ommingling, in and of itself, is not necessarily fatal to the exempt status of a gifted or inherited asset. The critical inquiry is whether, despite the commingling, the inherited or gifted component of the asset can nonetheless be identified and valued." *Brandt*, 145 Wis. 2d at 412. The court also held that while some portion

of the wife's investment account undoubtedly represented a part of her inheritance, it was impossible with any degree of certainty to identify or value that portion.

In a footnote, the court stated,

> [a]s an alternative to her tracing argument, [the wife] advances several novel theories under which her inheritance might be preserved. These include a 'reimbursement' theory and a 'de minimis commingling' theory. Although these theories have been adopted in some jurisdictions, they run contrary to previous rulings of the Wisconsin appellate courts that failure to preserve the character and identity of exempt property renders such property [divisible].

Id. at 413 n.4. This implies that equitable tracing rules such as reimbursement and de minimis commingling are not appropriate in a divorce context and are not persuasive in a property law context. The court's conclusion appears to be a stronger statement than was necessary to resolve the case.

A bankruptcy court has considered whether the de minimis rule should be adopted in Wisconsin in some cases. In *Geise*, 132 B.R. 908, the wife owned a residence as her individual property. During the marriage but before the filing of the bankruptcy petition, she had paid down the $40,900 mortgage note with $260 of her marital property wages, leaving a balance of $40,640.

The home appreciated in value by $3,120 during the marriage. Counting the marital property funds to reduce the mortgage principal balance would have made .52% of that asset marital property and cause that portion of the appreciation in value to also be marital property. However, the court found the aggregate of these amounts to be a "trifling sum." Thus, the court found that the entire residence remained the wife's individual property. The court recognized that the *Brandt* decision had rejected the de minimis approach in a divorce context and cited with approval the analysis in the supplement to this book that the conclusion in *Brandt* was not persuasive in a property law context.

In *Friebel*, 181 Wis. 2d 285, the court dealt with the accumulation of income in an investment account held by a corporate trustee and in which all funds deposited to the account were gifts. The court did not expressly determine that the income earned on that account was de minimis. However, the court did conclude that the accumulated income was only

five percent of the total value of the account and that the classification of the entire account was not tainted by and so commingled with this accumulated income as to convert the remainder of the account into divisible property.

A good example of a case in which the court followed this position is *Bowart v. Bowart*, 625 P.2d 920 (Ariz. Ct. App. 1980). The parties were married for 10 years. The wife was a beneficiary of trust funds with an annual income of approximately $250,000; the husband was a writer who received sporadic income. One issue was whether real estate owned by the wife before marriage was subject to a community property lien because community funds in the household account were used to fund improvements to the real property.

The court found that the funds in the household account were almost entirely from the wife's separate trust. The husband's meager and sporadic contributions to the account failed to render the entire household account community property. Moreover, the account did not become community property because the wife placed her separate funds in a joint checking account. No presumption arose that the wife had made a gift to her husband of one-half of the funds. The husband was authorized to write checks on the account, but the evidence disclosed that this was merely a matter of convenience and was not intended to change the classification of the funds. Thus, the court held that the real estate was the wife's separate property.

The court in *Conley v. Quinn*, 346 P.2d 1030 (N.M.1959), reached a similar result. The husband owned a large farm that was separate property. Under New Mexico law, the income generated by the farm was also separate property. The husband also raised a limited number of cattle, chickens, and hogs, which were community property. When the livestock was sold, the proceeds were deposited into the same account as the income from the crops. This commingling was held to be de minimis and not to change the separate classification of the account. Consistent with this view is *Noble v. Noble*, 546 P.2d 358 (Ariz. Ct. App. 1976). In that case, the husband deposited $3,000 of his earnings in his wife's bank account and then claimed that all subsequent assets purchased through the account were community property. The court rejected this assertion.

Although the cases do not decide the issue, a spouse should be obligated to reimburse the other spouse for the amount of marital property added to the commingled fund, assuming the appropriate

amount can be determined. This approach is based in equity and prevents nominal commingling by one spouse from producing a windfall to the other spouse.

7. Other Rules [§ 3.24]

When the spouses do not keep sufficient records for satisfactory tracing under any of the above rules, the courts must decide whether to follow the presumption that all the spouses' assets are marital property or to use equitable powers to establish a portion of the assets as individual property. This issue normally arises when a new investment is made and no special presumption arises from the nature of the expenditure, such as the purchase of a security. In this situation the court might determine itself bound by the presumption and classify all assets as marital property. However, if, for example, a spouse establishes an inheritance of $100,000 and is unable to trace the funds, but the aggregate assets of the couple increases, a court can probably consider the equities of the case. For this purpose, it is unclear whether ordinary accounting rules will be helpful. George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* §§ 926-28 (3d ed. 2007). See the discussion of Wisconsin's rejection of equitable tracing in divorce at section 3.23, *supra*.

If a court decides it is not bound to follow the presumption that all the assets are marital property, it has several options. It can use the reverse of the maximum-marital-benefit approach of *Duncan* discussed in section 3.22, *supra*, and give the spouse establishing untraceable individual property a pro rata interest in the assets. Alternatively, the court could assume that all the community funds are withdrawn first. *Barrington v. Barrington*, 290 S.W.2d 297 (Tex. Ct. App. 1956). A final approach would be to allocate all the investments to the community but allow the separate estate a reimbursement claim. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Ct. App. 1975); *Succession of Videau*, 197 So. 2d 655 (La. Ct. App. 1967). This final approach is similar to the procedure followed in divorce actions in Wisconsin and has been used in Texas and Louisiana, two of the three states that, like Wisconsin, provide that income on separate property is community—or "marital"—property.

The failure to sufficiently identify nonmarital property in a commingled account can have consequences beyond the mere reclassification of the account balance to marital property. In *Swope v.*

Swope, 739 P.2d 273 (Idaho 1987), the husband had a bank account before marriage. During the marriage, all the family's income and other cash receipts were deposited into this account, which was later made into a joint account. The husband had paid a premarital obligation from this account. Because of the commingling, the court found that the balance in the account was community property. Thus, the payment of the husband's premarital obligation was found to have been made with community funds, and the wife was entitled to reimbursement for one-half the amount so paid.

The various methods of sorting out commingled assets are doctrines of equity. Thus, evidence that commingled funds have been partly wasted (such as by supporting a gambling, liquor, or drug habit) may bar the use of tracing-based theories to establish individual property. *Anstutz*, 112 Wis. 2d 10; *see also* Reppy & Samuel, *supra* § 3.12, at 126–28.

C. Tracing Concerns Involving Other Assets [§ 3.25]

Mixing (i.e., commingling) can occur with regard to assets other than money. Whenever commingling occurs under section 766.63(1), regardless of the type of asset, the courts must determine whether any individual (i.e., separate) property can be identified. The following sections discuss various situations from other community property jurisdictions that have faced this problem. The cases may prove helpful in applying the Act.

1. Accounts Receivable [§ 3.26]

One of the assets a spouse may bring to the marriage as individual property is a business's accounts receivable. In the typical situation, the spouse's business continues after marriage, the original accounts receivable are collected, and new accounts receivable come into existence. At termination of the marriage, the issue is whether any of the accounts receivable at termination are classified as individual property. Normally, none of the accounts receivable at termination are so classified.

For example, in *House v. House*, 123 Cal. Rptr. 451 (Ct. App. 1975), the husband was a physician who came into the marriage with accounts

receivable from his medical practice. These represented a separate asset. At divorce, he requested that an amount of current accounts receivable equal to what he had brought into the marriage be allocated as his separate property. The court held that the current accounts receivable were all community property because they were earned during the marriage. The receivables brought into the marriage were spent for community purposes and acquisitions, but without an agreement for reimbursement. The court therefore held that the husband had made a contribution to the marriage and the community for which he could not recover.

2. Minerals and Wasting Assets [§ 3.27]

If a spouse owns an interest in a mineral deposit as individual property, a mixing issue arises when the mineral interest is developed. If the coal, oil, or other mineral is considered income, its development reclassifies the entire asset to marital property. *See supra* § 2.39. On the other hand, if the mineral proceeds are considered a return of capital, the marital estate obtains no return from the individual asset even though income on individual property would be marital property. *See supra* § 2.39.

The issue is further complicated if marital funds are used to develop the asset or if a spouse performs substantial labor in connection with the development. The alternatives are to allocate "all or nothing" to the individual interest based on the preponderance of value contributed or to make an equitable apportionment between the two interests. The all-or-nothing rule provides certainty but can produce arbitrary results. The equitable-apportionment approach is difficult because the portions are not known when received; thus, subsequent mixing of funds is unavoidable.

The all-or-nothing approach was used in *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953). The spouses were married for six years. Before the marriage, the husband owned an undivided interest in seven gas-producing wells as a lessee, plus two undivided partnership interests, one a one-quarter interest and one a one-half interest, in two oil and gas partnerships. The wells produced gas during the term of the marriage under contracts, entered into before the marriage, covering the life of production. The husband expended little effort in managing the properties.

The court found that the production of natural gas would eventually exhaust the gas reserves that comprised the separate estate. The court considered this equivalent to a piecemeal sale of the separate corpus and held that the funds acquired through a sale of the separate corpus, if traced, would remain separate property. This is consistent with the treatment of a lessor of the interest to whom royalties are paid when oil or gas is produced, the royalty payments being for extraction or waste of the separate estate and, therefore, classified as separate property. (The estate had acknowledged that the gas was separate property while it was in the ground, but had argued that the profits on the sale of the gas were community income. In Texas, most judicial determinations historically allocate all or nothing to the community.)

The *Norris* court distinguished two earlier cases in which a complete change of classification of an asset had been found to occur as a result of the asset's development. One of those cases involved bricks made from clay that had been extracted from land that was separate property; the other case involved finished lumber that was sold after having been sawed from timber classified as separate property. In both cases, unlike in *Norris*, there had been a great deal of community effort "required to transmute the separate property into a new and more valuable state." *Id.* at 680.

With regard to the partnership interests in *Norris*, the court initially looked to the gas wells the partnership owned at the time of the parties' marriage. The court held that the husband had the sole right to manage, control, and dispose of his separate property during marriage and that this included reasonable control and management necessary to preserve the separate estate and to put it to productive use. Thus, activities relating to the maintenance and production of the minerals would not cause a part of those minerals to be reclassified as community property.

In contrast to the all-or-nothing rule followed in *Norris*, the allocation rule is more equitable and will probably find judicial favor in Wisconsin. If this occurs, it will be beneficial to adopt some clear standards, such as that the individual interest receives the cash flow until complete recovery of the value of the asset before development. In addition, because allocation is impossible at the time of receipt, the claim should be one of reimbursement rather than of ownership. The partnership analysis was changed when Texas enacted the Uniform Partnership Act. *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. Ct. App. 1987).

3. Securities and Securities Accounts [§ 3.28]

Individual securities may become mixed property through trading if proceeds from the sale of securities are deposited into a commingled account and subsequent purchases are made from that account. Mixing may also occur when individual securities are placed in an account having marital property securities if both classifications of securities are later sold and the proceeds reinvested. A third mixing situation may occur if a security in a dividend reinvestment plan is sold and the proceeds are reinvested without allocating the proceeds between individual and marital property. This problem also occurs if the securities account is a margin account, amounts are borrowed to purchase securities, and repayment of the margin debt is made from sources having a different classification.

These situations were considered in *Marsden v. Marsden*, 181 Cal. Rptr. 910 (Ct. App. 1982). The husband contended that a number of securities maintained in a single securities account were his separate property. Before marriage, the husband owned a substantial amount of securities and had a savings account. During the marriage, the husband had a checking account into which his wages were automatically deposited. While the parties were married, the husband engaged in numerous transactions involving the sale and purchase of securities. The proceeds from some sales were deposited in the account into which his salary was deposited, and the husband acknowledged that it was impossible to identify the separate funds in this account. Some securities purchases also were paid for from this same account.

The certified public accountant hired to log the stock transactions admitted that if a stock had been purchased from funds in the checking account and then later sold and the proceeds deposited in the savings account, his worksheet would not show that the funds were originally from the commingled account. The accountant's figures identified the aggregate amounts purchased and sold for each year, and the accountant concluded that sufficient separate funds existed to purchase the securities. (This approach is similar to recapitulation of community income and expense.)

The court stated that the husband could have avoided this difficulty by contemporaneous, rudimentary record keeping. The court applied the presumption that a purchase of property during the marriage with funds from an undisclosed or disputed source, such as an account or fund in

which property has been commingled, is community property. The burden of establishing a spouse's separate interest in presumptive community property involves more than simply presenting proof at the time of litigation; it also requires keeping adequate records throughout the period of marriage. The court held that the professional reconstruction of records by the accountant was inadequate and awarded the husband only those securities that he never traded during the marriage.

The securities account was a margin account, and at the time of trial there was a margin-account debt of $38,000. The court did not permit deduction of this amount from the securities determined by the court to be community property because the husband did not introduce any evidence that the margin-account debt related to any of the securities determined to be community property.

In Wisconsin, margin-account debt should be classified when the debt is incurred. If a debt is incurred during the marriage, it is usually for a family purpose, and the assets thereby acquired are marital property. However, when the debt involves a margin account, it is arguable that the lender is looking primarily to the collateral (securities) in the account for repayment rather than to the income stream of the spouse. The classification of the debt determines the initial classification of the asset acquired. If the debt is subsequently satisfied from funds of a different classification, the issue of reimbursement versus ownership arises. *See infra* § 3.39.

4. Casualty Insurance [§ 3.29]

A building or tangible personal property asset identified as a spouse's individual property is normally insured against a casualty loss. If the premium on the casualty insurance is paid from marital property and a loss subsequently occurs, do the insurance proceeds take the classification of the asset insured or the classification of the insurance policy?

The court considered the situation in *Trahan v. Trahan*, 387 So. 2d 35 (La. Ct. App. 1980). Before marriage, the husband acquired as his separate property what later became the marital residence. The homeowner's insurance policy on the property was in the husband's name, but during the marriage he paid the $300 premium using

community funds. A fire occurred, and the insurance company paid the husband $46,560.

The question was whether the premium payment from the community funds caused the insurance proceeds to be classified as community property. The court held that it was the classification of the property insured, not the source of the premium payment, that determined the classification of the proceeds. Consequently, the community only had a right to reimbursement for the amount of the premiums paid. *See Saslow v. Saslow*, 710 P.2d 346 (Cal. 1985) (achieving same result regarding use of community property funds to pay premiums on private disability insurance contract and for payment of premiums for waiver of premium benefit in the event of disability on life insurance policies); *see also In re Marriage of Pearson-Maines*, 855 P.2d 1210 (Wash. Ct. App. 1993).

This result seems appropriate under Wisconsin's Act also, because although section 766.63(1) is predisposed toward the creation of ownership interests in situations in which marital property is expended, classifying the proceeds based on the source of the premium payment rather than on the classification of the property insured would convert a casualty loss on separate property to an inequitable windfall to the community. *See Bille v. Zuraff (In re Estate of Bille)*, 198 Wis. 2d 867, 543 N.W.2d 568 (1995) (regarding life insurance to secure a mortgage).

5. Income Tax Savings [§ 3.30]

During marriage, spouses frequently file joint income tax returns to reduce their tax liability. Is the amount of tax savings obtained through filing a joint income tax return, as compared to the tax obligation from filing separately, a marital asset? (This issue is different from the classification of an income tax refund.)

Bowart v. Bowart, 625 P.2d 920 (Ariz. Ct. App. 1980), concerned a husband's attempt to have the tax benefits realized from filing a joint return during marriage treated like community property, with the tax benefits analogous to retirement benefits and profit-sharing funds. Almost all the income reported on the returns was the wife's separate property. The court stated that the tax benefits from a joint return should not be treated like retirement benefits and should not be deemed community property. If community funds are used to pay a separate

income tax obligation, a right of reimbursement is created. *Saslow*, 710 P.2d 346.

D. Acquisition of Property [§ 3.31]

1. Single Payment in Full [§ 3.32]

After the initial classification of funds, the spouses' rights in assets purchased with those funds must be evaluated. If the property is acquired with a lump-sum payment that is partly marital property and partly individual property, a form of co-ownership results that recognizes the marital and individual ownership of each component. This is the rule in Wisconsin—*see* Wis. Stat. § 766.63(1)—and in all the community property states except Louisiana. Reppy & Samuel, *supra* § 3.12, at 80.

2. Acquisition on Credit—Classification of Debt [§ 3.33]

Most major acquisitions involve a loan. The loan may be a purchase money loan or a loan separate from the property acquired; in the latter case, the loan may be secured or unsecured. A loan raises two primary issues: first, its effect on the initial classification of the asset; and, second, whether the classification changes over time, based on the source of the payments used to reduce the debt. *See* William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* § 78 (1971 ed.).

In classifying an asset, all community property states consider the debt, and although they use different methods of analysis, all community property states presume that loans incurred during marriage are community obligations and that the loan proceeds and assets acquired with those proceeds are thus community property. An asset's classification is not determined solely by analysis of the funds used for the down payment. When an asset is purchased on credit before marriage, the entire asset is the acquiring spouse's individual property. The issue of what happens when an individual debt is satisfied with marital property is addressed in a later section.

Where property has been purchased with borrowed funds, the courts in classifying the property look to the point in time when consideration is

paid and title passes. When the seller parts with title upon being given a promissory note by a spouse, the effect is as if borrowed money had been used to make the acquisition, even though funds do not actually change hands. The historic rule is that the source of the funds used to discharge the loan, whether separate or community funds, does not affect the classification of the items purchased with the proceeds. The source does, however, give rise to a question of right of reimbursement. *Freeburn v. Freeburn*, 620 P.2d 773 (Idaho 1980).

If items purchased with borrowed funds are on hand at dissolution of the marriage or death, the items must be classified. While all the other community property states presume that loans during marriage are community obligations, the strength of the presumption and the method of analysis differ among the states. Texas has the easiest rule to apply for classifying credit acquisitions. It provides that all credit acquisitions during marriage are community property unless there is "clear and satisfactory evidence that the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction." *Mortenson v. Trammell*, 604 S.W.2d 269, 275 (Tex. Ct. App. 1980) (writ. ref'd n.r.e.). But see *Carter v. Carter*, 736 S.W.2d 775 (Tex. Ct. App. 1987), in which a margin debt was used to acquire securities and was subsequently satisfied from the proceeds from selling securities in the account. The court did not consider the margin debt to have caused any of the securities in the account to become community property. Similarly, in Nevada, proceeds of unsecured loans given on personal credit of the husband or wife are presumed to be community property. *Jones v. Edwards*, 245 P. 292 (Nev. 1926).

In California and Idaho, and apparently in Arizona and Washington, the presumption that the asset is community property is rebutted by showing that the lender made the loan based on a belief that the existence of separate property of the borrower made repayment likely. *See Shovlain v. Shovlain*, 305 P.2d 737 (Idaho 1956); *Finley v. Finley*, 287 P.2d 475 (Wash. 1955).

On the other hand, if a borrower in California, Idaho, Arizona, or Washington pledges separate property as security, the proceeds are presumed separate. *See Freeburn v. Freeburn*, 555 P.2d 385 (Idaho 1976). But what happens if the separate property pledged as security is the same property purchased with the loan proceeds after a down payment of separate property? Does a five percent down payment made with separate funds render the entire acquisition separate? Does the

other spouse's signature on the contract of purchase or mortgage note make the asset community property? When an asset is acquired during marriage and a debt is incurred, the other community property states use three approaches to determine the initial classification of the asset. One approach was set forth in *Cargill v. Hancock*, 444 P.2d 421 (Idaho 1968). The court held that the property was separate on the theory that simply incurring debt or signing the purchase contract was not enough to create community property; it was also necessary to make subsequent payments from community funds. Using a second approach, other community property states have found the signature alone sufficient to make the proceeds community property. *Finley*, 287 P.2d 475; *see also* Reppy & Samuel, *supra* § 3.12, at 93–96.

A third approach to determining the classification of an asset using funds obtained through a loan is found in California, where if money for the purchase of property is obtained on the credit of the community estate, the result is a community purchase. The lender's intent regarding the credit at the time the credit is given determines whether the community estate's credit has been used. In this respect, photographs and statements made after the purchase are not relevant.

Ford v. Ford, 80 Cal. Rptr. 435 (Ct. App. 1969), illustrates this approach. The spouses at all times were residents of California. The husband purchased a farm in Illinois by obtaining a bank loan. The note was signed by the spouses and was secured by a mortgage on two Illinois farms, also signed by both spouses. Payments on the note were made from the farm income, and there was no substantial evidence that the husband contributed his time, energy, or talent to the operation of the farms. The issue at divorce was whether the purchased farm was community property, based on the debt used for its purchase. Since there was no evidence that the bank considered the wife's occupation or income in granting the loan, the central issue was whether the wife's signatures on the note and mortgage indicated, in and of themselves, an intention on the part of the bank to hold the community estate responsible for payment.

Although the wife's signature on the note and mortgage raised the inference that if she had not executed the documents, credit would not have been extended, earlier California cases had held that a signature alone could not affect the rights of the parties. Consequently, the court in *Ford* held that the loan was a separate loan and the farm was the husband's separate property.

In Wisconsin, when an asset is acquired on credit during the marriage, the debt must be analyzed. If the debt were not considered, the down payment would be given undue weight, i.e., all appreciation or depreciation would follow the classification of the down payment. In Wisconsin, it appears that the first step in analyzing the debt is to determine the nature of the obligation created. That is, was the obligation incurred in the interest of the marriage or the family? If the obligation was incurred in the interest of the marriage or the family, the debt usually may be satisfied from all marital property. Wis. Stat. § 766.55(2)(b).

This approach follows the family-purpose doctrine used in Arizona, Louisiana, and Washington. In Wisconsin, almost all investment transactions are in the interest of the marriage or the family and thus may obligate all the marital property, whether or not the note is signed by both spouses. Given the obligation of marital property to satisfy the debt, it is likely that Wisconsin will develop a strong presumption that loan proceeds are marital property and that the asset they purchase is marital property.

The second step in analyzing the debt is to look at the specific circumstances of the loan. Not all loans incurred in the interest of the marriage or the family will be satisfied from marital property. For instance, in a situation in which a creditor has agreed to look only to individual property and predetermination date property, the debt will not necessarily be satisfied from marital property. *See* Wis. Stat. § 766.55(4).

Another instance in which the marital property result might not occur is one in which all the security for a loan is the individual property of the contracting spouse, and the individual security is not the asset being acquired. An additional instance is one in which there is no personal liability on the loan, and the creditor is looking only to the collateral, such as a loan against a life insurance policy. In that instance, the classification of the collateral should determine the classification of the loan proceeds.

3. Acquisition over Time [§ 3.34]

In addition to acquisitions made with a single payment, acquisitions during marriage may be made in which the consideration is paid over

time. In situations in which payment is in installments, title may be received immediately or after all payments are made. A land contract is the most frequently occurring type of transaction in which transfer of title is deferred.

When payment is over time, the issue is whether the property classification should be made at acquisition, when title is received, or periodically as the payments are made. It is also possible to find a gift between the spouses affecting classification, although in the acquisition situation, in contrast to some other situations, a gift is not presumed.

The community property states have developed three ways of determining ownership when payment is made over time. These three ways, the pro rata approach, the inception-of-title approach, and the time-of-receipt approach, are described below. The time-of-inception approach is most widely used in the other community property states but, as discussed below, Wisconsin is expected to use the pro rata approach.

No state uses a single theory consistently for all kinds of acquisitions occurring over time. Louisiana uses a time-of-vesting theory for real estate acquisitions, including those by adverse possession, but uses an acquisition-of-title theory for acquisitions of personal property and a pro rata theory for pensions. In California, an inception-of-right theory is used for adverse possession cases, a pro rata theory for installment purchase contracts, and a time-of-vesting theory in some deferred compensation contract cases. Reppy & Samuel, *supra* § 3.12, at 82. The classification question normally arises in the other community property states when title is in one spouse's name.

a. Pro Rata Approach [§ 3.35]

The pro rata (or tracing) approach provides for concurrent ownership like the concurrent ownership that stems from a lump-sum purchase. Reppy & Samuel, *supra* § 3.12, at 81. The focus is on the overall percent of consideration paid over time from each classification of property.

In existing community property jurisdictions, the pro rata approach has most frequently been followed in cases involving insurance and retirement benefits. *See, e.g.*, *Sims v. Sims*, 358 So. 2d 919 (La. 1978); *Porter v. MacLeod*, 553 P.2d 117 (Wash. Ct. App. 1976). It has also

been used in some cases involving installment-purchase contracts. *See, e.g.*, *Giacomazzi v. Rowe*, 240 P.2d 1020 (Cal. Ct. App. 1952); *Maskuns v. Maskuns*, 268 P. 1093 (Cal. Ct. App. 1928). On the other hand, the approach has been considered and rejected in some jurisdictions. *See, e.g.*, *In re Marriage of Harshman*, 567 P.2d 667 (Wash. Ct. App. 1977); *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. Ct. App. 1963) (writ ref'd). One problem with the pro rata approach involves determining the appropriate pro rata shares. The California cases have treated the initial payments made years before the debt was fully satisfied as buying the same share of ownership as the last payment. If the obligation is amortized over time, as occurs in the typical mortgage situation, the payment amount remains constant, but the initial monthly payments are nearly all interest and the later payments nearly all principal, and only the principal portion is considered in determining the pro rata ownership of each classification. Reppy & Samuel, *supra* § 3.12, at 82–83.

In Wisconsin, it is likely that preference will be given to the pro rata or tracing approach because the ownership interests created are most consistent with the source of payment. The pro rata approach best recognizes the statutory intent that an ownership interest be created when property is mixed, and the approach permits each interest to share in the appreciation or depreciation of an investment in proportion to its respective contribution. *See* Wis. Stat. § 766.63.

b. Inception-of-title Approach [§ 3.36]

The inception-of-title approach focuses on the initiation of the transaction. Under this rule, if one spouse enters into a purchase contract before marriage, the property is separate even though all payments are made during marriage from community property. The community has a claim only for reimbursement. On the other hand, if one spouse enters into a purchase contract during the marriage, the property may be community property even though all payments are made from separate property. The spouse's separate estate has a claim only for reimbursement.

The inception-of-title approach is illustrated in *Winn v. Winn*, 673 P.2d 411(Idaho 1983), which involved an installment purchase by a husband and wife of their principal residence. The spouses purchased a house, and the husband paid the earnest money and the down payment from his separate funds. A loan for the remaining purchase amount was

secured by a deed of trust on the house. Although both spouses were named in the contract and signed the promissory note and deed of trust, all payments during the marriage were made from the husband's separate funds. When the parties filed for divorce, the question was whether the residence was community property even though all payments had been made from separate property.

Under the inception-of-title approach, it is crucial to ascertain when property purchased through credit is acquired for the purposes of community property law; the answer "lies in the basic rule that 'the character of an item of property as community or separate vests at the time of acquisition.'" *Id.* at 414; *see also Freeburn v. Freeburn*, 555 P.2d 385 (Idaho 1976). Property purchased with money borrowed by either spouse during the existence of the community is presumed community property. Moreover, the property cannot be gradually converted from community property to separate property by one spouse making payments on a community debt from his or her separate funds. Otherwise, one spouse could unilaterally transform the property's classification, violating the doctrine that the classification of property may be changed only by agreement between the spouses.

Most commonly, the collateral for the loan is the very asset for which the loan is obtained. When, however, security is provided for a loan apart from the asset being acquired, the rule is different. The loan proceeds made upon the security of one spouse's separate estate are sometimes separate, whereas those made upon the security of the community estate are community. Finally, under the inception-of-title approach, an agreement as to the classification of an asset controls.

The court in *Winn* held that the loan was a community loan, and thus, the character of the entire property was community. The holding was based on the fact that the house was deeded to both the husband and wife and that each had signed the promissory note and deed of trust. Furthermore, the lender's first option in the case of default would have been to foreclose on the property. In reaching its conclusion, the court considered the liability of the community for the loan, the source of repayment, the basis of credit upon which the lender relied, the source of the down payment, the names on the deed, and which parties signed the loan documents.

The court did not allocate a proportionate interest in the home to the husband's separate estate based on his down payment. The court did

give the husband a right to reimbursement for the payments from his separate funds made on the community obligation in the absence of a finding that the contributions were intended as a gift to the community. The court also found that after the wife left the residence, she was entitled to receive one-half of the fair rental value of the property as rental for the husband's occupancy. For other illustrations of the inception of title approach, see *McCurdy*, 372 S.W.2d 381; *Carter v. Carter*, 736 S.W.2d 775 (Tex. Ct. App. 1987); and *Potthoff v. Potthoff*, 627 P.2d 708 (Ariz. Ct. App. 1981). *See also McVay v. Parrish (In re Parrish)*, 161 B.R. 785 (W.D. Tex. 1992), *aff'd*, 7 F.3d 76 (5th Cir. 1993).

The inception-of-title approach will probably not be the general rule used in Wisconsin. Both the Act's definition of acquiring and the comments to UMPA indicate that satisfaction of a debt creates an ownership interest. The Act appears to reject the concern of change of classification from the unilateral action of one spouse.

c. Time-of-receipt Approach [§ 3.37]

The time-of-receipt approach is used when receipt of title is deferred. This approach focuses on the marital status when the unencumbered title is received or the transaction is closed. The source of payments for the purchase is not determinative unless the entire consideration was paid from separate funds. If a community contribution was made, the separate estate has only a right of reimbursement. Reppy & Samuel, *supra* § 3.12, at 81. This approach has not been widely accepted outside Louisiana. It may, however, be equitable in adverse possession situations, when no interest arises until the entire period has expired.

This approach was explained in *Cosey v. Cosey*, 364 So. 2d 186 (La. Ct. App. 1978), *aff'd*, 376 So. 2d 486 (La. 1979). In *Cosey*, the husband entered into a bond-for-deed contract to purchase real estate during his first marriage. The contract was paid during that marriage using community funds. After the last payment, but before title was delivered, the couple divorced and the husband remarried. Thereafter the owners of the real property acquired good title and issued a deed to the husband and his second wife. The first wife died, and twelve years later the husband died survived by his second wife. The administrator of the husband's estate brought an action against the second wife, asking that the parcel of real estate be found to be community property of the first marriage.

The intermediate court held that because the title was acquired during the second marriage, the property belonged to the community of the husband and his second wife. The supreme court reversed on the ground that under the facts of the case, title vested when the vendor was contractually obligated to have delivered the deed. Because that point was when the final payment was made, the real estate was community property of the first marriage.

E. Transmutation to Joint Tenancy or Tenancy in Common [§ 3.38]

The other community property states find that title taken by the spouses in joint tenancy or tenancy in common are ownership forms inconsistent with community property. Thus, if community property funds are used to acquire an asset in joint tenancy or tenancy in common, the community is not entitled to reimbursement. The parties have the ownership rights of joint tenants or tenants in common. Community property ownership and reimbursement theories do not apply unless otherwise expressly provided by statute. *Gonzales v. Gonzales*, 172 Cal. Rptr. 179 (Ct. App. 1981); Cal. Fam. Code Ann. §§ 2581, 2640 (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. 20 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot).

In Wisconsin, after the determination date, spouses can only create a joint tenancy or tenancy in common exclusively between themselves by using a marital agreement. Other attempts are ineffective. An attempt to create a joint tenancy will create survivorship marital property; an attempt to create a tenancy in common will create marital property. Wis. Stat. § 766.60(4)(b). Thus, an unintentional reclassification of individual property or predetermination-date property may occur if one spouse attempts to place the individual or predetermination-date property in a joint tenancy or tenancy in common with the other spouse.

A joint tenancy or tenancy in common between spouses can be created by spouses after the determination date only under a marital agreement. The terms of the marital agreement will govern the disposition and respective rights in the joint tenancy. If the agreement has no provisions governing the disposition and rights, the rules applied in the other community property states should apply. Thus, if under a marital agreement and after the determination date, spouses place marital

property in a joint tenancy between themselves, that should constitute a transformation in the character of the asset. The result is that joint-tenancy rules rather than marital property rules apply to the asset. *See supra* § 2.252. If the joint tenancy so created is terminated, it is unclear whether the funds received are transformed back to marital property, or whether they become individual property of the spouses.

The conclusion that a transformation has occurred is consistent with the analysis in a number of Wisconsin divorce decisions. In *Trattles v. Trattles*, 126 Wis. 2d 219, 376 N.W.2d 379 (Ct. App. 1985), the wife deposited gifts from her father either in a separate bank account in her name or in a joint bank account. The funds were used for household furnishings, normal household expenditures, maintenance and improvements, and various mortgage payments on the residence owned in joint tenancy between the spouses. There was no express evidence of the wife's intention to make a gift to her husband of the funds received from her father. The court held, however, that the actions of the wife in using the gift proceeds on the jointly owned home and for the benefit of the family served as evidence of her donative intent.

The court concluded that the character of all property received by gift was altered so as to render its present form property subject to division under section 767.255 (now numbered section 767.61). The transfer of inherited property to joint tenancy changes the character of the ownership in the entire property to property subject to division. With regard to expenditures for household furnishings not titled in the name of either spouse, the court examined the way the parties treated the property to determine if its character had been altered. The court found that because the items in this case were usually purchased for the mutual enjoyment and use of both spouses, it was appropriate to infer such transmutation. *See also Bonnell*, 117 Wis. 2d 241; *Weiss*, 122 Wis. 2d 688.

In *Fowler*, 158 Wis. 2d 508, the wife received cash gifts from her father, a portion of which were deposited in a joint checking account. Funds from the joint checking account were later used to purchase securities registered in her sole name. The issue was whether, for property division in a divorce, the securities were property acquired by gift or inheritance. The court held that by depositing the funds in a joint checking account, the wife intended to make a gift to the family. The deposit caused the property to lose its character as property acquired by gift or inheritance. This is the first case holding that a deposit into a joint

bank account, being a statutory creation as opposed to a true common law joint tenancy, is sufficient to change the character of the funds deposited.

The parties in *Steinmann v. Steinmann*, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145, were married in 1994 and began divorce proceedings in 2004. Both parties had been previously married. During the marriage, the parties entered into a limited marital property classification agreement, which provided that all property listed on Schedule A was the respective individual property of each party, all earnings of each party after the date of marriage were the individual property of the earning party, and all property acquired from a third party by gift or inheritance was the individual property of the recipient spouse. The classification of assets was to determine property division in the event of a divorce. The agreement was backdated to March 3, 1995. In a separate proceeding, the court determined that the agreement was valid and binding on the court for property division purposes.

During the marriage, the wife used her individual property as classified by the agreement to purchase three residential properties and two boat slips, all of which were jointly titled. The issue before the court was whether the rules of tracing and transmutation (character and identity) were applicable to determining whether the jointly titled assets owned at the time of divorce were divisible. The identity and character doctrines assist courts in determining whether an asset was acquired by gift or inheritance and, if so, is specifically exempted by statute from property division. The wife advocated that tracing be applied and argued that if tracing was utilized, it would establish that all the jointly titled properties were in fact her individual property. The husband argued that the court should not use tracing but instead should apply the transmutation rules, and that this would result in the jointly titled property being divisible in divorce. The supreme court held that the character and identity analysis that is applied for determination of gifted and inherited property could properly be used to determine which assets were divisible when applying a marital property agreement. Pursuant to those rules, the parties' use of nondivisible property to purchase assets that were then titled jointly caused the assets to become divisible property.

The Act includes a statutory terminable marital property classification agreement and a statutory terminable individual property classification agreement. Wis. Stat. §§ 766.588, .589; *see also infra* §§ 7.73, .83.

Although the statutory agreements as originally enacted dealt with the property law consequences of the agreements upon assets owned in joint tenancy or tenancy in common, it was unclear whether those agreements affected funds held in a joint account created under chapter 705. Both agreements provided that to the extent the incidents of joint tenancy conflicted with or differed from the incidents of individual property or marital property, respectively, the incidents of joint tenancy, including the incident of survivorship, control. Wis. Stat. §§ 766.588(1)(c)4., .589(1)(c)2. The uncertainty arose because joint accounts are not traditional joint tenancies. Assets classified as individual property or as marital property would not have the survivorship feature. The Act was amended by the 1992 Trailer Bill to clarify that the statutory agreements under sections 766.588 and 766.589 do not affect the incidents of joint accounts under chapter 705, including the incident of survivorship. Wis. Stat. §§ 766.588(1)(d)2., .589(1)(c)1.

In addition to being used to create a new joint tenancy after the determination date, marital property may be added to a joint tenancy or tenancy in common created before the determination date. The classification of marital property added to a joint tenancy or tenancy in common is discussed at sections 2.252–.260, *supra*.

Under the Act, when marital property is added to a joint tenancy or tenancy in common, if the incidents of the joint tenancy or tenancy in common conflict with or differ from the incidents of the property classification under chapter 766, then the incidents of the joint tenancy or tenancy in common, including the joint tenancy incident of survivorship, control. Wis. Stat. § 766.60(4)(a). The marital property added to the preexisting joint tenancy or tenancy in common is not, however, reclassified. Instead, the addition of marital property to a preexisting joint tenancy invokes application of the general mixing rules of section 766.63(1).

F. Satisfying Debts or Making Improvements with Property of a Different Classification [§ 3.39]

An asset's initial classification is determined when it is acquired. A question arises when funds of a different classification are thereafter used to reduce indebtedness or improve the property. This is different from the situation in section 3.34, *supra*, because in this situation a classification of the asset has occurred, normally because of inheritance,

gift, or acquisition before marriage, and community property is subsequently used to reduce the debt. For example, if a spouse inherits a cottage and finances a substantial addition to it with marital property, does the cottage remain entirely individual property? As a further example, if a residence acquired before marriage has a mortgage and payments on the mortgage are made in part with marital property, does the residence remain entirely individual property? The steps to analyze this issue are discussed in the following sections.

1. Gift Analysis [§ 3.40]

When considering the effect of subsequent payments using funds of a different classification, the first inquiry is whether a gift has been made. *See Washington Deskbook*, *supra* § 3.20 (discussion of gift rules). If a gift is established, the mixing rules of section 766.63 do not apply. No gift is presumed if marital property is used by a spouse to improve his or her individual or predetermination date property. *See Warren v. Warren*, 104 Cal. Rptr. 860 (Ct. App. 1972). If, however, one spouse uses marital property to improve the other spouse's individual property or predetermination date property or uses his or her individual property or predetermination date property to improve marital property, a gift may be found. California, Idaho, Arizona, and Nevada generally presume a gift was made in these situations. *Cooper v. Cooper*, 635 P.2d 850 (Ariz. 1981); *Warren*, 104 Cal. Rptr. 860; *Shovlain v. Shovlain*, 305 P.2d 737 (Idaho 1956); *Lombardi v. Lombardi*, 195 P. 93 (Nev. 1921). (Many of these cases were decided before the change to a community property system based on equal management and control; this change should not affect the result, however.) It is possible to rebut the gift presumption, and rebuttal testimony by spouses has generally been accepted.

In Wisconsin, the Act does not indicate whether a gift is presumed. In early drafts of the Act, gift presumptions were included. These were not incorporated in the Act as adopted, and it appears likely that Wisconsin will use the mixing statute and not utilize gift presumptions. However, in each instance in which an improvement is made or indebtedness is reduced using property of a different classification, it is necessary to determine whether a gift was in fact made before applying the mixing statute. Finally, in Wisconsin, the limit on the amount of gifts does not apply because the gift is to a spouse and not a third party. Wis. Stat. § 766.53.

The gift analysis was applied in *Warren*, 104 Cal. Rptr. 860. In California, when a spouse uses community funds to improve his or her own real property, a form of the tracing doctrine applies to prevent the spouse from profiting from a constructive breach of fiduciary duty to the other spouse. When, however, one spouse uses community funds to improve the separate property of the other spouse, there is no tracing, and any right to reimbursement is made solely on the basis of a specific agreement.

In *Warren*, the spouses stipulated that $38,000 of community funds were used during marriage to improve a building that was initially the wife's separate property. At the time of divorce, the building was worth only $33,952. The court found that no gift was intended. The court stated that reimbursement was based on the commingling that constituted a breach of trust; the injured party (the husband) was entitled to the amount expended or the enhanced value, whichever was greater. Thus, the court held that $38,000 should be reimbursed to the community.

2. Satisfaction of Debt [§ 3.41]

When community funds are used to reduce indebtedness on a separate property purchase-money mortgage or land contract, and no gift was made, most states treat the situation as raising only a right of reimbursement. This is technically correct because title to property purchased with borrowed funds vests at the time of the acquisition of the property, not as repayment of the loan occurs. Subsequent repayment of the loan does not acquire any interest but merely reduces indebtedness. *See Rogers v. Rogers*, 754 S.W.2d 236 (Tex. Ct. App. 1988); *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988); de Funiak & Vaughn, *supra* § 3.33, at § 78. Nevertheless, some of the other community property states have recognized that reimbursement frequently fails to fairly compensate the community for the benefit realized by the use of the separate property. Thus, these states have permitted the community to acquire an interest in the property as the debt is reduced.

In Wisconsin, whether such payments give rise to a right of reimbursement or create an ownership interest is not stated in the Act or the legislative history. As indicated previously, however, the Act and UMPA have a preference for ownership interests rather than reimbursement rights. *See* Wis. Stat. §§ 766.01(1), .63; UMPA § 14 cmt.; *supra* § 3.12. The Act and UMPA define reducing a debt as a form

of acquiring property. Further, the classification statute does not provide that individual property can be increased through the use of marital property. Wis. Stat. § 766.31. Thus, if no gift is found, it is likely that Wisconsin will use an approach that provides an ownership interest. Some of the other community property states are moving in this direction from the traditional reimbursement rule, and some of the cases that illustrate this move are set out below.

In *Popp v. Popp*, 146 Wis. 2d 778, 432 N.W.2d 600 (Ct. App. 1988), the husband had inherited stock in a closely held corporation. During the marriage, the spouses became contingently liable for nearly $2 million of corporate debt. The debt was secured by all the business assets, a pledge of the husband's interest in the closely held business itself, and a second mortgage on the parties' homestead. Some of the debt was satisfied from proceeds of the subsequent sale of the parties' homestead. In addition, the corporation purchased tangible personal property (e.g., automobiles, a boat, and camera equipment), which the parties used for their personal benefit. The circuit court held that the parties' personal use of certain corporate assets as well as their pledge of certain marital property assets as collateral for corporate debts caused a change in the character of the stock itself for property division purposes.

The appellate court reversed. It held that using corporate monies for the purchase of tangible items and allowing the items to be used by the spouses personally may have served to transmute those items into divisible property. However, this use was not sufficient to transmute the corporate stock into divisible property. The purchase and use of assets was at most a withdrawal from the corporation, like a dividend, and not a commingling of the stock ownership interest.

A character analysis addresses the manner in which the parties have titled or treated the exempt asset. Thus, the inquiry should focus on the asset (here, the stock), not on other assets that may be pledged as collateral against the corporation's debts. In *Popp*, the wife's agreement to accept contingent liability on the company's debts did not affect the character of the exempt assets. *Popp* is a divorce case, but the analysis would be the same in property classification.

Popp supports the conclusion that marital property assets and income can be used to secure a loan to a corporation, the stock of which is classified as individual property, without changing the classification of

the stock. This would not be the case if a capital contribution were made or if the business were conducted as a sole proprietorship.

In *Derr v. Derr*, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170, the husband's parents gave him a 27-unit apartment building, titled in his sole name, during his marriage. Five years later, both spouses borrowed $300,000 and used those funds for the benefit of the marriage. Although the couple did not use any of the funds for the apartment building, the $300,000 loan was secured using the apartment building as collateral. The mortgage note was signed by both spouses, and the mortgage payments were made with marital property funds. At the time of the divorce, $282,935 remained due on the mortgage loan, and the apartment building had a fair market value of $905,000. During the marriage, the husband managed the 27-unit apartment building, as well as other smaller apartment buildings. The rental income from these properties was the major source of income for the family.

The court held that the apartment building remained the husband's nondivisible property. However, the court determined that the mortgage debt was divisible and thus should be allocated one-half to each party. The court found that the $300,000 debt was replaced by $300,000 of funds that were used for the benefit of the family. The use of marital property funds to reduce that debt only reduced a joint debt of the parties for which they had received cash used in the marriage. The use of the apartment building as collateral did not create a presumption of a gift by the husband to the marriage.

The court agreed that if the marriage purchased an equity in real estate, then that the equity would be divisible. In this case, however, the mortgage payments did not purchase an equity in the apartment building. The payments did not increase the husband's wealth; they reduced a marital debt. The only benefit the husband obtained from the mortgage payments was a reduction in the risk that he created when he used the building as collateral. Thus, the mere act of putting property at risk by using it as collateral for a marital loan does not create a presumption that the owning spouse intended to donate part or all of the property to the marriage.

The Wisconsin approach regarding debt satisfaction may follow the decision in *Torgerson v. Torgerson*, 128 Wis. 2d 465, 383 N.W.2d 506 (Ct. App. 1986). In this case, the wife purchased a duplex solely in her name during the marriage. She used inherited funds for the down

payment. The parties lived in one-half of the duplex and leased the other unit. The mortgage note was signed by the wife alone, but the mortgage itself was signed by both spouses. The mortgage payments were made primarily from the rental proceeds. The husband did not claim that as a result of the manner in which the parties had chosen to treat the property there had been a change in the character of the property attributable to the down payment, but he did contend that the rest of the duplex was purchased with income during the marriage and thus was divisible.

The circuit court held that the duplex was not a divisible asset. The appellate court reversed and held that only the down payment had been made with inherited funds. Property purchased with earnings during the marriage is not excluded from division. The court did not deal with whether any appreciation in the value of the property during the marriage could be allocated to the equity created by the down payment.

Bille v. Zuraff (In re Estate of Bille), 198 Wis. 2d 867, 543 N.W.2d 568 (1995), dealt with a home purchased by the wife before marriage and used as the parties' principal residence during the marriage. At the date of marriage there was an outstanding mortgage on the property and mortgage payments were made from marital property income. In 1986, the balance was paid when a new $40,000 mortgage was obtained. In 1987, a second mortgage was used for a loan of $8,688. In 1988, a new loan for $48,000 was obtained and used to pay off the balance on the two prior loans. All mortgage payments were made from marital property funds. The wife died and the husband claimed the residence was reclassified as marital property.

The court held that the fact that the residence was traceable precluded reclassification. The husband did not present evidence of the total monthly mortgage payments. The court held that (1) when the 1986 loan proceeds were used to satisfy the premarriage obligation, the husband had a remedy to recover one-half of that amount as his individual property; (2) there is a one year statute of limitation on the remedy, and no timely claim was made; and (3) the definition of *acquisition* in the Act does not usurp a valid section 766.63(1) nonmarital-component retention analysis.

In *Noble v. Noble*, 2005 WI App 227, ¶ 20, 287 Wis. 2d 699, 706 N.W.2d 166, the court characterized a number of cases cited by the wife as inapplicable to the issue at hand, namely, whether it constitutes marital waste for a party to fail to secure additional assets that would

have increased the marital estate's value for purposes of property division. Among the cases the court held inconsequential was *Antone v. Antone*, 645 N.W.2d 96 (Minn. 2002), in which the Minnesota Supreme Court set forth another approach for dealing with the appreciation of property acquired before marriage when a mortgage obligation is satisfied during the marriage using marital property funds. In *Antone*, the Minnesota court characterized the equity created through payments made with marital funds to reduce a mortgage on a property acquired before marriage as divisible property. The *Antone* court allocated the appreciation between the divisible and nondivisible property using a formula in which the value of the nonmarital interest at the time of the marriage is compared to the value of the property at the time of marriage and the fraction is multiplied by the value of the property at the time of separation. That portion of the appreciation is not divisible, while the balance is divisible. In *Noble*, the court gave no indication that it would endorse this formula for use in Wisconsin.

The Arizona court allowed a participation in the enhanced value of the asset in *Honnas v. Honnas*, 648 P.2d 1045 (Ariz. 1982). The dispute in that case involved the family residence, which the husband had owned before marriage, and which had substantially appreciated in value during the term of the marriage. During the marriage, two rooms were added that were partially paid for with community funds, a portion of the principal of the mortgage was paid with community funds, and the wife contributed substantial labor and maintenance services to the house.

The court stated that it had discarded the all-or-nothing rule in situations in which appreciation of property resulted from multiple factors. It held that although the profit resulting from the combination of separate property and community labor must be apportioned according to the contribution, the property itself took its character as separate or community when acquired and retained that character even if there was a subsequent marriage. The residence thus remained the husband's separate property, and the wife's interest was not one of title. The community was, however, entitled to share in the enhanced value of the property that resulted from the expenditure of community funds and labor. The court stated that the amount could be based on the amount of community funds spent (i.e., reimbursement) or on the value of the property at the dissolution of the marriage. For real estate cases, the court decided that the value at dissolution was the appropriate formula. *See also Lawson v. Ridgeway*, 233 P.2d 459 (Ariz. 1951).

The approach used by the Arizona court permits equity at dissolution. In Wisconsin, equity at dissolution is obtained under the statute providing for equitable division of property at dissolution. Wis. Stat. § 767.61. The Arizona approach is inadequate during marriage because the asset is not reclassified as marital property. If the approach were adopted in Wisconsin, the nontitled spouse could not use the asset to obtain credit nor would the statutory remedies be available. The Arizona approach is also inadequate at the death of the nonowning spouse because all the property remains the separate property of the surviving spouse and is not subject to testamentary disposition.

California, like Arizona, permits the community to share in the appreciation of an asset in proportion to the amount the community expends to reduce the indebtedness. California accomplishes this by reclassifying the asset and thus avoids the problems in *Honnas*. The leading case is *Moore v. Moore*, 618 P.2d 208 (Cal. 1980). In that case, the wife, before marriage, purchased a house for $56,640.57, paying $16,640.57 as a down payment. The credit balance was secured by a mortgage on the house. Before marriage, the wife made seven payments on the loan principal, thereby lowering the balance due by $245.18. During the marriage, community funds were used to make the mortgage payments, reducing the principal balance by $5,986.20. At the time of the trial, the house had a value of $160,000, and the couple's equity therein was $126,812.45.

In deciding the case, the court noted that when community funds are used to make payments on property purchased by one of the spouses before marriage, the community receives a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds. This rule excludes the portion of payments for interest and taxes. The spouse is entitled to share in the increase in fair market value of the property rather than only obtaining reimbursement. The court also noted that decisions in other community property jurisdictions (Arizona, Idaho and Washington) are in accord. *Hanrahan v. Sims*, 512 P.2d 617 (Ariz. Ct. App. 1973); *Gapsch v. Gapsch*, 277 P.2d 278, 283 (Idaho 1954); *Merkel v. Merkel*, 234 P.2d 857, 864 (Wash. 1951); *Drahos v. Rens*, 717 P.2d 927 (Ariz. Ct. App. 1985); *see Washington Deskbook*, *supra* § 3.20.

In *Moore*, the loan was made before marriage and thus was a separate property contribution. The court computed the separate property percentage interest in the home. This was the amount of the down

payment ($16,640.57) plus the full amount of the loan ($40,000), reduced by the amount of the loan paid from community property ($5,986.20). This left a total separate contribution to the purchase of $50,654.37. This sum, divided by the purchase price, yielded a separate property share of 89.43%. The separate property was thus 89.43% multiplied by the $103,359.43 of appreciation in the property plus the down payment and principal reductions made by separate funds.

The community property percentage was found by dividing the amount of mortgage payments made with community property ($5,986.20) by the purchase price, producing a community interest of 10.57%. That percentage multiplied by the $103,359.43 of appreciation was added to the amount paid by community funds to give a total community share of $16,911.29. The community amount was then divided between the spouses.

In *In re Geise*, 132 B.R. 908, the wife purchased a residence for $50,000. She made a $9,100 down payment from her individual property and borrowed the balance on a mortgage note. During the marriage, the wife's marital property wages were used to make the mortgage payments. On the date that the husband filed for bankruptcy, the mortgage note's principal balance had been reduced to $40,640.

At the time that the petition was filed, the home had appreciated in value by $3,120. In determining what portion of the residence was marital property, the court adopted the formula used in *Moore*. Thus, the bankruptcy estate was entitled to all marital property owned by the parties, namely the $260 reduction in the mortgage balance during the marriage and a share in the appreciation of the residence determined by the marital property investment in the house. Of the total value of the home, .52% of the appreciation realized before filing of the bankruptcy petition was also part of the bankruptcy estate. The court concluded that the reduction of the note's principal balance and share of the appreciation was de minimis and found that the entire residence had retained its individual property classification and was not part of the husband's bankruptcy estate.

The decision in *Moore* was followed in *Marsden*, 181 Cal. Rptr. 910. In *Marsden*, however, an additional fact was that the husband had owned the property for nine years before marriage and the home's value had appreciated during those nine years. The court held that the husband should have the benefit of the prenuptial appreciation and added the

prenuptial appreciation into the *Moore* formula as a separate contribution. *See also Dorbin v. Dorbin*, 731 P.2d 959 (N.M. Ct. App. 1986).

Washington has adopted a similar approach. *Elam v. Elam*, 650 P.2d 213 (Wash. 1982). New Mexico also reaches a similar result through a theory of doing substantial justice. *Portillo v. Shappie*, 636 P.2d 878 (N.M. 1981). Wisconsin likely will adopt the California approach.

Classifying an asset in cases in which both spouses have died and there is no evidence as to what money was used to reduce the indebtedness on a spouse's separate property raises the need for presumptions, because the classification of the funds expended during the marriage must be determined. Most states presume that separately owned funds, if available, were spent to reduce a debt on separate property. *Suter v. Suter*, 546 P.2d 1169 (Idaho 1976); Reppy & Samuel, *supra* § 3.12, at 109. This presumption applies to mortgage payments made during the marriage. However, in California the rule is that no presumption exists, and in Arizona it is presumed that community funds were used to pay off a mortgage on separate property, but that separate funds were used to build a house on separate land. *Sommerfield v. Sommerfield*, 592 P.2d 771 (Ariz. 1979); *Seligman v. Seligman*, 259 P. 984 (Cal. Ct. App. 1927). Wisconsin is likely to follow the majority and presume that separately owned funds were spent to reduce a debt on separate property, because this result is consistent with the presumptions in the family-expense doctrine. *See supra* § 3.20.

3. Improvements [§ 3.42]

Once it is determined that there is no gift, if an asset has been physically improved using funds of a different classification the issue is whether the improvement retains the classification of the original property or whether a mixed asset is created. *See Washington Deskbook*, *supra* § 3.20 (discussion of issues when property of one classification is improved using funds or labor of a different classification). Most state decisions follow the fixtures doctrine, whereby the improving estate is entitled to reimbursement of the amount expended but the improved asset retains its original classification. *See* Reppy & Samuel, *supra* § 3.12, at 106; *see also Rogers v. Rogers*, 754 S.W.2d 236 (Tex. Ct. App. 1988); *Potthoff v. Potthoff*, 627 P.2d 708 (Ariz. Ct. App. 1981). If the expenditures relate merely to the maintenance of the property and do not

add to its value, no reclassification occurs. See *In re Czerneski*, 330 B.R. 240 (Bankr. E.D. Wis. 2005), which held that the payment of real estate taxes on a vacant lot classified as individual property using marital property funds only maintained the property and, thus, did not create a marital property interest in the property. The other community property states are divided on whether reimbursement should be ordered. Reppy & Samuel, *supra* § 3.12, at 107. For example, should lawn-service expenses be reimbursed? It has been held that community property funds can be used to paint and repair a separate rental duplex when the rental income is classified as community property. *Bridges v. Osborne*, 525 So. 2d 337 (La. Ct. App. 1988).

A small minority of California cases reject the fixtures doctrine and hold that the improving estate owns the improvement. Thus, in these cases, if the spouse uses community funds to build a house on his or her separate land, that spouse would continue to hold the land as separate property but the community would own the house. *Id.* This approach is consistent with the ownership preference of the Act. It is also consistent with the result when an asset is improved through substantial undercompensated labor. Wis. Stat. § 766.63(2). As a general rule, however, this approach is more difficult to apply than the fixtures doctrine because expenditures for a new roof or kitchen remodeling create ownership interests that are difficult to separate or measure.

A third alternative for dealing with physical improvements was set forth in *Sparks v. Sparks*, 158 Cal. Rptr. 638 (Ct. App. 1979). In that case, a house was built on community property with the wife's separate funds, and no gift was intended. The house represented the principal value of the property. The court held that it would be unfair to apply the fixtures doctrine and instead allowed the wife's separate estate to buy into the present fair market value of the house and land in the ratio that the original cost of the house had to the value of the land at the time of construction.

If the fixtures doctrine is followed, it is necessary to determine the amount of reimbursement. In some states, no reimbursement is permitted when separate funds are used to improve community property absent an agreement for such reimbursement. *Fabian v. Fabian*, 715 P.2d 253 (Cal. 1986). The issue is whether the reimbursement should always be for the amount expended or should be limited to the enhanced value of the property if this is less. In many decisions, the enhanced value of the property has been used as a limit on the amount of

reimbursement. *See, e.g.*, *Bazile v. Bazile*, 465 S.W.2d 181 (Tex. Ct. App. 1971) (writ dismissed w.o.j.). In *Warren*, 104 Cal. Rptr. 860, however, the larger amount was reimbursed. *See supra* § 3.40. In situations in which community funds are used to bring a separate mineral estate into production, reimbursement is limited to the amount spent. Reppy & Samuel, *supra* § 3.12, at 107.

In Louisiana, reimbursement is the amount expended regardless of the enhancement of value. La. Civ. Code arts. 2364–67 (West, WESTLAW current through the 2009 regular session). This is similar to an interest-free loan, and this rule makes sense when the property improved is earning income that is community property (as in Wisconsin) or when the family is occupying the property or deriving some other benefit from it. The community does not, however, share the appreciation. Under this approach, reimbursement can include amounts spent for real estate taxes, interest, and routine maintenance. It is inconsistent, however, with the *Moore* approach. *See supra* § 3.41.

Idaho, which has the same income rule as Louisiana and Wisconsin, usually measures reimbursement by the enhanced value at dissolution. *Hiatt v. Hiatt*, 487 P.2d 1121 (Idaho 1971). This generally ensures equity for the community because the income is community property and the enhanced-value test allows the capture of a share of unrealized capital gain. In Texas, which also follows the rule, reimbursement is deemed an equitable claim and community expenditures must exceed community benefits before reimbursement is ordered. Community benefits include occupancy, income, and income tax deductions. Occupancy is offset against the community claim for reimbursement for taxes, insurance, and interest paid on separate property but not against a community reimbursement claim for reduction of indebtedness on separate property. *Hawkins v. Hawkins*, 612 S.W.2d 683 (Tex. Ct. App. 1981); *see also* Reppy & Samuel, *supra* § 3.12, at 108–09.

G. Assertion of Mixing Rules by Creditor [§ 3.43]

The final question in connection with mixing property having different classifications is whether a creditor may take advantage of a spouse's right to reimbursement or obtain an ownership interest in property titled in the name of the other spouse. In most of the other community property jurisdictions, spouses—and therefore their creditors—must await termination of the community to assert

reimbursement and ownership claims. Reppy & Samuel, *supra* § 3.12, at 109. In California, this rule is followed unless the community estate is left insolvent when the contribution to the separate estate is made. In Washington, however, the court in *Conley v. Moe*, 110 P.2d 172 (Wash. 1941), permitted a creditor who was entitled to collect from the community to seize the community's claim to reimbursement during the existence of the community.

In Wisconsin, there is no time restriction for asserting the mixing rule, and normally the spouse will have acquired an ownership interest in the property. It is marital property that the spouse may use to obtain credit and that is subject to the remedies provisions during marriage. As such, it appears that a creditor may use the mixing statute during marriage to satisfy an obligation incurred in the interest of the marriage or the family.

H. Appreciation through Labor [§ 3.44]

1. General Rules [§ 3.45]

In addition to mixing by the use of marital funds, a second type of mixing occurs when a spouse applies labor to the property, other than marital property, of either spouse. Under the Act, substantial labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity applied to either spouse's property other than marital property creates marital property attributable to that application if reasonable compensation was not received and substantial appreciation results from the application. Wis. Stat. § 766.63(2).

The statute does not organize the analysis of whether labor has created marital property. However, it seems appropriate to consider first whether substantial labor was applied. The comment to section 14 of UMPA states that the rule is strict and has a bias against the creation of marital property from personal effort, unless the effort is substantial. As the comment explains, "Routine, normal, and usual effort is not substantial." The comment states that "[r]eal property transactions are those in which the problem will typically occur. This might be work on a farm, or improvements or additions to a home or to a piece of commercial real estate." The substantial effort requirement of the Act is not easy to apply. For example, if a spouse puts a new roof on an inherited cottage, it is an improvement to the asset. Is this substantial labor? If a spouse builds an addition to the cottage, is this substantial

labor? What, by contrast, is routine, normal labor? Is it limited to regularly recurring maintenance? The Act provides no answer; however, labor that constitutes only recurring maintenance should not create marital property. In *Josephson v. Josephson*, 772 P.2d 1236 (Idaho Ct. App. 1989), the court held that labor expended to remodel the interior of a residence, construct a patio, and landscape the property at a cost of $20,000 did not enhance the value of the property; thus, no reimbursement was appropriate.

The Act attempts to avoid the valuation of all labor expended by requiring that substantial labor be involved to create marital property. Thus, if a spouse spends time working on a hobby, such as an inherited coin collection, it is possible that all the appreciation realized will be individual property. If the spouse, however, devotes too much time and effort to buying and selling the coins, that activity may be sufficient to become a business in itself, and the appreciation may then be marital property. If a spouse spends a substantial amount of time subdividing separate land, that may put the spouse in the real estate business and transform the appreciation on the land to community property. *Hiatt v. Hiatt*, 487 P.2d 1121 (Idaho 1971); *Evans v. Evans*, 453 P.2d 560 (Idaho 1969).

The question of substantial labor is not limited to physical labor; it also arises with intellectual activity. If a spouse is employed full time in one occupation and devotes one hour per day to following his or her inherited securities, is this substantial labor? If the spouse had no other employment and spent six hours per day on the inherited securities, would this be substantial? Would it depend on what the spouse did during that time? Would it depend on whether security transactions were made based on the analysis? Note that in the physical labor examples, there was a substantial amount of time expended over a short period. In the intellectual labor example above, less time was expended in the short period, but the labor extended over an indefinite period. In all cases in which a spouse devotes a significant amount of time to an asset that is classified as other than marital property, there is the possibility that the labor will be deemed substantial and will invoke the mixing rule.

If substantial labor was expended, the second inquiry concerns whether reasonable compensation was received. Normally, no monetary compensation is paid when labor is expended for home improvements or for management of personal investments or a farm operation. Any monetary compensation in those circumstances would have to be paid

from the individual property or predetermination date property of the spouse benefiting from the labor. It appears that only monetary compensation is considered; it is unlikely that a family's use of the improved cottage in the above example will be considered compensation and the fair market value of such use analyzed to determine if it is reasonable compensation. The comment to UMPA section 14 refers to compensation paid, which implies monetary compensation. Typically, reasonable compensation is only a factor in the operation of a business; business situations are discussed below. For an analysis of income retained in a partnership, see *Todd v. Commissioner*, 153 F.2d 553 (9th Cir. 1945).

If there was no reasonable compensation, the final inquiry is whether the labor caused the property to substantially appreciate. UMPA does not explain what constitutes substantial appreciation. Nevertheless, it is unlikely that putting a new roof on an inherited cottage constitutes substantial appreciation. On the other hand, the comment to section 14 of UMPA indicates that an addition to a home may cause substantial appreciation of the property.

When physical labor is expended over a short period, the value of the asset before and after the labor is expended should be the measure for substantial appreciation. The inquiry under the Act appears to be the enhanced value or the extent the asset has appreciated, not the cost of having the labor performed by a third person.

In situations in which the labor is expended over an indefinite period, however, determining what is substantial entails more than merely comparing of the value at the time of litigation to the value before the labor commenced. For example, if security investments, followed over a period of years, increase in value from $10,000 to $30,000, this is not necessarily substantial appreciation. The investments' appreciation must be compared with the change in published market averages. If the increase in value is similar to market averages for securities for which no trading has occurred, the appreciation is not attributable to the labor.

When the increase in value is substantial and attributable to substantial undercompensated labor, the Act provides that the labor creates marital property. If in the example above, the market averages had increased 40%, so that the natural growth would have been from $10,000 to $14,000, would the marital property be $16,000 or $20,000 ($30,000 less $14,000 or less $10,000)? The marital property interest

would only be the additional value attributable to the substantial labor, i.e., $16,000.

The cases in this area have primarily involved business interests and are often connected with questions involving the income from such property. States (like Wisconsin) in which income on separate property is community property—Texas, Louisiana, and Idaho—have a civil-law system based on Spanish law. Under the American rule of the other community property states, income on separate property is separate property. Many of the decisions involving labor by a spouse from those states are affected by the different treatment of income on separate property. In particular, some of the remedies are inappropriate in Wisconsin because the income in Wisconsin is already marital property. The development of two different approaches for allocating appreciation in the value of an individual property business resulting from labor by a spouse during marriage is considered in J. Thomas Oldham, *Separate Property Businesses That Increase in Value During Marriage*, 1990 Wis. L. Rev. 585.

In the following cases involving business interests, the spouse worked in the business and generally was found to have performed substantial labor. Unless otherwise indicated, the business had also appreciated in value.

2. Sole Proprietorship [§ 3.46]

Cases involving a sole proprietorship differ from cases involving other business entities because the business assets of the sole proprietorship are owned by a spouse and not by the entity. Thus, if a spouse performs substantial undercompensated labor, the mixing statute is applied, and it applies to the business assets in the same manner it applies to labor on a residence or investment portfolio. In the reported cases, the compensation issue is not addressed. Under the Act, however, if the amount withdrawn from the business as compensation is reasonable, the appreciation in the business is not marital property. Wis. Stat. § 766.63(2). If the income of the business is retained and used for business purposes, the assets acquired with those funds are marital property. Wis. Stat. § 766.63(1).

The general rules on appreciation resulting from labor of a sole proprietorship are set forth in *Abraham v. Abraham*, 87 So. 2d 735 (La.

1956). At the time of marriage, the wife owned as her separate property a controlling interest in an unincorporated business. She operated the business as general manager, credit manager, cashier, and chief salesperson. In the eight years the parties were married, the business tripled in value. Based on a Louisiana statute, the court held that if during the marriage either spouse substantially contributed to the increase in the value of the separate property of one spouse, the nonowning spouse was entitled to one-half the value of the increase. Substantial community labor had occurred, and the separate property had increased in value. Once this was established, the burden of proof shifted to the wife to affirmatively establish that the increase in value resulted from independent factors, such as inflation, chances of trade, and the ordinary course of events. In *Abraham*, the court determined that the only testimony to that effect was self-serving and therefore was insufficient; the court held that the increase in value was community property.

Lopez v. Lopez, 113 Cal. Rptr. 58 (Ct. App. 1974), concerned the classification of assets in a law partnership. The husband began a law practice in 1953 as a sole practitioner. From 1955 through September 1957 and on two occasions thereafter, he practiced in a partnership. The parties were married in August 1957. The husband's income increased substantially during the marriage. The issue was how to classify his interest in the law partnership and the proceeds he received when two partners were brought into the partnership. Classification was required because in California, only community property is divided in a divorce proceeding.

The court held that because the practice had become lucrative as a result of the husband's industry and professional ability during marriage, the business was a community property asset with substantial value. The primary value of the practice was derived from the husband's individual efforts after the marriage, rather than from the relatively negligible sum of money initially invested in the practice and the value attributable to periods before marriage. In this case, the value of the law practice "was clearly one and the same as the husband's energy, skill, judgment, intelligence and personality as a practicing attorney." *Id.* at 65.

Lopez differs from *Pereira*, *Van Camp*, and *Beam* because in those cases, the husbands' separate property played a key role in their businesses. In *Lopez*, the trial court may well have concluded that the "husband's initial investment in his law practice became so commingled

with the community that all traces and vestiges of it as separate property have been lost." *Id.* at 66. The "professional goodwill may thus be separate property, community property, or varying degrees of both depending upon the particular circumstances. The fact that 'professional goodwill' may be elusive, intangible, difficult to evaluate and will ordinarily require special disposition, is not reason to ignore its existence in a proper case." *Id.* at 67 (listing the factors in valuing goodwill).

A farm was at issue in *Cockrill v. Cockrill*, 601 P.2d 1334 (Ariz. 1979). At the time of marriage, the husband owned a farming operation as separate property. During the marriage, the net worth of the farm increased substantially. (In Wisconsin, it is appropriate to determine only the increase in value of the property itself and not the change in net worth of the business because net worth includes retained income, and all income—absent a unilateral statement—is marital property.) The trial court found that this increase was attributable primarily to the efforts of the husband and thus was community property. The husband appealed, claiming that the increase in net worth resulted primarily from the inherent nature of the separate property and was, therefore, also his separate property.

On appeal, the court first held that when the value of separate property has increased, the burden is on the spouse contending that the increase is separate to prove that the increase is because of the inherent value of the property itself and not the work effort of the spouse. The court then rejected its prior all-or-nothing rule and held that it would instead apportion the increase in value between the separate property and community property. The court found that all the community property states except Texas had rejected the all-or-nothing approach. (Texas has since changed its rule. *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982).)

According to the court, because there is no fixed standard for allocating appreciation, a court should use the yardstick most appropriate and equitable in a particular situation. The court stated that in the case of real estate, there were three possible approaches: (1) award the owner of the separate property its rental value, with the community entitled to the balance of the income produced from real estate by the parties' labor, skill, and management; (2) determine the reasonable value of the community services and allocate that amount to the community, with the balance treated as separate property attributable to the inherent nature of the separate estate; or (3) simply allocate to the separate property a reasonable rate of return on the original capital investment, with any

increase above this amount considered community property. *See Potthoff*, 627 P.2d 708.

Cockrill is an Arizona decision, and the possible approaches reflect Arizona's rule that income on separate property is separate property. In states like Wisconsin, where income on separate property is community property, allocating the reasonable rental value to the separate property is inappropriate because this income is already marital property. Moreover, allocating the value of the labor to the community does not recognize the creation of an ownership interest and the failure to have paid reasonable compensation. *See* Wis. Stat. § 766.63(2). Thus, in Wisconsin, the first two *Cockrill* approaches are not appropriate. The only alternative from *Cockrill* that could be used in Wisconsin is allocating a reasonable rate of return on capital to the individual property, i.e., natural appreciation.

The court of appeals in *Haldemann v. Haldemann*, 145 Wis. 2d 296, 426 N.W.2d 107 (Ct. App. 1988), considered whether appreciation in the value of property resulting from a spouse's labor was divisible. The Haldemanns lived on a farm that the wife had inherited. During the marriage, the husband

> assisted in planning and construction of a new sunroom, converted a former chicken coop into a two-car garage, planted trees, seeded the lawn, installed a water heater and softener, rewired parts of the residence, wired the barn, built hogpens, removed an old silo foundation, filled an old cistern, leveled dirt for cementing, removed an old chimney and closed the roof, insulated the house ceiling, relocated a window in a lower bedroom, paneled walls, laid carpet in the second bedroom, installed a stairway iron railing, installed gutters and downspouts, built an insulated wall on one side of the house, constructed a base for a TV tower, planted trees to prevent soil erosion, removed an old porch and asbestos siding, backfilled around the garage, and constructed a dry well for roof drainage.

Id. at 306. The issue in the divorce action was whether these services constituted normal home repairs and maintenance or whether they constituted improvements resulting from the husband's labor. If they were improvements resulting from the husband's labor and the improvements increased the value of the property, then the increase in value would be divisible. (Note that this test is different from the requirement in section 766.63(2) in which "substantial" labor is required to classify appreciation on individual property as marital property.)

The parties' experts testified that the value of the Haldemanns' farm property had increased during the marriage by 5 to 40 percent and that the value of other farm properties during that period declined, some by as much as 50 percent. The record did not indicate that the increase in value was attributable to any unique features of the farm or its surroundings. Still, the circuit court refused to find that the husband's labor had caused the value of the property to increase, thereby denying that the increase was subject to property division.

The appellate court reversed. The court held that appreciation in the value of inherited property resulting from the efforts and abilities of the nonowning spouse is part of the property that is divisible in a divorce. The court agreed that the nonowning spouse's efforts and abilities must be unusual and uncompensated to the extent that they require something more than the performance of usual and normal marital responsibilities. It is not necessary, however, that the nonowning spouse's efforts and abilities be beyond or apart from the owning spouse's efforts and abilities. On the other hand, merely maintaining the marital relationship and performing the customary obligations of one spouse to the other does not constitute a contribution by the nonowning spouse that requires that the appreciation in value of the inherited property be treated as part of the divisible property.

The wife argued that the husband had operated a hog-raising business during the marriage and that the income from this business had compensated the husband for his efforts and abilities. (For marital property mixing rules to apply, there must not have been reasonable compensation.) The husband was not charged rent for the use of the farm property for this business. The court found that the parties had jointly operated and benefited from the hog-raising business and therefore rejected the wife's argument that the husband had been compensated. The court also held that it was irrelevant that the wife had paid for the materials and supplies that went into the improvement of the farm and its buildings. The husband's claim also was not affected by the fact that some of his efforts were used to make the farm suitable for a hog-raising operation. This conclusion was reached because those efforts increased the value of the farm and the farm buildings. Thus, the court held that the husband's efforts and abilities had increased the value of the farm and the farm buildings and that this increase was part of the divisible estate in the divorce proceeding.

Similarly, in *Krejci v. Krejci*, 2003 WI App 160, 266 Wis. 2d 284, 667 N.W.2d 780, the husband inherited a resort property before the marriage. The resort at the date of marriage was subject to a balance due on a land contract. During the marriage, the parties built a large addition to the main house, including five bedrooms, a bath, and a living area. The husband did much of the labor himself, and he managed the resort full time. The land contract payments were made in part from resort operation income with a final balance satisfied with funds he inherited. The wife worked in a nursing home from the fall to the spring of each year. From May through September, she helped run the resort. She was assisted by her children from a prior marriage. Neither the wife nor the children were compensated for their labor. At the time of the marriage, the property tax statement showed that the resort had a value of $151,000. At the time of divorce, the market value was $398,000. There was no expert testimony introduced to establish the appreciation attributable to the increase in value of the land itself during the marriage.

The court of appeals found it undisputed that income from the resort was used in part to build the addition to the marital home, make other improvements to the resort property, and pay a portion of the land-contract payments. As a result, marital property was invested in the inherited resort. The court also found that the improvements to the residence were significant. The addition, as well as the new septic systems, well, and sea wall, were more than routine upkeep of the property. The court held that the husband's and wife's income and labor were invested in the resort. The evidence introduced failed to demonstrate how to specifically trace and identify their added investment. Thus the court held that the appreciation was part of the marital estate and, accordingly, divisible by the circuit court.

A similar analysis was made in *Applegate v. Applegate*, 365 N.W.2d 394 (Neb. 1985), to determine if an asset retained its inherited status. In that case the wife's contributions were considered "typical of a wife of a farmer-cattle raiser." *Id.* at 397. The contribution included help "with branding, dehorning, calving, sorting out, feeding, weed burning, irrigation, fencing, putting up hay, and resetting irrigation pipe." *Id.* These services were held not to contribute directly to any preservation of or increase in the value of the property. However, the funds and labor expended to add a new addition to the residence were significant and made part of the inherited parcel divisible.

A somewhat different issue was raised in *Denney v. Denney*, 171 Cal. Rptr. 440 (Ct. App. 1981). The husband owned and operated a doughnut shop that was his separate property at the date of marriage. During the marriage, he became an alcoholic and the business became almost worthless. The wife took over the operation, and before their separation, the business recovered most of its initial value. During the marriage, the spouses had withdrawn funds from the business to cover their living expenses. The wife asserted that the increased value of the business from her labor was community property.

The court held that when the value at separation is no greater than the value at the date of marriage, no community interest is acquired. A court cannot be expected to value a business at numerous times during the marriage. The only exception to this rule is in a situation in which a bankruptcy has occurred so that a date has been fixed at which the business had no value. *Winn v. Winn*, 159 Cal. Rptr. 554 (Ct. App. 1979).

In Wisconsin, if reasonable compensation is not received, the appreciation attributable to substantial spousal labor is marital property. The result is consistent with *Abraham*. Wisconsin courts also are likely to reach the same result as that reached by the court in *Denney* because substantial measurable appreciation did not occur. In some states, the community receives only what would be reasonable compensation for the labor performed. This result is inconsistent with the Act, which states that marital property is created. Wis. Stat. § 766.63(2).

In *Schorer v. Schorer*, 177 Wis. 2d 387, 501 N.W.2d 916 (Ct. App. 1993), the husband had inherited stock in a closely held business from his father. The stock appreciated during the marriage, and the issue was whether any portion of the value was included in the divisible estate. The circuit court held that the entire interest in the business was divisible, basing its determination on the fact that the business was in bankruptcy in the early 1980s during the marriage and had only minimal value at that time. Therefore, all the value of the business was generated during the marriage and was not the result of the inheritance. In addition, all of the appreciation in the business resulted from the spouses' efforts (primarily the husband's). The court held that the value of the business was divisible even though the husband had received adequate compensation for his efforts during the marriage. *See supra* § 2.51. This result is different from the classification rules under chapter 766, which do not classify appreciation in the value of individual property resulting

from efforts of a spouse as marital property if reasonable compensation is received. Wis. Stat. § 766.63(2).

3. Incorporated Business [§ 3.47]

In all the community property states, the spouse asserting an apportionment of a business interest has the burden of proving that the value of the business has increased as a result of a spouse's labor. If this is not done, there will be nothing to apportion. Once this threshold issue has been met, the next step is to see whether reasonable compensation was received. When a spouse receives a salary for services to the company, that salary is presumed to be adequate compensation for the services rendered, and the other spouse must show that the salary was unreasonable. If the services were irregular, the other spouse must prove they had extreme value. The entire principle of apportionment is based on a substantial community contribution to the assets. In most cases in which an apportionment has been made, one spouse has been in control of the business and able to set his or her own salary and determine the business's dividend policy. A spouse in such a position is able to manipulate his or her income and enhance his or her separate property while exercising management and control over both separate property and community property. *See* Weekley, *Appreciation of a Closely-Held Business Interest Owned Prior to Marriage—Is It Separate or Community Property*, Comm. Law J. 261 (Fall 1980).

The significance of a majority interest in an incorporated business is that a spouse with majority interest can, acting alone, declare dividends and disburse the corporate earnings or retain those earnings. In addition, the spouse with control of a corporation can liquidate the corporation and obtain direct ownership of the appreciated assets. This is not possible if the spouse has a minority interest in a corporation. In the unincorporated business previously discussed, all the business income was marital property and, if retained in the business, caused the business assets themselves to become marital property. The obligation of good faith in the Act expressly provides that a spouse is not obligated to produce income on his or her nonmarital property. Wis. Stat. § 766.15(2). In the cases discussed below, the corporation has earned income and has retained a portion of it. One spouse was employed by the business and performed substantial labor. Following the suggested approach, once substantial labor is established the next question is whether reasonable compensation was received for such services.

The court addressed the issue of what constitutes reasonable compensation in *Speer v. Quinlan*, 525 P.2d 314 (Idaho 1973). The husband started working in his father's company after his marriage, became a co-manager of the business, and later received 320 of the 500 total shares of the business stock. From the time the husband began working in the company through the date of divorce, the corporation's market value more than tripled. The company never declared any dividends and had several hundred thousand dollars of undistributed after-tax earnings. The husband, who devoted much time to the job, had received compensation in the form of a salary, bonuses, and fringe benefits during the entire term of his employment. The wife also made some contributions to the business through entertaining business guests, but she received no compensation from the company.

The court held that if community efforts have been expended in the conduct of a separate property business, a proper inquiry upon dissolution is whether the community has received fair and adequate compensation for its labor. The court further held that a trial court should take into consideration the nature of the business, the size of the business, the number of employees, the nature and extent of community involvement in the conduct of the business, and the growth pattern of the business. Once those questions have been answered, the proper inquiry is whether the overall compensation the community received was equivalent to the compensation the business would have had to pay a nonowner employee to perform the same services rendered by the spouse. This involves analyzing the salaries of nonowner employees at the same level of responsibility in comparable businesses in the same area of the country. In Idaho, if the compensation is not reasonable, a judgment for the amount of such compensation is awarded.

In Idaho, after it is determined whether reasonable compensation was received and a judgment rendered if required to provide a reasonable compensation, the court considers whether the accumulated net after-tax earnings of the company are properly deemed to be community property and thus divisible at divorce. In Wisconsin, this may occur in situations in which inadequate compensation has been paid. The issue in Wisconsin is whether the nonemployee spouse receives an ownership interest in the stock or a share of the corporate income, including the retained income. No contention was made in *Speer* that the retention of the net earnings was unreasonable from a business point of view or that they were retained to defraud the community. The question was whether the retained earnings constituted income that was a community asset

subject to division under Idaho law. The court initially held that the retention of the earnings in the business did not present a case of community funds being invested in a separate property business and thus that no ownership interest in the business was community property. However, the court did hold that under the discretionary-division-at-divorce statute applicable in Idaho, any inequity that the retention of income may have caused could be rectified. This decision gives the nonowner spouse the right to participate in the corporate income that is accumulated during the marriage.

Texas also has considered whether substantial appreciation of the corporation is classified as individual property when a spouse with majority interest in a corporation receives a reasonable salary. *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982), is relevant in Wisconsin in cases in which inadequate compensation was paid. The husband worked in his father's restaurant. During the marriage, the assets of the restaurant, a sole proprietorship, were transferred to the husband as a gift and became his separate property. When the husband incorporated the business, 47% of the initial capitalization was traceable to the separate property received by gift from the father, and the balance was community property.

During the marriage, the business prospered and the husband received a salary and bonus of approximately $200,000 per year. At the time of the divorce, the business was worth $1 million. Of this amount, testimony indicated that $700,000 was attributable to retained earnings, and it was agreed that there was no natural increase in the value of the separate property. The trial court held that 47% of the initial capitalization was traceable to the husband's separate estate, and it therefore set aside 47% of the corporate stock as his separate property. The court of appeals reversed and held that the separate property had substantially increased by reason of community labor and that the division of the estate was therefore manifestly unfair.

In a 5–4 decision, the Texas Supreme Court held that the 47% interest was properly classified as separate property, but that this holding did not preclude a right of reimbursement. (In Wisconsin, the payment of reasonable compensation precludes further inquiry.) The court found that a spouse may spend a reasonable amount of talent or labor in the management and preservation of his or her separate estate without impressing a community character upon that estate. *See Jensen v.*

Jensen, 665 S.W.2d 107 (Tex. 1984) (analyzing reimbursement theory and ownership theory for compensating labor by a spouse).

The decision in *Vallone* summarizes the formulated rules in other community property states when reimbursement is sought for uncompensated community labors. The decision states that Washington follows the rule that when a closely held corporation pays a salary to a spouse, it is presumed that the community has been compensated for the spouse's services, and the enhanced value retains its separate character. In Arizona, the spouse's salary must be fair and adequate, otherwise the entire increment in value is deemed community property. California applies either of two rules: under one rule, the court allocates a reasonable rate of return on the separate property to the separate estate and apportions the remainder to community and under the other rule, the court awards a reasonable value for the spouse's services to the community. Nevada applies both California tests. New Mexico reimburses or allocates to the community the reasonable value of the spouse's labor. Idaho courts are in accord with New Mexico and consider several factors when determining if the salary paid to the spouse is fair compensation for the labor expended. The factors considered include the nature and size of the incorporated business, the number of employees, the extent of the spouse's involvement, and the growth pattern of the business. If the spouse has not received or taken adequate compensation from the corporation, the courts will award the community the difference between the compensation received and what the corporation would have had to pay an employee to perform the same services.

The Idaho court considered a minority shareholder in *Simplot v. Simplot*, 526 P.2d 844 (Idaho 1974). When the marriage took place, the husband owned shares in a holding company, which in turn owned shares in an operating company. The combination of the shares gave the husband an 8.4% interest in the operating company. He was a director of the holding company and was employed as an officer of the operating company. During the marriage, the operating company's retained earnings increased dramatically. The husband's 8.4% interest in these earnings was several million dollars, which the wife claimed was community property to be divided at divorce.

The first issue was whether the increase in value of the stock as a result of the retained earnings was income (community property) or natural enhancement of the property (separate property). The court noted

that the husband, as a minority shareholder, could not have caused dividends to be declared or caused the directors to reinvest the earnings. Therefore, the court held that the increase in retained earnings was natural enhancement and not income, rents, or profits.

The second issue was whether the increase in retained earnings resulted from community labor. The court considered whether the husband had brought any special skills to the job, as well as the level of compensation he received during his employment. There was no evidence that the husband's salary was inadequate in light of his responsibilities, and there was no evidence that the corporate structure was set up to deprive the community of these earnings. The court held that the husband's efforts during the marriage had not contributed to any increase in the value of the company assets or stock. The decision not to recognize the increased corporate value is directly opposite in result to the decision in *Speer* and can only be explained by the difference in the spouse's ownership interest—majority versus minority—during the marriage.

In Idaho, where *Speer* and *Simplot* arose, there are two questions in cases in which labor is performed by a spouse as a corporate employee and the spouse holds stock in the corporation initially as separate property. The first is whether the compensation received during the marriage is adequate. The second is what sum earned by the company should be considered rents and profits resulting from the labor of a spouse (i.e., a. return on capital) and thus divisible after deducting the reasonable compensation.

As to the second question, it is necessary either to allocate a sum to rents and profits, leaving the balance to represent a natural increase in value (which would be separate property), or to first determine the sum that is the natural increase in value, leaving the balance as rents and profits. Under the latter approach, it is appropriate to look first to published inflation indices and outside evidence of unusual market factors that could have caused a natural gain.

In divorce cases, Idaho courts have considered the increase during marriage in the value of a corporate business as a result of retained earnings. In Wisconsin, this is possible under section 767.61. However, in neither *Speer* nor *Simplot* did the Idaho court find that the accumulated corporate income itself was a community asset. Thus, the nonowner spouse could not have willed his or her one-half interest in the

corporation, and at the death of the owner spouse, a gift of the shares of stock would also transfer all interest of the nonowner spouse. It may be impossible in community property states to avoid this result in situations involving corporations.

The rules for a partnership are different from those for an incorporated business. In *Swope v. Swope*, 739 P.2d 273 (Idaho 1987), the husband owned an undivided one-quarter interest in a partnership before his marriage. The partnership owned both real and personal property associated with the operation of a business. During the marriage, the partnership retained earnings attributable to the husband's share of $75,765, and the husband and the other partners created a corporation to which they transferred the personal property of the partnership. The husband received 4,000 shares of common stock and a $100,000 debenture in exchange for his interest. The securities and the real estate, which continued to be held in the partnership, were later sold to a third party for $840,000 during the marriage. The issue was the classification of these funds. In Idaho, income on separate property is community property.

The court found that a corporation is a separate legal entity distinct from its shareholders, while a partnership is instead the sum of the owners' interests. The court found fundamental ownership and control differences between partnerships and corporations. A partner has a right to direct the payment of earnings or, if the other partners disagree, to dissolve the partnership. A shareholder has no equivalent right. Likewise, shareholders are not corporate agents and do not make business decisions, while partners are agents of the partnership and have a right to make business decisions. "A partnership, then, is a contract of mutual agency, where each partner acts as a principal in his own behalf and as an agent for his co-partners, while the corporation is a separate and distinct entity, apart from the owners." *Swope*, 739 P.2d at 280. Thus, the court held that the earnings of a separate property partnership, whether retained or distributed, are community property.

The next issue was the effect on the stock's classification of the transfer of the retained earnings, as well as all other personal property, to the corporation. The husband performed no services for the corporation. The court held that the community had an interest in the corporation and that the wife was entitled to be reimbursed for the improvement or enhancement attributable to the contributions of the retained earnings to the corporation. The appellate court remanded the case for the trial court

to determine whether the value of the stock had increased during the period before the sale to the third party.

The Wisconsin Court of Appeals considered appreciation in the value of a corporation as a result of retained earnings for purposes of a property division in *Lendman v. Lendman*, 157 Wis. 2d 606, 460 N.W.2d 781 (Ct. App. 1990). In this case, the husband used $8,500 of inherited funds to purchase stock in a corporation he created. The corporation used those funds plus borrowed funds to purchase a funeral home at which the husband was then employed during the marriage. Before the divorce action, the unpaid balance on the corporate obligation relating to the purchase of the business was reduced by approximately $130,000. It appears that the parties agreed that the value of the stock had increased as much as the debt had been reduced. The parties agreed that the husband's labors created the corporate income that had paid for the retirement of the debt. It does not appear that there was a determination in the proceeding of the fair-market value of the business at the time of the divorce. The circuit court held that the appreciation in the value of the stock was inherited property and therefore not divisible.

The court of appeals initially determined that whether appreciation in an asset is divisible depends on whether the appreciation was "purchased with funds acquired" by inheritance as provided in section 767.255 (now section 767.61). The court did not discuss *Plachta*, 118 Wis. 2d 329, in which a different appellate court had held that natural appreciation is excluded from division. Likewise, the court did not use the analytical rule in the Act that there be substantial appreciation caused by substantial undercompensated efforts before the appreciation on individual property assets is classified as marital property.

The appellate court held the appreciation was not purchased with inherited funds, but rather was

> paid for by corporate "income" generated through [the husband's] labors. In this regard, *Arneson* controls. In that case, we viewed income generated by an inherited asset as separate and distinct from the asset itself….
>
> Here, the money used to pay off the corporate debt was earned income. Thus, just as in *Arneson* where property purchased by dividend income of an inherited stock was held to be marital, the appreciation purchased by earned income of a corporation acquired by inherited funds is also marital.

Lendman, 157 Wis. 2d at 612. The court did not note the distinction that income on securities is received by a shareholder when dividends are paid by the corporation, not when the corporation generates the income. The court's holding apparently would be the same regardless whether the corporate income was used to reduce acquisition debt or used for other corporate purposes, such as expansion of facilities.

In the portion of its decision dealing with property division, the court did not consider the amount of compensation taken by the husband. However, the decision includes a review of the maintenance determination. In that section, the court noted that the husband's annual salary had declined by more than $10,000 for the last two years. During that two-year period, the corporation's retained earnings increased from $12,000 to $60,000. The circuit court had found that the husband's self-imposed salary cuts were bogus. The appellate court did not discuss or challenge that finding. The circuit court increased the husband's salary for maintenance purposes to the level before the reduction.

This decision can be reconciled with the divorce decisions in other community property states in which the husband did not take reasonable compensation during the period the appreciation occurred or in which the corporation itself was a sham and fraudulent as to his wife. See the discussion of *Schorer v. Schorer*, 177 Wis. 2d 387, 501 N.W.2d 916 (Ct. App. 1993), in section 3.46, *supra*.

4. Residential Real Estate [§ 3.48]

The issues presented regarding the residential real estate of the parties differ from other cases involving mixing because often both labor is expended in connection with the upkeep or improvement of the property and capital items for the home, such as carpeting or a furnace, are purchased using funds of a different classification than the residence. The issue regarding labor mixing is whether the labor expended is sufficient to satisfy the standards of section 766.63(2) and thereby cause the appreciation in the value of the property during the marriage to be classified as marital property. The issue regarding marital property funds expended for improvements to a nonmarital property residence is the classification of the improvement and the consequences thereof.

Lloyd, 170 Wis. 2d 240, addressed the labor issue. Before the marriage took place, the husband acquired ownership of a residence, in

which the spouses lived during most of their marriage. The court of appeals held that although the circuit court had made no explicit finding regarding donative intent, it was clear from the testimony that the spouses meant to keep their respective property separate. The court of appeals then looked to the labor expended to maintain the property. The circuit court had found that the wife had used her funds to pay for the couple's food, clothing, and shelter expenses. The court of appeals held that this finding did not satisfy the legal standard set out in section 766.63(2). "The finding does not establish that the applied efforts of either spouse were anything more than performance of usual and normal marital responsibilities." *Id.* at 262. The court did not separately consider the use of marital property funds to maintain the residence. The court also held that there was no evidence of substantial, or even any, appreciation to the property. Thus, the court concluded that no portion of the residence was marital property.

In *Kobylski v. Hellstern (In re Estate of Kobylski)*, 178 Wis. 2d 158, 503 N.W.2d 369 (1993), the court addressed the expenditure of both labor and funds. Before marriage, the wife acquired ownership of a residence, in which both spouses lived during the marriage. During the marriage all of the funds received by the husband and the wife were deposited into joint accounts. The funds in those accounts were used to pay property taxes, utilities, insurance, and other related residence expenses. Also, the parties expended approximately $4,000 from the joint accounts during the marriage for improvements to the residence, including new siding and gutters, carpet, a garage door, and building materials and concrete for a new garage. The husband testified that during the marriage he painted the interior and exterior of the residence, assisted in enlarging the garage, and did the yardwork around the residence. He testified that he received no compensation from the wife for these efforts.

The wife died, and the husband asserted a marital property interest in the residence. From these facts, the probate court concluded that the contribution of labor and the funds from the joint accounts for maintenance and improvements constituted a mixing of marital property with property other than marital property under section 766.63(1) and concluded that "because 'substantive labor, efforts and marital cash were applied' during the marriage and 'tracing is [not] possible as unreimbursed labor is involved,'" the entire residence was reclassified to marital property. *Id.* at 170.

The court of appeals first held that the burden of establishing the occurrence of mixing under section 766.63(1) was properly assigned to the party claiming a reclassification. Once that burden is satisfied, the party seeking to avoid reclassification has the burden of proof to trace the nonmarital property component. The court followed its decision in *Lloyd* in requiring the estate to establish that the identity of the property has been preserved. In performing the identity analysis, the issue is whether the nonmarital component has been preserved in an identifiable form so that it can be meaningfully valued and assigned. The court referred to the character analysis in *Lloyd* and held it did not apply to mixing issues under section 766.63. *Id.* at 173–74 n.7. The court clarified that character involves donative intent and that a character/gift/donative intent analysis under the Act is properly made using the reclassification by gift rules of section 766.31(10).

The use of marital property funds in the joint account to pay for improvements to the residence satisfied the burden of proof that the property was mixed under section 766.63(1). Thus, the question became whether the component of the mixed property that was not marital property could be traced. The court held that the estate satisfied its burden by the husband's proof of the amount of the contribution of marital property funds to the nonmarital residence. This gave a basis to segregate the nonmarital component.

The court of appeals then considered the appropriate remedy. It found that all community property states use both the ownership and reimbursement approaches. The court noted that the book stated that there was a preference in the Act for creation of an ownership interest. The court stated that decisions in a majority of community property states provide that improvements take on the classification of the property itself and also create a right of reimbursement. Determining that reimbursement was the correct approach in this case, the court held that the amount of the reimbursement should be the enhancement in the value of the property as a result of the improvements. It should not be the amount of marital property funds actually expended.

> Thus, expenditures that relate merely to the maintenance of the property or which do not enhance the property's value are not to be considered. The party seeking such reimbursement has the burden of demonstrating that the improvement funds expended have enhanced the value of the spouse's separate property and the amount of enhancement.

Id. at 180; *see also Krueger v. Rodenberg*, 190 Wis. 2d 367, 527 N.W.2d 381 (1994). This analysis of ownership versus reimbursement approaches is an important step in Wisconsin law involving improvements to property.

The court of appeals then considered the labor-mixing issues. The probate court had held that the efforts constituted substantial uncompensated labor, serving to reclassify the entire residence to marital property. Regarding substantial appreciation, the probate court analyzed the assessed value of the property and its sale price. The probate court recognized that the property declined in value between the determination date and the date of death, but found that the labor expended contributed to the utility and comfort of the home. The probate court found the decline in market value was something not contemplated by the statute, a market value drop not related to the activity of the nonowning spouse while "substantive labor, efforts and marital cash were applied." *Estate of Kobylski*, 178 Wis. 2d at 167.

The court of appeals reversed this portion of the probate court decision and held that under section 766.63(2), the claimant had to establish the contribution of his labor, that no reasonable compensation was received, and that the labor produced a substantial appreciation in the nonmarital asset. The court held that most of the husband's efforts did not constitute the substantial efforts required by section 766.63(2). The court considered the UMPA explanation of substantial effort. It concluded that painting and yardwork, without more, qualify only as routine, normal, and usual property maintenance. The court did, however, find that the husband's efforts in enlarging the garage qualified as a substantial contribution of industry and in a footnote stated it would not give an opinion on whether the appraiser's testimony that a garage would increase the value of the residence by $2,000 to $3,000 would constitute evidence of substantial appreciation. *Id.* at 186–87 n.14. The probate court, however, had found no evidence of an increase in market value of the property as a result of the efforts and, fair or not, held that the legislature has decreed the contributing party may not recover for uncompensated substantial industry if there is no resulting substantial appreciation. *See also Bille*, 198 Wis. 2d 867.

The circumstances in *In re Marriage of Pearson-Maines*, 855 P.2d 1210 (Wash. Ct. App. 1993), were that before the marriage, the wife owned a residence that was used by the parties after the marriage. The residence was destroyed by fire during the marriage, and the wife

received an insurance settlement. The settlement proceeds as well as the parties' labor were used to rebuild the property. At the time of the divorce, the residence was worth $50,000. Of that amount, $28,000 was the amount expended from the settlement and the remaining $22,000 stemmed from community effort. (The analysis does not include all the findings required by section 766.63(2).) The husband was entitled to reimbursement for the increased value of the property resulting from his efforts. However, the wife was entitled to compensation for the community benefit obtained from their occupancy of the property during the marriage. The rental value was $11,000 for the period, reducing the community interest to $11,000.

I. Passive Income from Labor [§ 3.49]

Before the enactment of the 1985 Trailer Bill, labor applied to individual property during marriage did not create marital property unless the requirements of section 766.63(2) were satisfied. Section 766.63(2) dealt with appreciation in the principal value of the asset, and under the original Act all income from property of any classification was marital property. The 1985 Trailer Bill changed the rule on income from property other than marital property if a unilateral statement was filed. Wis. Stat. § 766.59. If a spouse has executed a unilateral statement, all income on assets other than marital property is individual property. This includes income on all predetermination date property and individual property.

If one spouse performs services that assist in the collection of income or that increase the amount of income earned that is otherwise classified as individual property because of a unilateral statement, is a portion of that income considered earned income and thus marital property? For example, if a parcel of individual, rental real estate is covered by a unilateral statement, and one spouse performs routine maintenance on the property, such as painting, plumbing and other repairs, and assists in the collection of the rental income, is a portion of that rental income deemed earned income and thus not covered by the unilateral statement? Such services would not satisfy the requirements of section 766.63(2). Moreover, if a portion of the rental income is considered earned income, the deposit of the rent check into an account with other individual or predetermination date property would invoke the mixing rule of section 766.63(1), thereby potentially reclassifying the entire income and assets acquired therewith to marital property. Because the portion that was

earned income would be difficult to ascertain on a periodic basis as the rent was received, it would be almost impossible to segregate the income into the appropriate components except by means of a marital property agreement. *See* McClanahan, *supra* § 3.12, at § 6:18.

Because classifying a portion of the income as earned income would entirely frustrate the intended benefits of a unilateral statement as authorized by the Act, no portion of the income covered by the unilateral statement should be considered marital property unless the services provided have some significance. In addition, to maintain the maximum effectiveness of the unilateral statement, it is appropriate to provide the marital estate with only a right to reimbursement for the value of the services, rather than creating an ownership interest that could also affect other assets and income. *See* Acres, *Community and Separate Property Characterization of Closely Held Business Interest in Texas*, 14 Community Prop. J., Oct. 1987, at 9; Perkins, *Appreciation of the Separately Owned, Closely Held Business*, 14 Cmty. Prop. J., Oct. 1987, at 62.

If, however, a portion of the income is deemed earned income, other community property jurisdictions have in analogous situations used two approaches to establish the respective shares. One theory is set forth in *Pereira v. Pereira*, 103 P. 488 (Cal. 1909). In that case, the court assumed that the separate property had produced income at a reasonable rate of return, and the court allocated that income to separate property. Under this approach, any balance in the income is community property. The second approach is set forth in *Van Camp v. Van Camp*, 199 P. 885 (Cal. Ct. App. 1921). In that case, the court determined a reasonable wage or salary for the services rendered. That amount was allocated as community property, and the balance of the income realized was separate property. For a discussion of the differences in applying the *Pereira* and *Van Camp* approaches, see *Cord v. Neuhoff*, 573 P.2d 1170 (Nev. 1978). The appropriate approach in Wisconsin will depend on the facts and circumstances of each particular situation.

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Management and Control of Property During Marriage

I. General Rules [§ 4.1]

A. Scope [§ 4.2]

This chapter discusses the rights of each spouse under the Wisconsin Marital Property Act, 1983 Wis. Act 186 (codified as amended at chapter 766 and scattered sections of the Wisconsin Statutes) [hereinafter the Act or Wisconsin Marital Property Act], to manage and control assets during marriage, including the authority to incur liabilities with respect to marital property assets and to commence and defend litigation over such assets. Management and control of marital property assets for the purpose of contracting for an extension of credit is discussed in chapter 5, *infra*. Marital property agreements, which can be used to modify the management and control rules, are discussed in chapter 7, *infra*.[1]

B. Management of Marital Property [§ 4.3]

1. In General [§ 4.4]

Management and control is defined as "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

[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 Internal Revenue Code (I.R.C.) are current through Public Law Number 111-166 (excluding Pub. L. Nos. 111-148, -152, and -159) (May 17, 2010); and all references to the Code of Federal Regulations (C.F.R.) are current through 75 Fed. Reg. 28,739 (May 21, 2010). Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

civil action regarding or otherwise deal with property as if it were property of an unmarried person." Wis. Stat. § 766.01(11). All management and control rules may be varied by marital property agreement. *See* Wis. Stat. § 766.58(3)(b). The right to manage and control an asset—whether exclusive, in the alternative, or joint—does not determine the asset's classification and does not rebut the presumption under section 766.31(2) that all property of spouses is marital property. Wis. Stat. § 766.51(5). The rights of management and control of an asset may be used to change the classification of an asset. Wis. Stat. § 766.31(10). This occurs if there is a gift to a spouse. *See infra* § 4.43.

➢ ***Note.*** The rules regarding management and control set forth in this chapter are partially limited by chapter 767 after the commencement of certain actions affecting the family, including divorce. Wis. Stat. § 767.117(1)(b). Without the consent of the other party or an order from the court, the parties to the action are prohibited from encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both of the parties except in the usual course of business, to secure necessities, or to pay the costs of the action. *Id*. Thus, investment decisions regarding assets or the incurring of debt to make an investment would require this additional approval without regard to the management and control rules in chapter 766. These statutes do not prevent changes in beneficiary designations for existing assets.

2. Determination of Whether a Marital Property Asset Is "Held" [§ 4.5]

In determining spouses' management and control rights for a specific marital property asset, the initial question is whether the asset is held in the name of one or both spouses. If the marital property asset is held in one spouse's name, that spouse has exclusive management rights over the asset. Wis. Stat. § 766.51(1)(am). The comment to section 1 of the Uniform Marital Property Act (UMPA) (1983), *reprinted infra* app. A, indicates that the concept of holding was used instead of title because using the word "title" might have encouraged "overlooking the separate legal status of title and ownership, which is a fundamental aspect of the Act."

Section 766.01(9) defines the term *held* as follows:

> (a) Except as provided in pars. (b) to (d), 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.
>
> (b) An account is "held" by the person who, by the terms of the account, has a present right, subject to request, to payment from the account other than as an agent. Accounts that are so "held" include accounts under s. 705.01(1) and brokerage accounts.
>
> (c) An uncertificated security, as defined under s. 408.102(1)(r), is "held" by the person identified as the registered owner of the security upon books maintained for that purpose by or on behalf of the issuer. If the registered owner of an uncertificated security is identified as a brokerage account, the security is "held" as provided under par. (b).
>
> (d) The property rights, as specified and described in ss. 178.21 and 178.22, of a partner in a general partnership are "held" by the partner.

Under section 766.01(9), marital property real estate, for example, is held by one spouse if the deed to the real estate names that spouse as the grantee, because a deed is a writing that customarily operates as a document of title to real estate. The deed may but need not be "registered, recorded or filed" to confer exclusive management rights. *See* Wis. Stat. § 766.01(9)(a). However, the management and control rights are limited if the real estate is homestead property. *See* Wis. Stat. § 706.02(1)(f).

Like a deed to real estate, title to a marital property vehicle or boat confers exclusive management rights on the spouse named on the title. The title may but need not be registered in Wisconsin for the marital property asset to be considered held. *See* Wis. Stat. § 766.01(9)(a).

A stock or bond certificate registered in one spouse's name is a document that customarily operates as a document of title for a security, and such marital property security is held by the named spouse. A bill of lading, dock warrant, dock receipt, warehouse receipt, or order for delivery of goods in the name of one spouse is a document that customarily operates as a document of title and that causes the marital property asset to be held by the named spouse. *See* Wis. Stat. § 401.201(15). A savings account passbook or certificate of deposit at a financial institution in one spouse's name means that the marital property

account is held by that spouse. Checks representing marital property funds payable to a spouse are also held by that spouse.

However, some other written instruments regarding marital property assets are not likely to cause the asset to be held by a spouse or spouses. For example, it is unlikely that a bill of sale for household furniture or a deed of gift would cause the marital property asset described in those documents to be held by the named spouse. Although both documents may effectively transfer ownership, neither customarily operates as a document of title. Household furnishings may when sold be accompanied by a bill of sale, but their ownership could also be transferred by mere change of possession.

If no document of title exists, an asset is held if it meets the requirements of subsection 766.01(9)(b), (c) or (d). Under section 766.01(9)(b), an account is "held" by the person who, by the terms of the account, has a present right, subject to request, to payment from the account other than as an agent. Wis. Stat. § 766.01(9)(b). Section 766.01(9)(b) expressly includes bank accounts under section 705.01(1) and brokerage accounts. Thus, if one spouse opens an account with a brokerage firm, and the marital property securities are placed in the account and are registered in the nominee name of the brokerage firm, only the spouse who opened the account may direct transactions involving the securities.

- ***Note.*** Checking and investment accounts entail relationships based on a contract between a spouse or spouses and a third party. Contracts with a financial institution regarding a checking or investment account set forth who has access to the account and who may exercise further management rights regarding the assets in the account. If only one spouse is a party to the contract, then because of the express provision of section 766.01(9)(b), the other spouse does not have a right to change the terms of the contract with the third party but is instead limited to the remedies provided in section 766.70. *See infra* ch. 8; *see also infra* ch. 5 (regarding either spouse's use of marital property assets to obtain credit).

Under section 766.01(9)(c), an uncertificated security is deemed to be held by the person identified as the registered owner on books maintained for that purpose. Under section 766.01(9)(d), the property rights of a general partner in a partnership are as described in sections

178.21 and 178.22. General partnership interests are deemed to be held by the general partner.

In addition to having the right to manage and control a marital property asset held in his or her own name, each spouse acting alone may also manage marital property assets *not* held in the name of *either* spouse. Wis. Stat. § 766.51(1)(am). Both spouses have the right to manage such property independently, and management is effectively determined by possession. Property that is not normally held in either spouse's name includes bearer securities, crops, jewelry, collectibles, artwork, animals, commodities (such as gold), cash, and furniture.

A marital property asset may be held in one spouse's name or may not be held in either spouse's name; in addition, marital property may be held in the names of both spouses. *See* Wis. Stat. § 766.60. If the spouses' names on a marital property asset are in the alternative (i.e., "H or W"), either spouse acting alone may manage and control the asset. Wis. Stat. § 766.51(1)(b). If any other form of holding that names both spouses is used, both spouses must act together to manage the asset (i.e., "H and W"). Wis. Stat. § 766.51(2).

The distinction between assets that are held by a spouse and assets that are not held by a spouse should not affect third parties dealing with married individuals. In either situation, if the asset is classified as marital property, the third party may become a bona fide purchaser. A third party bona fide purchaser may obtain status under the Act, the Uniform Commercial Code, or common law rules. *See* Wis. Stat. §§ 402.403, 766.57. The spouse who holds or, if the marital property asset is not held, has possession of the asset has the right to manage and control that marital property asset. The most important management power is the ability to contract with regard to the asset. This, among other powers, permits the purchase, sale, and encumbrance of the asset.

3. Management and Control of Joint-venture Interests and Other Contractual Assets [§ 4.6]

The concept of assets being held, as developed in UMPA, is administratively functional for titled assets. The concept is difficult to apply to contract rights, which can represent assets of significant value. The only contract rights whose management is clearly determined are those expressly dealt with by statute. For example, contract rights in

brokerage accounts, bank accounts, and general partnerships are defined as held in the Act through special provisions not found in UMPA. *See* Wis. Stat. § 766.01(9)(b), (d).

General partnership interests are deemed to be held by the general partner under the definition of *held* in section 766.01(9). Wis. Stat. § 766.01(9)(d). However, the definition does not include limited partnership interests for which a certificate is not issued nor does it apply to other contractual assets. A joint-venture interest or limited partnership interest may be classified as marital property if this result is supported by an analysis of the classification of the capital contribution or funds used for the purchase. *See supra* § 2.51. However, a written joint-venture agreement or limited partnership agreement does not appear to be "a writing that customarily operates as a document of title to the type of property [which] is issued for the property in the person's name." Wis. Stat. § 766.01(9)(a). The agreement is not issued in a person's name.

The Act as originally adopted did not include section 766.01(9)(b). 1985 Wisconsin Act 37 [hereinafter 1985 Trailer Bill] added the provision because accounts "appear not to be included in the general definition of property 'held' by a person." Wis. Stat. Ann. § 766.01 Legis. Council Notes–1985 Act 37, §§ 69 to 73 (West 2009). If accounts were not held under the original Act, it does not appear that other contractual relationships could be considered held either. Joint venture contracts and limited partnership contracts have value and create rights and obligations but are not within the definition of held.

- ***Query.*** The general rule is that when an asset is not held, it may be managed by either spouse acting alone. Does this mean that a spouse who is not a party to the joint-venture agreement, limited partnership agreement, or other contract (the interest in which is classified as marital property) can transfer the joint-venture interest or contractual rights to a third party or exercise the contractual rights the same as a contracting party? If one spouse creates an individual retirement account (IRA) using marital property funds, may the noncontracting spouse change the beneficiary or exercise other rights? The answer is probably no. Before a joint-venture agreement, limited partnership agreement, or other contract is made, the contracting spouse must have the right to manage the marital property assets subsequently used for the capital contribution. The spouse may also contract for his or her services. Thus, when those assets or services are committed to a contract, the management rights should

not be altered or lost. After an agreement is made, only the parties to it should be able to exercise rights under the agreement.

4. Special Rules: Life Insurance and Deferred-employment-benefit Plans [§ 4.7]

The Act provides special management and control rules for certain types of marital property assets. Management rights to these assets are conferred without regard to whether the asset is all or partly marital property. Two assets with special management and control provisions are life insurance and deferred-employment-benefit plans. With regard to life insurance, the Act provides that a spouse acting alone may manage and control a life insurance policy if the spouse is designated as the "owner" on the policy issuer's records. Wis. Stat. § 766.51(1)(d). Ownership set forth on a policy issuer's records may differ from marital property ownership pursuant to the Act. *See* Wis. Stat. § 766.61(1)(a). For example, if a husband purchases a life insurance policy insuring his life before marriage, he will be listed as the owner on the records of the policy issuer and under the Act will have exclusive management and control rights. This power continues even though after the marriage he uses marital property funds to pay a premium, which creates a marital property ownership interest in the policy for his wife. For group life insurance, the term *owner* means the holder of each individual certificate of coverage under the group plan, regardless of whether the person is listed as the owner on the contract. *Id*.

➢ ***Note.*** Before 1987 Wisconsin Act 393 [hereinafter 1988 Trailer Bill], a written consent to a beneficiary designation or a consent as to the use of property to pay premiums was only possible for policies insuring the life of a spouse. Thus, the consent was not available for policies purchased to fund a cross purchase buy-sell agreement. *See infra* § 4.84. The 1988 Trailer Bill deleted the limitation. Under current law, written consents may be used on a life insurance policy insuring the life of any individual and providing for payment of death benefits at the insured's death. Wis. Stat. § 766.61(1)(c). This revision is not in UMPA.

With regard to a deferred-employment-benefit plan, the Act provides that an employee spouse acting alone may manage and control his or her rights under the plan accruing as a result of that spouse's employment.

Wis. Stat. § 766.51(1)(e). The employee has exclusive management even though the deferred-employment-benefit plan is all or partly marital property. For example, the employee spouse may select his or her retirement date, settlement options, and times of payment and also designate the beneficiary of such payments. *See* I.R.C. §§ 401(a)(9), (14), 417.

Neither of these special management provisions affects the classification of the asset or the remedies available to the other spouse. Wis. Stat. §§ 766.51(5), .70.

C. Management of Individual Property and Predetermination Date Property: General Rule [§ 4.8]

Each spouse acting alone may manage and control his or her property that is not marital property—in other words, individual property and predetermination date property. Wis. Stat. § 766.51(1)(a). The Act grants the owner spouse the sole right to manage and control that spouse's property which is not marital property. *See id*. Section 766.51(6) expressly provides that the Act does not affect the right to manage either or both spouses' property acquired before the determination date. Thus, the right to manage and control predetermination date property is not affected by the Act and is the same right that existed under pre-Act law. However, unless a unilateral statement or marital property agreement is in effect, the income on the individual or predetermination date property is marital property, Wis. Stat. § 766.31(4), and if the marital property income becomes mixed with a nonmarital property asset, the nonmarital property asset may be reclassified as marital property. *See* Wis. Stat. § 766.63(1). If the nonmarital property component can be traced, different management and control rules may apply to the respective components. The income, which is marital property, is subject to marital property management and control rules.

D. Limits on Management of Marital Property [§ 4.9]

The Act confers broad management rights on the spouse holding or possessing a marital property asset. Unlike the other community

property states, Wisconsin has no requirement of joinder in management actions, except with respect to actions involving the homestead or any marital property asset held in both spouses' names (other than in the alternative form). *See infra* §§ 4.44–.48. Nevertheless, the management powers are not unlimited.

The first limitation on management powers is the good-faith obligation. Each spouse has an obligation to act in good faith with respect to the other spouse in matters involving marital property assets or the other spouse's property. Wis. Stat. § 766.15(1); *see also infra* §§ 4.26–.33. The obligation of good faith, which is a lower standard than a fiduciary obligation, may not be altered by a marital property agreement. Wis. Stat. § 766.15(1); *see* UMPA § 2 cmt. The good-faith obligation does not apply to a spouse exercising management powers over his or her individual or predetermination date property. Wis. Stat. § 766.15(2).

The second limitation on management and control relates to a remedy available if one spouse acting alone makes substantial gifts of marital property assets to a third person. Under the Act, a spouse acting alone may give marital property assets in any amount to a third person. Wis. Stat. § 766.51(4). However, if the gift of marital property assets to a third person has an aggregate value exceeding (1) $1,000 in a calendar year or (2) a larger amount if, when made, the larger gift is not reasonable in amount considering the spouses' economic position, the nondonor spouse has a remedy against the donor spouse, the donee, or both unless the spouses act together in making a gift. Wis. Stat. §§ 766.53, .70(6)(b); *see also infra* §§ 4.35–.42.

The Act's limitations protect the nondonor spouse's ownership interests. UMPA §§ 2, 6 cmts. Gifts defeat the nondonor spouse's interest in the donated property and thus make an absolute dollar limit appropriate, without regard to whether the donor spouse was acting in good faith. The general rule in other community property states applies a good-faith obligation to gifts of community property made by one spouse acting alone. William A. Reppy & Cynthia A. Samuel, *Community Property in the United States* 233–41 (2d ed. 1982). In one case in which the donor spouse could not remember how much money he gave away or to whom he gave it, the transfers were presumed fraudulent toward the nondonor spouse. *See Reaney v. Reaney*, 505 S.W.2d 338 (Tex. Civ. App. 1974). Similarly, another spouse was required to account for community property funds spent for gifts and favors connected with an

extramarital affair. *Simpson v. Simpson*, 679 S.W.2d 39 (Tex. App. 1984); *see also Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App. 1975). In Wisconsin, it appears that in a proper case, gifts of marital property assets made by one spouse acting alone may be challenged as violating the good-faith obligation even if the amount given to a third party is less than the amount permitted by section 766.53. *See infra* §§ 4.35–.42.

II. Substantive Differences from UMPA [§ 4.10]

A. In General [§ 4.11]

Since the Act is based on UMPA, it is appropriate in resolving questions under the Act to consider UMPA and its comments when the provisions are the same in both acts in resolving questions under the Act. Conversely, when the Act and UMPA differ, the Wisconsin legislative history should be examined to see why the UMPA provision was not used and the substantive impact of such differences. In addition to its special management and control provisions that apply in connection with incurring an obligation for the extension of credit (discussed in chapter 5, *infra*), the Act contains four provisions affecting management and control that differ from UMPA, discussed in sections 4.12–.15, *infra*.

B. Homestead [§ 4.12]

UMPA provides for creation of "survivorship marital property" but, unlike the Act, does not provide that a homestead acquired exclusively by spouses is survivorship marital property, absent a contrary expression of intent in the instrument of transfer. UMPA § 11. (Under UMPA, a spouse may exercise management and control powers to create survivorship marital property if the term "survivorship marital property" is included in the document of title.) In the Act, a homestead acquired exclusively by spouses is survivorship marital property unless a contrary intent is expressed. The intent not to hold a homestead as survivorship marital property may also be expressed in a marital property agreement. *See* Wis. Stat. § 766.605. Thus, after the determination date, absent an intent to the contrary, a deed for a homestead to "A and B, husband and wife" or to "A and B" (if they are in fact married) creates survivorship marital property. *Id*. (Section 700.19(2), providing that such designation of spouses in a deed creates a joint tenancy, was amended by the Act to

apply only to property acquired before January 1, 1986 or while the Act does not apply.) A homestead may be reclassified in any manner provided in section 766.31(10). *Id*.

The decision in *Jones v. Estate of Jones*, 2002 WI 61, 253 Wis. 2d 158, 646 N.W.2d 280, dealt with a homestead property. The spouses had entered into a premarital agreement that provided for each party to hold all his or her solely owned property, including real estate, free of all rights or claims by the other party. The couple lived in a house that the husband owned before marriage; however, when the parties had been married for about 20 years, the husband transferred the home to the wife by warranty deed. Later that same day, the wife conveyed the homestead to her husband's two children with a reserved life estate. The husband did not sign this second deed. After the husband's death, the issue was whether the failure to have both spouses sign the deed as required in section 706.02(1)(f) made the transfer a nullity. The Wisconsin Supreme Court held that a spouse can waive the homestead protections in a premarital agreement; thus, it was not necessary in this case for both spouses to sign the deed for the deed to be effective.

C. Life Insurance [§ 4.13]

Under UMPA and the Act, the owner of a marital property life insurance policy, as reflected on the policy issuer's records, has all management and control power over the policy, including the power to designate the beneficiary. *See* Wis. Stat. § 766.61(1)(a); UMPA § 12(a)(1); *see also infra* § 8.13. Even if the insured is the owner on the policy issuer's records, the insured's spouse may nevertheless have a marital property interest in the policy and its proceeds. Before the insured's death, the nonowner spouse can relinquish (or reclassify) any marital property interest in the policy and its proceeds by consenting (in writing) to either the designation of another person as beneficiary or the reclassification of the marital property interest. Wis. Stat. § 766.61(3)(e). UMPA section 12(c)(5) provides only for relinquishment and not for reclassification by consent. UMPA also presumes the nonowner spouse's consent to relinquish any interest when the beneficiary is a parent or child of either spouse. The Act omits this presumption. *See* Wis. Stat. § 766.61(3)(e).

➢ ***Note.*** Before passage of the 1988 Trailer Bill, a written consent to a beneficiary designation or to the use of property to pay premiums

was only possible for policies insuring the life of a spouse. Thus, the consent was not available for policies purchased to fund a cross purchase buy-sell agreement, *see infra* § 4.84. The 1988 Trailer Bill deleted the limitation. Under current law, written consents may be used on a life insurance policy insuring the life of any individual and providing for payment of death benefits at the insured's death. Wis. Stat. § 766.61(1)(c). The revision is not in UMPA.

The Wisconsin Act and UMPA also differ in another way with regard to life insurance. In Wisconsin, if (1) a spouse owns a policy on the other spouse's life and the policy-owning spouse dies first, or (2) a spouse has a marital property interest in a policy in which the insured spouse is the owner on the policy issuer's records and the noninsured spouse dies first, then the surviving spouse has the option of purchasing the decedent's interest in the policy from the estate at the interest's fair market value at the date of death. Wis. Stat. § 766.70(7). UMPA does not provide this option. *See infra* § 12.68.

D. Deferred Employment Benefits [§ 4.14]

The Act provides that a nonemployee spouse's marital property interest in a deferred-employment-benefit plan terminates at death if he or she predeceases the employee spouse. Wis. Stat. §§ 766.31(3), .62(5). Section 13 of UMPA does not provide for such termination. Thus, under the Act, the employee spouse's ability to manage and control deferred-employment-benefit plans and fully direct the beneficial interest in such plans is not affected if the nonemployee spouse dies first.

E. Marital Property Agreements [§ 4.15]

The provisions of the Act and UMPA differ with respect to the requisites for a valid marital property agreement vis-à-vis management and control. *See infra* ch. 7.

III. Scope of Management and Control [§ 4.16]

A. Compensation for Services [§ 4.17]

1. Earned Income [§ 4.18]

Compensation for services performed by a spouse after the determination date is marital property, absent a marital property agreement or court order to the contrary. Wis. Stat. § 766.31(4). Although the nonemployee spouse owns an undivided one-half interest in compensation received by the employee spouse for services during the marriage, Wisconsin statutes and employer-employee contracts generally require that the entire wage be paid to the employee. Wis. Stat. § 109.03(1). Absent a court order, the other spouse is not entitled to direct receipt of such wages. *See infra* § 8.40; *see also* Wis. Stat. § 109.03(3) (regarding payment of compensation after death of employee). However, in most situations, the employee spouse needs the nonemployee spouse's written consent to make an assignment of wages. Wis. Stat. § 241.09. A nonemployee spouse's interest in compensation, as well as in other marital property assets, is further protected by the duty of good faith under section 766.15. *See infra* §§ 4.26–.33. It appears that a nonemployee spouse may also seek remedies provided under the Act to limit or terminate the employee spouse's management and control rights and change the classification of compensation to the individual property of the nonemployee spouse. *See* Wis. Stat. § 766.70(4)(a) 1., 2.; *see also infra* § 8.40. These remedies are discretionary with the court and are discussed in chapter 8, *infra*.

Compensation is usually paid by check, in cash, or by direct deposit. Management and control rights differ under each of these alternatives.

1. *Compensation paid by check*. If compensation is paid by check, the funds represented by the check (a writing that customarily operates as a document of title to this type of property) are held by the employee spouse and are subject to his or her exclusive management and control. Wis. Stat. §§ 766.01(9), .51(1)(am); *see also infra* § 8.40. This permits the employee spouse to solely manage the funds. The funds may be deposited into an account at a financial institution or may be used to purchase assets. The account or assets so acquired may be titled as the employee spouse directs, but they remain classified as marital property.

2. *Compensation paid in cash*. Compensation that is paid in cash is not property held by the employee spouse; thus, under the Act, either spouse acting alone has the right to manage the cash. Wis. Stat. § 766.51(1)(am). Actual management rights are determined by possession.

3. *Compensation paid by direct deposit*. If compensation is directly deposited into an account at a financial institution, the employee spouse selects the account into which the deposit is made and may, as a result, control subsequent management by how the account is titled.

In all events, the resulting management and control rights are subject to the obligation of good faith and the other spouse's remedies.

2. Deferred Employment Benefits [§ 4.19]

a. General Rules and Federal Law [§ 4.20]

Deferred employment benefit plan is a term defined under the Act, and it includes most employer retirement plans and deferred compensation. *See* Wis. Stat. § 766.01(4). To the extent benefits are attributable to employment occurring during marriage and after the determination date, they are marital property. (The nonemployee spouse's marital property interest in a deferred-employment-benefit plan, or in assets in an IRA that are traceable to the rollover of a deferred-employment-benefit plan, terminates if he or she predeceases the employee spouse. Wis. Stat. § 766.62(5). A marital property agreement that classifies a deferred employment benefit as marital property does not affect the operation of this terminable interest provision unless the marital property agreement expressly provides otherwise. Wis. Stat. § 766.58(7)(a)).

If the employment and accrual of benefits began before the determination date, the benefits are mixed property subject to the proration rules of section 766.62(2).

The right to manage and control deferred employment benefits resides exclusively in the employee spouse under section 766.51(1)(e). Thus, depending on the type of benefit plan, the employee spouse may have the right to designate a beneficiary, select payment options, select time for payments to begin, request loans from plan assets, request in-service

withdrawals, and request withdrawals upon termination of employment, subject to the federal limitations discussed below.

1993 Wisconsin Act 160, which expanded the scope of the terminable-interest rule to include the marital property portion of the assets in an IRA that are traceable to the rollover of a deferred employment benefit plan, did not similarly expand the scope of section 766.51(1)(e). Thus, the right to manage and control an IRA continues to be determined under the general rules of section 766.51.

Federal law regarding tax-qualified defined benefit plans under I.R.C. § 401 protects the nonemployee spouse by requiring a joint and survivor annuity or the actuarial equivalent. Profit-sharing plans can avoid the joint and survivor annuity only if the spouse is named as primary beneficiary. These beneficiary provisions may be changed only with the nonemployee spouse's written consent. I.R.C. §§ 401(a)(11), 417. Under the Act, if the employee designates a beneficiary other than his or her spouse, the surviving spouse may recover his or her marital property interest in the plan from the beneficiary. *See* Wis. Stat. § 766.70(6)(b).

➢ ***Practice Tip.*** If a federal consent is executed, there may be federal preemption of the Wisconsin rule for plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461. *See supra* §§ 2.214–.217. Until the uncertainty is resolved, if the spouses wish to provide that a beneficiary other than the spouse will receive more than one-half the proceeds, it may be advisable for the spouses to have a marital property agreement classifying the plan benefits as individual property to ensure the effectiveness of the beneficiary designation.

One planning technique to obtain maximum benefit of the applicable credit amount for federal estate tax purposes has been to classify the assets in a deferred-employment-benefit plan as marital property and override the terminable-interest rule. If this technique is adopted and the nonemployee spouse dies first, one-half of the plan's assets are part of the nonemployee spouse's estate and can be used to fund the applicable exclusion amount (formerly the "credit shelter gift").

➢ ***Caution.*** The U.S. Supreme Court has determined that ERISA preempts state law permitting a transfer such as that described in the preceding paragraph, and therefore the exercise of management and

control over ERISA plans is limited. *Boggs v. Boggs*, 520 U.S. 833 (1997).

b. Limitations on Management and Control: Analogy to Community Property Divorce Cases [§ 4.21]

Under the Act, the basic limitation on the exercise of management and control rights is the spousal obligation of good faith. Cases in other community property states and some common law property states regarding the exercise of certain management rights may provide guidance in Wisconsin as to the scope of the employee spouse's good-faith obligation in protecting the nonemployee spouse's interest. Some California divorce cases are illustrative.

- ***Note.*** In California, only community property is subject to division in a divorce proceeding. This places a premium on classifying assets as community property and may have affected the outcome in the cases discussed below.

In *Gillmore v. Gillmore*, 629 P.2d 1 (Cal. 1981), the court held that a husband could not unilaterally determine when his former wife would receive her interest in the pension benefits attributable to his employment during the marriage. At the time of divorce, the trial court had reserved jurisdiction over the husband's interest in a retirement plan. Shortly after the judgment of dissolution was final, the husband, who intended to work for several more years, became eligible for benefits under the company retirement plan. His former wife filed a petition to obtain her share of the pension benefits immediately.

The court found that the benefits had matured because the only condition on the husband's enjoyment of the benefits was his retirement—a condition within his sole control. The court held that the husband could not invoke a condition wholly within his control (continuing to work) to impair his former wife's interest in those retirement benefits and defeat her community property interest.

The court further held that the husband had the right to postpone receipt of his pension and to run the risk that he might die before that date, but he was not free to force his former wife to do so as well.

According to the court, one spouse's financial situation may involve factors significantly different from the other's. After divorce, each spouse should be able to make an independent decision about how to handle his or her share of the former community property. Under the court's analysis, the employee spouse retains the right to change or terminate employment, agree to a modification of the retirement benefits, and elect between alternative benefits. However, if the right to choose among alternative retirement benefits is exercised in a way that impairs the nonemployee spouse's interest, the nonemployee spouse must be compensated. *Cf. Brooks v. Brooks*, 767 S.W.2d 358 (Mo. Ct. App. 1989) (similarly holding that a husband could not retire early, thereby adversely affecting his spouse by reducing retirement benefits).

Stenquist v. Stenquist, 582 P.2d 96 (Cal. 1978), concerned a further limitation on a spouse's right to elect a particular pension. The husband, a former member of the armed forces, had an opportunity at retirement to choose between a disability pension that would provide 75% of his basic pay and a retirement pension that would provide 65% of his basic pay. Under California law at the time and federal preemption rules, a disability pension was the husband's separate property, whereas a retirement pension was community property. In 1970, the husband, while still married, retired and elected the disability pension. In 1974, the husband commenced an action for divorce and claimed the disability pension as his separate property.

The court held that the employee spouse had the management right to select which pension benefit would be received but also held that if the employee elected the disability pension, the benefit would be apportioned between the spouses so that the retirement pension amount (65% of basic pay) would be considered a community asset divisible at divorce.

- ***Note.*** In Wisconsin, a disability pension may have components with different classifications. Part of the disability pension could compensate for loss of income during marriage (marital property), while another part could represent a recovery for personal injury or loss of income after marriage (individual property). *See supra* § 2.136. If so, the computations and resulting management rights in *Stenquist* could apply in Wisconsin.

Another pension case, *Lucero v. Lucero*, 173 Cal. Rptr. 680 (Ct. App. 1981), concerned a former spouse's right to participate in a redeposit

after separation (the end of the creation of community property rights) and thereby share in the resulting increase in pension benefits. The husband worked for the federal government from 1942 until his retirement in 1977, receiving credit for more than 30 years of employment service. In 1966, while married, he had withdrawn his retirement contributions and expended them for community purposes. To obtain the maximum retirement benefit, he had to redeposit $9,373, which redeposit would increase the monthly pension by $366 plus subsequent cost-of-living increases. In 1977, after the spouses' separation, the husband redeposited this amount, using his separate funds. The wife claimed that she was entitled to participate in the increased pension resulting from the redeposit as if she had paid a pro rata share of the redeposit. The court agreed.

The court held that the duty of spouses to deal fairly with each other does not terminate when they separate and dissolve their marriage. One spouse cannot, by exercising a management right wholly within his or her control, defeat the community interest. The court held that to allow the husband the sole right to decide whether to redeposit and the sole right to elect whether to redeposit with separate or community funds would be to treat the redeposit right as the husband's separate property. According to the court, the redeposit right was a pension right. The community owned all pension rights attributable to employment during the marriage, and the court thus permitted the wife to contribute to the redeposit and obtain a portion of the additional annuity as if it had been purchased with community property.

c. Conclusion [§ 4.22]

The Act grants the employee spouse the right, acting alone, to manage and control a deferred-employment-benefit plan that accrues as a result of that spouse's employment. Wis. Stat. § 766.51(1)(e). However, ERISA restricts the employee spouse's ability acting alone to make third parties the beneficiary of certain plan benefits (or permits the nonemployee spouse to exercise certain options). In addition, as the cases in section 4.21, *supra*, illustrate, a court is likely to compensate the nonemployee spouse (or permit the nonemployee spouse to exercise certain options) when the employee spouse's management decisions adversely affect the nonemployee spouse's economic interests. In Wisconsin, the good-faith obligation can be applied to limit the exercise

of the right to manage and control deferred-employment-benefit plans during marriage.

3. Group and Split-dollar Life Insurance [§ 4.23]

A group life insurance policy arising from employment commencing after the determination date is classified entirely as marital property. Wis. Stat. § 766.61(3)(a)1. A time-apportionment formula will apply to the policy if, after its issuance, either or both of the spouses are at any time not domiciled in Wisconsin. Wis. Stat. § 766.61(3)(a)2. If the policy was issued before the determination date, it has a marital property component. Wis. Stat. § 766.61(3)(b). In determining the marital property component of the ownership interest and proceeds of a group policy sponsored by an employer or association, the date on which the policy becomes effective is the date on which the individual coverage begins, notwithstanding that the employer or association thereafter changes policy issuers or that the amount of coverage changes under the policy pursuant to the plan or benefit offered by the employer or association. Wis. Stat. § 766.61(2m)(b). If additional underwriting is required after original issuance of the policy, the effective date of the policy is the date on which the newly underwritten coverage begins. *Id.* These rules may be changed by a marital property agreement or written consent. Wis. Stat. §§ 766.58(3), .61(3)(e).

If the noninsured spouse predeceases the insured spouse, the decedent's marital property interest in a policy that designates the surviving spouse as the owner (as defined, with regard to group insurance, in section 766.61(1)(a)) and insured is limited to a dollar amount equal to one-half of the marital property interest in the interpolated terminal reserve and in the unused portion of the term premium of the policy on the date of death of the deceased spouse. Wis. Stat. § 766.61(7). All other rights of the decedent spouse terminate upon death. *Id*. A marital property agreement may change this result only if it expressly provides for the different result. Wis. Stat. § 766.58(7)(b).

For purposes of management and control, group and split-dollar life insurance are not considered benefits under a deferred-employment-benefit plan, *see* Wis. Stat. § 766.01(4)(b); thus, the special management rules governing such plans, *see supra* §§ 4.19–.22, do not apply. The group and split-dollar life insurance policies do, however, fall within the exclusive management and control of the employee spouse, since the

employee spouse initially is designated as owner on the policy issuer's records. *See* Wis. Stat. § 766.51(1)(d). The management and control powers include the power to designate a beneficiary of the policy proceeds and to assign ownership of the policy.

If group or split-dollar life insurance is marital property, in whole or in part, and if a beneficiary other than the surviving spouse is designated to receive more than one-half of the marital property proceeds, then upon the death of the employee owner spouse the surviving spouse can recover his or her marital property interest from the beneficiary. *See Socha v. Socha*, 204 Wis. 2d 474, 555 N.W.2d 152 (Ct. App. 1996); *see also* Wis. Stat. § 766.70(6)(b); *infra* § 8.51. This remedy exists unless (1) the nonemployee spouse gives written consent to the designation of another person as beneficiary of the proceeds or to the use of marital property to pay premiums, or (2) the nonemployee spouse has executed a marital property agreement or a written consent reclassifying the policy. *See* Wis. Stat. § 766.61(3)(e). The consent may cover insurance coverage attributable to subsequent premium payments. *Id*.

- ***Comment.*** Even if the spouses so intend, it is unclear whether a written consent as to beneficiary designation or classification of a split-dollar policy is effective for additional coverage purchased with subsequent dividend additions classified as marital property. *See* Wis. Stat. § 766.01(10); *see also infra* ch. 10. The better view is that such policy dividends are property used to pay premiums, and thus the consent is effective.

The employee spouse who owns a group or split-dollar insurance policy may name a creditor as the policy beneficiary. In addition, the owner of a split-dollar policy may, unless prohibited by the split-dollar agreement, assign the policy to a creditor as collateral for an obligation. (Assignment to a creditor is not effective for group life policies. *See* Wis. Stat. § 632.56(3).) If a creditor is named as beneficiary or if an assignment occurs, the creditor's interest in the proceeds is superior to the other spouse's marital property interest to the extent of the consideration paid by the creditor. *See* Wis. Stat. § 766.61(4); *see also Bille v. Zuraff (In re Estate of Bille)*, 198 Wis. 2d 867, 543 N.W.2d 568 (1995). This provision giving creditors priority allows an employee spouse to use a beneficiary designation or assignment to preserve his or her individual property.

➢ ***Example.*** If an asset is acquired that creates an obligation in the interest of the marriage or the family and the only funds available to satisfy the obligation are individual property, the use of the individual property to satisfy the obligation may be presumed a gift. *See supra* § 3.40. When new funds are received through salary, they are classified as marital property and the individual property is depleted. A right of reimbursement exists only if there is an agreement between the spouses. *Id.* If the spouse instead obtains a loan using the marital property insurance policy as security, the loan proceeds can satisfy the obligation and preserve any individual property funds. The exercise of this management and control alternative is subject to the obligation of good faith. *See* Wis. Stat. § 766.15(1).

An employee spouse who owns an interest in a group or split-dollar life insurance policy has the additional management power to assign ownership of the interest by gift to a third party, which may include transferring the interest to an irrevocable life insurance trust. *See* Wis. Stat. § 766.51(1)(d). Such transfers are subject to the restrictions on gifts, the obligation of good faith, and the interspousal remedies. *See infra* §§ 4.26–.33, .35–.42, 8.46. A gift of a life insurance policy is valued for this purpose at the amount that would have been payable if the insured had died when the gift was made; this amount is used to determine whether the amount of the gift was reasonable. Wis. Stat. § 766.53; *see also infra* §§ 4.37, ch. 10.

4. Stock Options [§ 4.24]

Stock options granted to an employee spouse for services performed after the determination date are compensation for services and thus are marital property. *See* Wis. Stat. § 766.31(4). It is unclear whether stock options issued under a corporate plan are within the definition of deferred-employment-benefit plans under section 766.01(4)(a). If the statute is interpreted so that stock options are a deferred-employment-benefit plan, the employee spouse has exclusive management of them. *See* Wis. Stat. § 766.51(1)(e). On the other hand, if the stock options are not a deferred-employment-benefit plan, the option-grant contract appears to determine the parties' rights and can subject the option to the employee spouse's exclusive management and control. *See supra* § 4.6.

5. Other Benefits [§ 4.25]

Employee benefits take many forms. Some employers provide group health insurance and group disability insurance coverage. Others provide employees with paid vacations, use of automobiles, club memberships, and other benefits.

After the determination date, employee benefits are classified as marital property because they are economic benefits having value attributable to a spouse's efforts. *See* Wis. Stat. § 766.01(10). Such benefits do not qualify as a deferred-employment-benefit plan. One exception is when the right to payment accrues on a disability plan, *see* Wis. Stat. § 766.01(4)(b); the right to payment is converted to a benefit under a deferred-employment-benefit plan, and the employee spouse has exclusive management rights. *See supra* §§ 4.19–.22. Otherwise, employee benefits fall within the definition of wages and thus must be paid to the employee. *See* Wis. Stat. §§ 109.01(3), .03. At dissolution or death, benefits that have a monetary value may be divided. *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d 235 (1978); *Lorenz v. Lorenz*, 194 Cal. Rptr. 237 (Ct. App. 1983); *Hewett v. Hewett*, 160 Cal. Rptr. 1 (Ct. App. 1979) (ordered not published).

B. Good-faith Duty [§ 4.26]

1. In General [§ 4.27]

a. Analysis of Wisconsin Statute [§ 4.28]

In the exercise of management and control over marital property assets or the other spouse's property, all transactions are subject to review by the other spouse. The overriding obligation of both spouses is to act in good faith. Under section 766.15(1), "[e]ach spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse."

Section 766.15(1) is identical to UMPA section 2(a). Neither section explains the actual duty of good faith or gives examples of permitted or prohibited conduct. The comment to UMPA section 2 refers the reader to William A. Reppy, Jr., *Community Property in California* 174–75, 177 (1980), and to section 5125(e) of the California Civil Code.

California's statute, described as "similar" to UMPA section 2(a), became effective in 1975, when the state changed to an equal management system. The comment to UMPA section 2 explains that spouses are not trustees or guarantors toward each other, but that they are more than "simple parties to a contract endeavoring to further their individual interests." *See infra* § 8.12.

Several Wisconsin statutes require good faith in commercial situations. *See, e.g.*, Wis. Stat. §§ 401.201(19), .203, 402.103(1)(b), 421.108. Although findings regarding good faith have been made in a few cases involving those statutes, those cases do not analyze the requirements of the standard, and the decisions are of limited relevance to a spousal relationship. *See Crown Life Ins. Co. v. La Bonte*, 111 Wis. 2d 26, 330 N.W.2d 201 (1983); *First Am. Nat'l Bank v. Fiesta Corp.*, 25 Bankr. 236 (Bankr. W.D. Wis. 1982).

Section 766.15(2), which immediately follows the good-faith obligation in subsection (1), provides that "[m]anagement 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 sub. (1)." Thus, a spouse does not have a good-faith obligation to produce income with his or her individual or predetermination date property.

- ***Comment.*** A logical inference might be that while individual property and predetermination date property may be so managed, marital property assets may not be managed or controlled to intentionally limit, diminish, or fail to produce income. If correct, this reading would severely restrict permissible investments and prohibit investment in nonincome-producing assets, such as vacant real estate or securities that do not pay dividends. The comment to UMPA section 2(b) does not support this interpretation. The comment states that subsection (2) was included to resolve any questions that might arise regarding the application of subsection (1) to the income stream of property that is not marital property. Subsection (2) should be limited to this purpose and not be construed to create affirmative obligations regarding marital property assets.

The obligation of good faith was considered in *Lloyd v. Lloyd (In re Estate of Lloyd)*, 170 Wis. 2d 240, 487 N.W.2d 647 (Ct. App. 1992). The husband established accounts in joint tenancy with a third party after a divorce proceeding was commenced and in violation of a court order.

The circuit court held that the accounts were fraudulent because they were established in violation of a court order. The court of appeals agreed and also stated: "We agree that all [of the accounts] are marital property because they were established after the determination date with funds not clearly shown to be nonmarital. Thus, the transfers also constituted a breach of the spousal duty of good faith." *Id*. at 264; *see also Gardner v. Gardner*, 175 Wis. 2d 420, 499 N.W.2d 266 (Ct. App. 1993).

In *Socha*, 204 Wis. 2d 474, the parties commenced a divorce proceeding, and the court entered an order restraining both parties from disposing of marital property assets. The husband changed the beneficiary of his group life insurance and Wisconsin Retirement System death benefit from the wife to his son. The husband died before the divorce was concluded, and the wife commenced an action to recover the proceeds. The court held the change of beneficiary to be a breach of good faith.

b. Analogy to Other Community Property States [§ 4.29]

The other community property states recognize a duty between spouses regarding the management of community property. Reppy & Samuel, *supra* § 4.9, at 245. Some decisions from these jurisdictions refer to this duty as a fiduciary duty. William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* §§ 113, 119, 120, 150 (2d ed. 1971). However, most of these cases were decided before those states changed from sole male management to equal management, and the analysis of the duty between spouses is different from that applied to a trustee. *See Williams v. Williams*, 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (1971); *see also infra* § 8.12.

The cases in other community property states illustrate the kind of fact situations from which allegations of lack of good faith may arise in Wisconsin. Those cases, especially those that have arisen in California after January 1, 1975, and were decided under a similar statute, should provide some guidance in determining the scope of the good-faith obligation in Wisconsin. Generally, the facts in those cases that support a finding that there was no breach of fiduciary duty would also support a finding that there is no breach of the good-faith obligation under section 766.15. However, if the court finds that there was a breach of fiduciary

duty—a higher standard than that imposed by section 766.15(1)—the facts involved may not support a finding that there has been a breach of the good-faith obligation under the Act.

2. Investments [§ 4.30]

To date there are no Wisconsin decisions regarding the good-faith obligation by a spouse in handling investments. The cases from other states show the type of issues that can arise. The spouse's obligation of good faith in connection with an investment opportunity was considered in *Ogden v. Ogden*, 331 So. 2d 592 (La. Ct. App. 1976). The husband had used community property to acquire stock in a closely held family corporation. After the spouses were legally separated but before their divorce, the corporation offered additional stock for sale under preemptive purchase rights attributable to the original stock. The husband used his separate funds to purchase the additional stock. The trial court held that the acquisition was community property because the preemptive rights were attributable to the original community property securities purchased before separation. The appellate court affirmed, stating that after separation the husband still had a fiduciary duty to his wife with regard to the management of community property. The appellate court held that when an investment opportunity arises from community property assets, it is a community opportunity of which the spouse must take advantage if community funds are available. The spouse may not change the classification of the purchase rights derived from the original community property stock by using separate funds. Moreover, if the spouse does not take advantage of the investment opportunity for the community, he or she must make full disclosure of the opportunity so the other spouse might exercise the preemptive right.

The issue of good faith in investment opportunities arising from employment of a spouse during marriage was considered in *Somps v. Somps*, 58 Cal. Rptr. 304 (Ct. App. 1967). The husband was a partner in a partnership commenced before marriage. The cash accumulated from his work in the partnership was allocated 60% separate property and 40% community property. The husband used his separate funds to purchase real estate with his partner and a third party; the property was later sold for a substantial profit. The investment opportunity was tangential to the husband's employment. The issue was whether the husband had breached his fiduciary relationship by using separate funds rather than available community funds to acquire the investment. The court held

that the husband did not breach his fiduciary duty, stating that there "is no reason why husband should be compelled to keep his separate funds idle." *Id.* at 310. In so holding, the court noted that the husband had apparently made many investments that benefited the community.

The handling of an investment was also considered in *Baum v. Baum*, 584 P.2d 604 (Ariz. Ct. App. 1978). The husband received a gift from his father of numerous shares of a closely held corporation. The shareholders subsequently sold their shares to B.F. Goodrich Company. By separate agreement, the husband acquired from B.F. Goodrich an option to purchase those shares for a fixed price if the business relationship continued and the husband continued as manager. The husband transferred the option to the closely held corporation for no consideration. One year later, during the marriage, the corporation exercised the option and repurchased the stock. Of the purchase price, almost 90% was paid by the corporation from its retained earnings during the marriage.

In the divorce proceeding, the wife claimed that the option had a value that was a community asset. The court held that even if the option were a community asset when it was offered to the husband, its value certainly was not the same as the total purchase price of the stock, and the wife did not establish the option's value. Moreover, the court held that regardless of the option's value when it was offered to the husband, the community lost any rights to it when the husband transferred the unexercised option to the closely held corporation. The community had not paid anything for the option, nor did the records support the allegation that the husband acted improperly to benefit his separate property at the expense of the community. No evidence was presented establishing that the community was interested in exercising the option or that it was in a position to do so. Thus, the court held that the community did not retain rights in the option when it was transferred.

Although the obligation of good faith applies to investments, the cases in the other community property states do not state a consistent standard by which to test a spouse's management decisions. In contrast to older cases, more recent cases are similar to *Somps* and *Baum* in refusing to second-guess management decisions. Reppy & Samuel, *supra* § 4.9, at 245–46.

➢ ***Query.*** What effect does the spouses' separation have on the good-faith standard for testing a spouse's management decisions?

The *Lucero* decision discussed at section 4.21, *supra*, and the *Ogden* decision discussed earlier in this section concern management and control after spouses separate. In Wisconsin, after spouses have separated, it is possible to obtain a judgment of legal separation under chapter 767 that constitutes a dissolution for purposes of the Act and thus affects management of assets that were classified as marital property. *See* Wis. Stat. § 766.01(7); *see also infra* § 11.29. If a judgment of legal separation is not obtained, is the measure of the good-faith obligation applicable after separation different from that applicable before separation? *See infra* § 4.57. The courts may, however, consider this fact in applying the obligation of good faith and in deciding cases under the equitable remedies provisions in section 766.70. *See infra* § 8.12.

The issue whether a spouse breached the duty of good faith with regard to an asset classified as marital property was raised in *Noble v. Noble*, 2005 WI App 227, 287 Wis. 2d 699, 706 N.W.2d 166. In that case, two brothers, Dale and Danny, were partners in a partnership that farmed numerous properties. The land farmed by the partnership was not owned by the partnership. The two brothers owned some of the land as tenants in common. During Danny's marriage, three different parcels of land that the partnership farmed became available for purchase, and the brothers decided that Dale and his wife should purchase the three parcels. The partnership financed the purchase and created a ledger showing the amount receivable from Dale.

In the divorce action, Danny's wife claimed that her husband breached the obligation of good faith by not purchasing a one-half interest in the three properties when they became available for purchase. She claimed that by not purchasing an interest in this real estate the husband committed marital waste. She requested as a remedy that the court include the value of the three properties in the divisible estate for purposes of the property division.

The court held that "once the divorce action is filed, the section 766.15 cause of action and its attendant remedy are no longer available." *Id.* ¶ 18. Once the divorce action was started, sections 767.255(3) and 767.275 (since renumbered as sections 767.61(3) and 767.385) became applicable. Under those statutes, it does not matter that the husband refused to purchase the properties in large part for the purpose of keeping them out of the divisible estate. The statutes are designed to prevent squandering or destruction of marital property or the unjustified

depletion of divisible assets. Neither statute "require[s] a party to a pending divorce to take advantage of an opportunity to acquire property that would *increase* the value of the marital estate. This is so even if the opportunity represents a good deal." *Id.* ¶ 19. The fact that Danny permitted partnership funds to be used to finance the purchase of the real estate by Dale and his wife did not constitute waste, squandering, destruction, or unjustified depletion of marital assets.

3. Litigation [§ 4.31]

One power of management and control is the right to institute or defend a civil action regarding an asset classified as marital property. Wis. Stat. § 766.01(11). Once commenced, an action must be pursued in good faith with regard to the other spouse. The obligation of good faith in the conduct of litigation involving community assets and obligations was considered in *Schultz v. Schultz*, 164 Cal. Rptr. 653 (Ct. App. 1980). The court in the divorce action ordered the residence sold to satisfy certain creditors. One obligation was based on a community debt owed to a third party. The third party filed suit to collect the debt against the husband, who did not have counsel and apparently failed to appear on the trial date.

After the residence was sold, the trial court allocated the debt unequally because of the husband's failure to defend the suit properly. The appellate court held that the circumstances in this case were not sufficient to permit unequal division. (California at that time only authorized unequal division if a spouse had deliberately misappropriated community property. *See* Cal. Civ. Code § 4800(b)(2) (West 1983).) The court held that *deliberately misappropriated* refers to calculated thievery as opposed to mishandling of assets, although the phrase could also apply to gross mishandling of community financial affairs tantamount to fraud.

In Wisconsin, a spouse who brings an action to enforce a claim involving a marital property asset or who is a defendant in an action in which the obligation may be satisfied from property classified as marital property should be aware of his or her good-faith obligation to properly represent the spouses' interests. *See* Wis. Stat. § 766.15(1); *see also infra* §§ 4.49–.56. If, for instance, a spouse allows a default judgment to be entered in an action in which a defense exists, the spouse may breach the obligation of good faith. *See infra* § 8.12.

4. Accounting for Marital Property [§ 4.32]

Section 766.70(2) authorizes a spouse, both during the ongoing marriage and at dissolution or death, to obtain an accounting of the spouses' property and obligations. *See* UMPA § 15 cmt. Most other community property states recognize the duty to account for management transactions and assets only at dissolution or death. Reppy & Samuel, *supra* § 4.9, at 249.

In the other community property states, the obligation of good faith requires a spouse in a dissolution to be able to account for community property in his or her possession. *Id*. at 247. By contrast, in Wisconsin the duty is separately stated, and a court may order a spouse during marriage to account for the spouses' property and obligations. *See* Wis. Stat. § 766.70(2). Thus, in Wisconsin a failure to account gives rise to the determinations in section 766.70(2). It is unclear whether in Wisconsin a failure to account would also violate the duty of good faith. Despite this ambiguity, the cases in other community property states should help determine the extent to which a spouse domiciled in Wisconsin must account for expenditures or disposition of marital property assets.

The good-faith obligation to account for community property in a spouse's possession was considered in *Valle v. Valle*, 126 Cal. Rptr. 38 (Ct. App. 1975). The parties were divorced, and the appeal involved the division of community property. The husband contended that two community property assets, a parcel of real property in Mexico and an automobile, should not have been allocated to him in the property division because he no longer held the property, which had been taken by creditors. The court held that the husband's uncorroborated testimony was not sufficient to prove that the disputed assets had been taken by third-party creditors in discharge of community debts. The husband was required to produce documentary evidence of the obligations, the transfer of the automobile title, and the foreclosure sale. The appellate court held that absent such evidence, the trial court had correctly allocated the assets to the husband because he was last in possession. The fact that the assets were lost after the spouses had separated does not appear to have affected the analysis.

The good-faith obligation to account for community funds was raised in *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. App. 1974). In the divorce action, the husband testified that he had spent $53,000, losing some

through gambling and giving some away to strangers. The court held that the husband, who had the burden of proof, had failed to show that the loss and dissipation of the community funds were not an abuse of his managerial powers. Consequently, the court entered a damage judgment against him in favor of the wife.

In the other community property jurisdictions, when community property is lost to third parties, the spouse last in possession has the burden of explaining the occurrence. If an adequate explanation is made, the loss is shared. If the explanation is insufficient, the loss is charged to the spouse last in possession. Trial courts frequently reject vague explanations of the disposition of community assets as attempted in *Reaney*, but it is unusual to require documentary evidence as in *Valle*. A general explanation that "I spent it" was rejected in *Linton v. Linton*, 303 P.2d 905 (Idaho 1956), a case in which the sum involved was $20,000. It may be possible, however, to account for substantially lesser amounts through general testimony that the money was spent on basic living expenses. Such testimony has been accepted with regard to small amounts, such as $470. *Cohen v. Cohen*, 164 Cal. Rptr. 672 (Ct. App. 1980); Reppy & Samuel, *supra* § 4.9, at 248–49.

In *Shreve v. Shreve*, No. 91-0635, 1991 WL 285884 (Wis. Ct. App. Nov. 5, 1991) (unpublished opinion not citable per section 809.23(3)), the court of appeals considered a related problem. While the divorce was pending, the husband incurred what the court found to be unnecessary and unreasonable debts. The court found that in so doing, the husband had intentionally depleted the couple's divisible property. The court held that to remedy that misconduct, it is appropriate to assign debts to the party who has intentionally squandered the divisible property.

- ***Comment.*** It is unreasonable to expect a spouse to account for each item of income and each disbursement over the entire term of a marriage. To require such detailed accounting would in effect treat the spouse as a trustee and impose a burden beyond that reasonably to be expected from married individuals. *See Williams v. Williams*, 92 Cal. Rptr. 385 (Ct. App. 1971). Consistent with decisions in other community property jurisdictions, in Wisconsin the duty to account with regard to necessary records should be interpreted to accord with reasonable expectations of married individuals. *See infra* § 8.12.

A Wisconsin Court of Appeals case dealt with a divorcing spouse who lost $45,000 while engaging in the investment practice of day

trading. *Derr v. Derr*, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170. The court held that the circuit court properly treated this loss as a wasted asset for purposes of the property division. The court did not determine which party had the burden of proof to prove the asset had been wasted. However, the court indicated that the spouse who lost the money had control of all the information pertinent to the question of waste and, thus, had an obligation to provide complete answers as to disposition of the funds.

5. Related-party Transactions [§ 4.33]

Questions of good faith may arise in related-party transactions. Transfers between family members must be analyzed to determine whether they are gift transactions and, if not, whether adequate consideration was received. If the transfer was not a gift and adequate consideration was not received, the facts may establish that the obligation of good faith was breached. *See Byrd v. Blanton*, 197 Cal. Rptr. 190 (Ct. App. 1983).

In the other community property states, gifts intended to defraud a spouse are found unfair, and the court may award exemplary damages. This was done in *Logan v. Barge*, 568 S.W.2d 863 (Tex. App. 1978). The husband in this case operated a general merchandise store in Texas until a few years before his death. During his lifetime, he kept large cash balances in a safe in the store, and from these funds he made large cash gifts to his children and grandchildren, without his wife's knowledge. The total amount transferred was $245,820.72. The wife sought recovery of her community interest and exemplary damages from the gift recipients. The court found a conspiracy to transfer funds to the wife's detriment and awarded the reimbursement of one-half of the improperly given community cash, as well as exemplary damages. In Wisconsin, a conspiracy of this nature should be found to violate the good-faith obligation. The gift remedy may also apply.

A presumption of fraud may arise when one party produces facts that cast serious doubt on a transaction's validity. *Thompson v. Thompson*, 411 So. 2d 699 (La. Ct. App. 1982), concerned the conveyance of real property the parties purchased during the marriage. The parcel was community property. During the marriage, the husband allegedly sold the property to his sister. The wife later learned of the transfer and filed suit to have the conveyance set aside as fraudulent. To support her

position, she introduced the transcript from a previous court proceeding involving alimony in which the husband testified that he still owned the property and that his income in the year the sale allegedly occurred was only $400, although the sale price was stated as $20,000 in cash. The court held that the sale had no substance whatsoever, and the sale was set aside.

C. Gifts [§ 4.34]

1. To a Third Party [§ 4.35]

a. General Rules [§ 4.36]

Section 766.51(4) permits a spouse with management and control powers to make gifts of marital property assets to third persons. The management and control provision is unrestricted. *See* Wis. Stat. Ann. § 766.51(4) Legis. Council Committee Supplemental Notes Relating to 1985 Act 37 (West 2009). However, the Act has a specific provision, section 766.53, relating to recovery by the other spouse, which states that a spouse acting alone may give marital property assets to a third person only if the value of the marital property assets given does not "aggregate more than either $1,000 in a calendar year, or a larger amount if, when made, the gift is reasonable in amount considering the economic position of the spouses." If a gift does not comply with section 766.53, the other spouse has a remedy—a right of recovery. *See* Wis. Stat. § 766.70(6). The right of recovery applies to all gifts, including gifts to relatives or charities. If "both spouses act together in making the gift," then the remedy is not available. Wis. Stat. §§ 766.53, 766.70(6).

➢ ***Comment.*** As originally enacted, section 766.51(4) stated that "[t]he right to manage and control marital property permits gifts of that property *only to the extent provided in s. 766.53*" (emphasis added). The 1985 Trailer Bill amended the statute to read, "The right to manage and control marital property permits gifts of that property, subject to remedies under this chapter." Section 766.53 was not harmonized with the change in section 766.51(4) made by the 1985 Trailer Bill. Read alone, section 766.53 appears to grant a spouse management powers only for gifts within the amount limitations specified in that section. This reading is not correct. Each spouse has

the unlimited power to make gifts of marital property assets. *See* Wis. Stat. § 766.51(4).

The Act contains no limitation on a spouse's right to make gifts of his or her individual property or predetermination date property. This includes predetermination date property that would have been marital property if the Act had been in effect when the asset was acquired, property that thus would be subject to the deferred marital property election at death. *See infra* § 8.45. There is also no limitation on transfers in satisfaction of any debts, whether or not in the interest of the marriage or the family. Obligations of support are debts, and the gift provisions thus do not apply. *See infra* § 6.5.

Section 766.53 provides special valuation rules for two types of assets:

1. *Life insurance*. If the property transferred is a marital property life insurance policy (whether or not it is on the life of a spouse), it is valued at the amount that would have been payable under the policy if the insured had died when the gift was made. (The statute is unclear about this rule's application to the entire policy if only part of the policy is classified as marital property.)

2. *Retained interests*. If the donor spouse retains an interest in a marital property asset given to a third party, the gift is valued at its full value without consideration of the retained interest or any interest donated to the other spouse.

An absolute value is used in the above two situations because the actual value depends on numerous factors, including the health of the insured or donor, and the amount given often substantially exceeds the interpolated-terminal-reserve value or the value of the remainder interest.

A transfer of marital property during divorce proceedings is subject to the Act's remedies under section 766.70 rather than under chapter 767 if the proceedings are terminated by the death of one of the spouses. In *Socha*, 204 Wis. 2d 474, the parties were involved in a divorce proceeding. The family court commissioner had entered two orders, one restraining the parties from disposing of assets and the other requiring each party to maintain in force all insurance. During the pendency of the divorce proceeding, the husband changed the beneficiary of his accidental life and group life insurance policies from his wife to his son.

Both policies were marital property. The husband died before the divorce was concluded, and therefore the parties were legally married at the time of the husband's death. The circuit court concluded that the husband had violated his duty of good faith and transferred assets in violation of court orders. The court placed a constructive trust over the entire proceeds, minus the $1,000 the husband was authorized to give to a third party. On appeal, the court of appeals reversed the circuit court. Chapter 767 only applies when a divorce proceeding is pending. In this case, the husband's death terminated the divorce action, and therefore the wife's rights should have been determined pursuant to the Act's remedies provision. The court of appeals concluded that the proceeding was at law and not at equity.

- ***Query.*** Does a gift occur if the surviving spouse does not exercise the deferred marital property election? Section 861.10(3) expressly provides that the failure of a spouse to make the deferred marital property election is not a gift to the decedent spouse's estate or the party who would have been responsible for contribution.

b. Reasonable Amount [§ 4.37]

Courts in other community property states have considered what amount constitutes a reasonable gift. De Funiak & Vaughn, *supra* § 4.29, at 297–304. Their decisions should be helpful in determining the amount of marital property assets that may be given by one spouse acting alone to a third party without bringing into operation the recovery remedies. For example, *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. App. 1975), concerned a husband's gifts to his daughters from a previous marriage. The gifts totalled $131,517, and were made from community property during the parties' six-year marriage. The gifts ranged in value from $3,000 to $6,000 per year per donee, plus an amount equal to the $30,000 lifetime federal gift tax exclusion then in effect. The wife challenged these gifts in the divorce proceeding. The husband and his accountant testified that reducing income taxes was the motivation for making the gifts. On the wedding date, the husband had property with a net value of approximately $1 million. Throughout the marriage, the value of spouses' total assets exceeded $1 million, and at dissolution, the spouses owned properties with a net value of approximately $3 million to $4 million.

The Texas court held that the spouse making a gift had the burden of proving that the gift was fair and not a constructive fraud. In determining whether the gifts in this case constituted a constructive fraud, the court considered three primary factors: (1) the size of the gift in relation to the total size of the community estate, (2) the adequacy of the assets remaining to support the spouse in spite of the gifts, and (3) the relationship of the donor to the donee. The court found that the gifts at most constituted approximately 13% of the total assets, the remaining community funds were sufficient to provide for the wife's needs, and the donees were the natural objects of the husband's bounty; thus, the court held that the gifts were fair and not a constructive fraud. *See also Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App. 1987).

In Wisconsin, section 766.53 provides that a gift of more than $1,000 to a third party by one spouse acting alone is not subject to the recovery statute if the gift is reasonable in amount, "considering the economic position of the spouses." In *Horlock*, the court looked at the amount of the community property as well as the separate property owned by the husband when the gifts were made. Apparently, the Wisconsin statute adopts the *Horlock* approach, and thus the spouses' marital property assets *as well as* their individual property and predetermination date property assets are considered. Arguably, then, a gift of marital property assets could be found reasonable in amount if a donor spouse has substantial nonmarital property assets and the marital property assets are significantly less. In such a case, however, it may be a breach of the obligation of good faith for the donor spouse to use marital property assets instead of nonmarital property assets for the gifts. *See supra* § 4.30.

The third factor in *Horlock* permits consideration of the relationship between the donor and the donee. This consideration would assist a spouse in avoiding a successful challenge based on the recovery statute if, for example, he or she used marital property funds to provide support, including support for post-high school education, to a child 18 or older from a prior marriage.

c. Date Gift Complete [§ 4.38]

Under the Act, a gift is complete for property law purposes when the gift is made rather than when the statute of limitation for remedies expires. *See* Wis. Stat. Ann. § 766.51(4) Legis. Council Committee

Supplemental Notes Relating to 1985 Act 37 (West 2009). As to when a gift is complete for tax law purposes, *see* chapter 9, *infra*.

d. Transactions Affected [§ 4.39]

Section 766.53 on its face applies to all gifts of marital property assets. However, it may not apply to all gratuitous transfers under which marital property assets are transferred to third parties.

Several types of gratuitous transactions may not be affected by section 766.53. For instance, are enforceable charitable pledges superior to a spouse's remedy? Initially, such a pledge is a gift. If the pledge is not paid, however, it can be enforced by the donee under some circumstances. Richard A. Lord, *Williston on Contracts* § 8.4, 5 (4th ed. 1992). If the pledge is enforceable and can be reduced to a judgment, it is unclear whether the transaction should be analyzed as a gift or a contract. If it is analyzed as a contract, the issue is to determine the type of debt and then determine the property available for satisfaction. *See* Wis. Stat. § 766.55. However, if the pledge is analyzed as a gift and is paid from marital property funds, it appears that the nondonor spouse is not deprived of a remedy against the donee charity. This is true even if the spouse's promise could be enforced under the doctrine of promissory estoppel—for example, if the promise caused other donors to make gifts in reliance upon the spouse's pledge. 31 C.J.S. *Estoppel and Waiver* § 116 (2008); *see Bank of California v. Connolly*, 111 Cal. Rptr. 468 (Ct. App. 1973); Reppy & Samuel, *supra* § 4.9, at 239. Thus, the transaction may be enforced if the contract approach is used and may be subject to a remedy if the gift analysis is used.

- ***Query.*** Is a remedy available under section 766.53 if transfers are made by a sole proprietorship to a charity? For example, if the nonmanaging spouse can establish that for a period of years the other spouse's sole proprietorship made contributions in excess of $1,000 to a charitable organization such as United Way, would these contributions be subject to an action by the nonmanaging spouse for recovery? Would evidence that the contributions were a legitimate business expense free the transfers from the statutory gift limitations? The better rule appears to be that gifts to a charitable organization or to political entities by a business or under a business motive are not subject to the provisions of section 766.53.

The Wisconsin Court of Appeals has considered whether a gift of marital property funds by the spouse of a lobbyist to an elected official outside the window within which the lobbyist was allowed to make the contribution violated a state statute regulating the conduct of lobbyists. *Katzman v. State Ethics Bd.*, 228 Wis. 2d 282, 596 N.W.2d 861 (Ct. App. 1999). In this case, the State Ethics Board sought to depose the spouse to determine why she made the contribution, and the Board took the position that if the contributions were made at the suggestion of the lobbyist, they would violate the statute. The circuit court enjoined the board from making this investigation, and the court of appeals affirmed. The court observed that the only relevant issue was whether the spouse was using the individual property of the lobbyist, and held that the spouse had a right to give marital property funds to whomever the spouse wanted, whenever the spouse wanted, and after such consultation as the spouse desired.

Finally, under section 766.53 there is a question whether a spouse's *voluntary* payment of a debt falls within the scope of the remedy available for gifts when the debt is otherwise unenforceable because the statute of limitation has run or the debt has been discharged in bankruptcy. Courts have recognized that a moral obligation to the recipient may remain. Washington courts have held that that state's restriction on gifts does not apply. *Catlin v. Mills*, 247 P. 1013 (Wash. 1926). *But see Gannon v. Robinson*, 371 P.2d 274 (Wash. 1962) (holding that attempted revival of debt after bankruptcy was not for benefit of community). Similarly, in Wisconsin this type of transaction may be found to be outside the scope of section 766.53 and subject only to the obligation of good faith. With regard to a guarantee of an indebtedness, *see* sections 4.59 and 6.22, *infra*.

e. Gift from Commingled Account [§ 4.40]

Questions about the gift's source are raised if one spouse acting alone makes a gift from a commingled account that includes nonmarital and marital property funds. By analogy to the duty to provide an accounting, *see supra* § 4.32, the donor spouse generally should have the burden of tracing the source of funds used. If the donor spouse is unable to establish the source, it appears that the gift should be presumed to have been made from his or her nonmarital property funds. *See supra* § 3.16. On the other hand, in *Succession of Ratcliff*, 24 So. 2d 456 (La. 1945), the court stated that absent an intent to use separate property, gifts should

be charged to the community. Consistent with *Ratcliff*, in Wisconsin it is anticipated that if spouses act together in making a gift from a commingled account, the gift should be presumed made from marital property funds.

f. Remedies [§ 4.41]

If a gift is found to have exceeded the amount authorized under section 766.53, the nondonor spouse has a right of recovery. Wis. Stat. § 766.70(6)(a). If a gift is excessive, some community property states consider the gift void, and others consider it voidable. Reppy & Samuel, *supra* § 4.9, at 239–40. Wisconsin has clearly selected the latter approach.

Section 766.70(6)(a) permits a nondonor spouse to bring an action against the donor spouse or the donee to recover either (1) the property or (2) a compensatory judgment equal to the amount by which the gift exceeded $1,000 or a reasonable amount, whichever is greater. Allowing recovery of the property permits nullification of the entire transaction, including the amount that would have been reasonable. Thus, if a spouse gives a house worth $50,000 to a child, and the court determines that only a $25,000 gift would have been reasonable, the nondonor spouse has the right to recover either the entire house or a compensatory judgment of $25,000. The nondonor spouse may bring action against the donor spouse, the gift recipient, or both. Wis. Stat. § 766.70(6)(a). Either recovery would be classified as marital property. If recovery occurs after a dissolution or after the death of either spouse, the recovery is limited to 50% of the recovery that would have been available if the recovery had occurred during marriage. *Id*.

In addition to bringing an action to recover the property under section 766.70(6), a spouse may challenge a gift on the ground that the gift was made in violation of the obligation of good faith. *See* Wis. Stat. § 766.15(1); *see also infra* § 8.18.

g. Requirements to "Act Together" [§ 4.42]

Section 766.53 provides that a gift is subject to the remedies of section 766.70(6) unless "both spouses act together in making the gift." The Act does not define what constitutes acting together, and the

comment to UMPA section 6 is not of assistance. The comment does, however, state that the provision addresses the concern that a gift will defeat the other spouse's interest in the donated property. If a nondonor spouse approves a gift, the concern addressed by the provision is satisfied. Thus, almost any form of approval by a nondonor spouse should suffice, although affirmative approval, as opposed to mere knowledge, is necessary. Knowledge only shortens the statute of limitation. *See* Wis. Stat. § 766.70(6)(a).

Consistent with the Act's purposes, Wisconsin should recognize oral approval as constituting acting together. Similarly, approval given after a gift is made also should suffice and should be retroactive to the time of transfer. Wis. Stat. Ann. § 766.53 Legis. Council Committee Supplemental Notes Relating to 1985 Act 37 (West 2009). The Act does not require actual joinder by the spouses before or at the time of the gift transfer. *Cf. infra* § 4.47.

2. To a Spouse [§ 4.43]

The Act expressly permits spouses to reclassify their property by gift. *See* Wis. Stat. § 766.31(10). When spouses make gifts of property to each other, section 766.53 does not apply because the gift is not to a third party. One spouse acting alone may reclassify his or her individual or predetermination date property assets as marital property assets or as the individual property assets of the other spouse. *See* Wis. Stat. §§ 766.31(10), .51(1)(a). Likewise, one spouse acting alone with management powers may reclassify marital property assets as the individual property assets of the other spouse. *See* Wis. Stat. §§ 766.31(10), .51(1), (4).

Joinder is not required to effect these transactions. Wis. Stat. § 766.31(10); *see also infra* §§ 4.44–.48. In a gift between spouses, however, both spouses participate. Although only one spouse is the donor, the donee must accept delivery of the property for it to be a completed gift.

➢ ***Comment.*** It is not always clear whether a completed gift has occurred. For example, if a husband takes 100 shares of XYZ Corporation stock that is his individual property and reregisters the certificate in his name alone "as marital property," has a gift occurred? Was there delivery and acceptance? As a further example,

> if a husband and wife own an asset as tenants in common and reregister the title "as marital property," have they reclassified the asset by gift? Before and after the change, they both owned an undivided one-half interest in the entire asset. What did they give? The Act does not provide an answer. The best answer seems to be that a gift occurred to the extent required for a reclassification under section 766.31(10). Until these issues are resolved, parties may wish to use a deed of gift or a marital property agreement to ensure that reclassification has occurred.

State v. Baugh, No. 93-1200-CR, 1994 WL 20071 (Wis. Ct. App. Jan. 26, 1994) (unpublished opinion not citable per section 809.23(3)), concerned one spouse's theft of tangible property in the possession of the other spouse. At issue was whether the classification of the property had been changed by gift. The husband entered his estranged wife's apartment and took certain items of her clothing and a radio. The husband was on bail, and his release was conditioned on his not engaging in any criminal activity. He was arrested and charged with theft and bail jumping. The husband acknowledged that he took the items but claimed the assets were classified as marital property and that he could not be convicted of stealing property in which he had an ownership interest. The wife testified that the items had been given to her and thus were her individual property. The jury determined that the items were the wife's individual property and convicted the husband of bail jumping. The court of appeals held that the jury's finding as to ownership of the items was reasonable and obviated the need for discussion of the husband's contention that the items were marital property.

D. Joinder: Concurrent Management [§ 4.44]

1. In General [§ 4.45]

Wisconsin spouses are not required to act together in acquiring marital property assets. If a marital property asset is held in the names of both spouses other than in the alternative, the spouses must act together in managing and controlling the asset. Wis. Stat. § 766.51(2). However, acting together is probably only required for conveyances and for leases of more than one year, not for routine administrative management. *See infra* § 4.46.

The requirement that spouses act together is found in the gift statute, section 766.53, *see supra* § 4.42, and also in the management statute, section 766.51(2). It appears that the requirement that spouses act together has different meanings in the different statutes. In the gift statute, simultaneous action is not required and subsequent consent is permitted. Wis. Stat. Ann. § 766.53 Legis. Council Committee Supplemental Notes Relating to 1985 Act 37 (West 2009). In the management statute, acting together probably must entail signing the conveyance or lease in the same manner as for the conveyance of a homestead. *See infra* § 4.47.

2. Transactions Requiring Spouses to Act Together [§ 4.46]

Many other community property states require joinder for the acquisition, sale, or encumbrance of real property and certain other community assets. Reppy & Samuel, *supra* § 4.9, at 215–41. In Wisconsin, joinder is required in only two situations. First, conveyance of a homestead requires both spouses either to sign the conveyance or to join in it by separate conveyance. Wis. Stat. § 706.02(1)(f). Second, the right to manage and control a marital property asset that is held in both spouses' names other than in the alternative requires the spouses to act together. Wis. Stat. § 766.51(2); *see also infra* ch. 5. Neither of these provisions applies to the acquisition of property.

With regard to a homestead, both spouses must sign a conveyance that alienates any interest of a spouse in the homestead, whether or not the homestead is classified as marital property. Wis. Stat. § 706.02(1)(f). Exceptions are made for conveyances of homesteads between spouses and for purchase money mortgages if only one spouse is the purchaser. *Id*. A spouse can waive homestead rights in a premarital agreement. *Jones v. Estate of Jones*, 2002 WI 61, 253 Wis. 2d 158, 646 N.W.2d 280.

With respect to marital property assets held in the names of both spouses other than in the alternative, the statute only applies to marital property assets held (already owned) by the spouses. Wis. Stat. § 766.51(2). Thus, joinder or acting together is not required when an asset is acquired even if title will be taken in both names other than in the alternative.

When a marital property asset is held in the names of both spouses other than in the alternative, what specific transactions require both spouses to act together? Section 766.51(2) does not expressly provide any exception to its requirement that spouses act together, and the statute has no accompanying notes. The comment to section 5 of UMPA states: "If 'and' is used in the concurrent title, *both* spouses manage and control, and joinder is required to discharge management and control functions."

Must both spouses act together to convey marital property real estate titled in the names of both spouses other than in the alternative? *Conveyance* is defined as a written instrument evidencing a transaction "by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity." Wis. Stat. §§ 706.001(1), 706.01(4). The term is also defined in other sections of the Wisconsin Statutes. *See, e.g.,* Wis. Stat. §§ 77.21(1), 178.01(2)(c), 243.04. A conveyance is the most significant management transaction, and it is likely, as with a homestead, that both spouses must act together. Likewise, a lease for more than one year of a marital property asset held by spouses other than in the alternative must meet the standards for a conveyance and should require the spouses to act together. *See* Wis. Stat. § 704.03. Leases for one year or less may not require the spouses to act together, because fewer formalities are involved and the lease can be oral.

For some other management transactions involving property held in the names of both spouses other than in the alternative, it is not likely that both spouses must act together. For example, if spouses own their residence in both names other than in the alternative and wish to contract with a third party to paint the house, does this contract require both spouses to act together? In determining the situations requiring spouses to act together, the joinder cases in other community property jurisdictions may be of assistance.

In *Meltzer v. Wendell-West*, 497 P.2d 1348 (Wash. Ct. App. 1972), the issue was whether one spouse could hire a contractor to remodel the community residence when state law created an automatic mechanic's lien in the event of nonpayment. The court held that one spouse acting alone could make such a contract even though a lien could result. In Wisconsin, this holding may not be consistent with the rule that one spouse may not create a security interest in or otherwise encumber a marital property asset in connection with an application for extension of credit unless that spouse otherwise has management and control rights

over the asset. *See* Wis. Stat. § 766.51(1m)(b); *see also infra* ch. 5. However, it seems appropriate that one spouse should be able to enter into such contracts and that any resulting lien should be outside the scope of the credit prohibition and the "acting together" requirement. This conclusion can also be based on an apparent-agency analysis.

In *Reimann v. United States*, 315 F.2d 746 (9th Cir. 1963), the court considered whether under Idaho law one spouse acting alone could contract with the U.S. Department of Agriculture under the soil-bank program not to plant any crops on community property real estate. The court held that the spouse's action neither created an encumbrance nor violated the requirement that spouses act together.

The rule in Wisconsin probably should permit one spouse acting alone to execute certain contracts regarding at least some uses of marital property assets held in the names of both spouses other than in the alternative. Each spouse acting alone should be able to enter into contracts for the routine management and maintenance of marital property assets even though the property is held in a form requiring the spouses to act together. The extent to which the managing spouse is subject to the duty of good faith and the remedies available to the nonmanaging spouse should be sufficient protection.

In some situations, the actual ownership of property may be changed without spouses acting together. This issue was considered in *Janes v. Le Deit*, 39 Cal. Rptr. 559 (Ct. App. 1964). The husband acquiesced in the placement of a fence on what was assumed to be the boundary between a community property parcel and an adjoining parcel. Actually, the fence encroached 400 feet onto the community land, and under California law, acquiescence in the fence had the effect of shifting the boundary. The court held that even though the wife had never seen the property and had no knowledge of her husband's acquiescence, the neighbor acquired the 400-foot strip of community realty. The court held that the joinder statute was inapplicable because no instrument of conveyance was involved.

3. Satisfaction of the Acting-together Requirement [§ 4.47]

When spouses must act together, what is required? The notes to the Act and the comments to UMPA are not of assistance.

Besides section 766.51(2), the only other statute using the "act together" language is the gift statute, section 766.53. For gifts, the spouses are not required to act simultaneously, and a subsequent consent is sufficient. Wis. Stat. Ann. § 766.53 Legis. Council Committee Supplemental Notes Relating to 1985 Act 37 (West 2009). For a gift, it is probably sufficient if the subsequent consent is oral.

The gift standard may not apply in situations in which acting together is required in a conveyance or a lease for more than one year. With those transactions, there is a document of title, and the third party should know that bona fide purchaser status is obtained only if the property is acquired or leased from a spouse or spouses having the right to manage and control the property. *See* Wis. Stat. § 766.57(3). Thus, the third party should insist that both spouses sign the lease or conveyance as part of the closing.

The gift standard for acting together may be appropriate, however, for other management transactions for which spouses are required to act together. For example, if both spouses must act together in contracting to paint their house, then subsequent and oral consent to the contract should be sufficient.

4. Consequences of Spouses' Failure to Act Together [§ 4.48]

If spouses must act together but do not, the final issue is whether the transaction is void or voidable. In Idaho, Arizona, and New Mexico, if joinder is required and does not occur, the transaction is wholly void. Reppy & Samuel, *supra* § 4.9, at 223. This is the result in Wisconsin if both spouses do not join in a conveyance of a homestead. *See* Wis. Stat. § 706.02. *But see Jones*, 2002 WI 61, 253 Wis. 2d 158 (holding that waiver of homestead-conveyance protection in premarital agreement was valid). In Louisiana, Washington, and California, the transaction is merely voidable and may be voided only by the nonjoining spouse. Reppy & Samuel, *supra* § 4.9, at 223. This is the result in Wisconsin if an excessive gift is made and the spouses do not act together. *See* Wis. Stat. § 766.70(6).

Neither the Act nor UMPA indicates the result for other situations when spouses are required to act together and fail to do so. The failure to act together could be found merely to authorize an interspousal remedy

and to have no effect on the third party. *See infra* § 8.18. This result is unlikely, at least in cases involving conveyance of an interest in property, in which a third party should know that both spouses are required to act together and that, if they fail to do so, the third party is not a bona fide purchaser. Whether a transaction is void or voidable, it is likely that only the nonjoining spouse can raise the issue.

Finally, even when the rule is that the transaction is voidable if the joinder requirements are not met, it has been held in some circumstances in other community property states that a spouse can be estopped from challenging the transaction. *Reid v. Cramer*, 603 P.2d 851 (Wash. Ct. App. 1979), concerned a husband who contracted to purchase a tract of land, signing a promissory note as earnest money, and then attempted to repudiate the agreement, arguing that the contract and note were not binding because his wife had not joined in the transaction. The court held that the community is estopped to deny a liability resulting from the failure of one spouse to join a transaction when (1) one spouse permits the other to carry out the transaction, (2) both have a general knowledge of the transaction, and (3) both are ready to accept the benefits that may come from the transaction. In *Reid*, the court held that the wife generally knew of the transaction and was ready to accept the benefits, and thus she was estopped from disaffirming the transaction. *But see Smith v. Stout*, 700 P.2d 343 (Wash. Ct. App. 1985) (finding that wife was not ready to accept benefits of transaction in which she did not participate because she had already signed an agreement to sell property at issue to other people).

In Wisconsin, the facts in some cases may justify estoppel when spouses have not acted together. However, mere knowledge of a transaction may not be sufficient. In the gift context, knowledge only shortens the statute of limitation. *See* Wis. Stat. § 766.70(6)(a). Knowledge is not acting together and may not be sufficient to raise the equitable bar of estoppel.

E. Civil Procedure [§ 4.49]

1. Parties [§ 4.50]

a. In General [§ 4.51]

An important management and control right is the right to institute an action to recover for damage to marital property assets or for personal injuries resulting in a loss of marital property income. *See* Wis. Stat. § 766.01(11). The corollary is that the right to defend an action exists if the judgment in the action can be satisfied from marital property assets. *Id*. The civil procedure statutes that apply to actions involving marital property assets do not distinguish between actions based on contract and actions arising from a tort.

With regard to such management rights, the first issue concerns who is the proper plaintiff in an action affecting marital property. Under the Act, resolution of this issue can be approached in either of two ways depending on (1) whether the cause of action is an incident of ownership of an asset or (2) whether once an asset has been damaged, the cause of action is an intangible separate right.

Under the first approach, which focuses on the cause of action as an incident of ownership, management and control of the cause of action is based on how the marital property asset itself is held. For example, if an automobile classified as marital property and held in one spouse's name is damaged in an accident caused by a third party, a cause of action arises with respect to that damage. The Act does not indicate whether this cause of action is an incident of ownership of the automobile and is thus also held by the spouse who holds the automobile. If the cause of action is an incident of ownership of the automobile, it is considered held by that spouse, and the Act limits the right to bring the action to the holding spouse. If the automobile was instead held in the names of both spouses other than in the alternative, and the cause of action is considered an incident of the property, then management and control rights over the cause of action would require both spouses to act together. *See* Wis. Stat. § 766.51(2). If the cause of action retains the management characteristics of the asset, both spouses apparently must act together to commence an action for relief.

This approach is supported by the definition of *management and control*, which includes "the right to … institute or defend a civil action regarding … property." *See* Wis. Stat. § 766.01(11). Under this analysis, some causes of action, such as those for personal injury or libel and slander, are not attributable to any asset, and thus, if the recovery would be marital property, either spouse could bring the action. (The limitation on who may act as plaintiff does not affect who may be named as defendant, because if a recovery from marital property assets is appropriate, it can be satisfied from marital property assets held by either spouse.)

The second approach focuses on the cause of action itself as a separate asset. The first question under this approach is whether the recovery would be marital property. If so, the cause of action would be an asset that was not held by either spouse. *See* Wis. Stat. § 766.01(9). As such, either spouse acting alone could manage and control the asset and thus institute the action. Wis. Stat. § 766.51(1)(am). Under this approach, then, either spouse acting alone may recover for injury to a marital property asset, regardless of how the asset was held. However, this is probably not the correct analysis.

➢ ***Comment.*** Under both approaches, section 766.51(1)(f) appears to be limited to causes of action created by other statutes, such as those governing worker's compensation, wrongful death, and loss of consortium. Section 766.51(1)(f) provides that a spouse acting alone may manage and control a claim for relief vested in that spouse by law other than the Act. This provision is in UMPA, but its scope is undefined. It does not, however, appear to take the analysis of the proper party for most causes of action outside the management and control analysis of the Act.

The Act changed Wisconsin's rules of civil procedure to reflect the additional ownership interest in marital property assets and the new obligations that may be satisfied from marital property assets. Section 803.04(3) provides that "[i]n an action affecting the interest of a spouse in marital property, as defined under ch. 766, a spouse who is not a real party in interest or a party described under s. 803.03 may join in or be joined in the action." Thus, in all actions affecting a spouse's interest in a marital property asset, both spouses thus are permissive parties either as plaintiff or as defendant. According to the Legislative Council notes on the creation of section 803.04(3), "The provision is intended to clarify that, at the initial stages of an action affecting a spouse's interest in

marital property, both spouses may sue or both spouses may be sued." Wis. Stat. Ann. § 803.04 Legis. Council Notes—1985 Act 37, § 152 (West 1994). The Legislative Council notes do not mention whether either or both spouses hold the marital property asset involved in the action. The notes imply that either spouse could maintain an action to recover for damage to a marital property asset, even if the asset is held in only one spouse's name. The notes continue:

> It is recognized by the Special Committee that it may be desirable to deal more specifically in the statutes with the issue of when a spouse is a proper party plaintiff or defendant in an action affecting marital property. However, the Special Committee concluded that ch. 766 and the current rules of civil procedure provide general guidance in this regard. More detailed rules, if necessary, are best left to future legislation.

Id.

➢ ***Comment.*** To commence an action, there must be a real party in interest, and whether there is such a party is probably determined from an analysis of whether and how the marital property asset involved is held by a spouse. Since section 803.04(3) deals only with permissive joinder of parties, it should not be construed to authorize a spouse acting alone to commence an action when the underlying marital property asset that is the subject of the litigation is held solely in the other spouse's name. Likewise, both spouses should be required parties to maintain an action involving a marital property asset held in both names other than in the alternative. *See infra* § 6.54.

b. Spouse as Plaintiff [§ 4.52]

The Wisconsin rules as to proper party under chapter 803 when a spouse is a plaintiff will probably be applied as follows:

1. A cause of action involving damage to individual or predetermination date property must be commenced by the spouse owning the property. The other spouse is not a proper party.

2. A cause of action involving a spouse who sustains a personal injury must be commenced by the spouse who sustained the injury because the recovery for pain and suffering is individual property. *See* Wis.

Stat. § 766.31(7)(f). Either spouse may commence an action for the portion of the asserted liability representing loss of income during marriage. *See* Wis. Stat. § 766.31(4), (7)(f).

3. A cause of action involving a marital property asset that is not held by either spouse or that is held by both spouses in the alternative may be commenced by either spouse. The other spouse is a permissive party.

4. A cause of action involving a marital property asset held by one spouse must be commenced by that spouse. The other spouse is a permissive party.

5. A cause of action involving a marital property asset held by both spouses other than in the alternative must be commenced by both spouses. If one spouse is disabled or absent, see section 4.58, *infra*.

6. A cause of action involving contract rights arising other than from property that is held (such as an action for breach of contract or loss of income from a contract), and for which the recovery would be marital property, is not held by either spouse and so may be commenced by either spouse.

7. Any other cause of action authorized by law, such as worker's compensation or loss of consortium, may be commenced by the spouse authorized by the statute involved. Wis. Stat. § 766.51(1)(f).

If a cause of action involving a marital property asset or contract right is commenced by one spouse, the defendant can move to join the other spouse because that spouse is a permissive party. *See* Wis. Stat. § 803.04(3). This rule helps ensure that all claims of both spouses against the defendant and arising from the transaction will be adjudicated in a single proceeding.

➢ ***Example.*** Assume that a wife sustains a personal injury in an automobile accident and the vehicle is her husband's individual property. Neither spouse acting alone can fully resolve all claims. The recovery for pain and suffering is the wife's individual property, the recovery for damage to the automobile is the husband's individual property, and the recovery for loss of income is marital property. If the action is commenced only by the wife and she settles the case and classifies the entire recovery as her individual property, is the

defendant protected from a subsequent claim by the husband for the loss of income? Has the wife breached her obligation of good faith?

➢ ***Practice Tip.*** When an action commenced by one spouse is being settled, the other party may wish to consider obtaining releases from both spouses. Joinder and releases from both spouses may be appropriate because the decision has claim preclusive effect only as to the issues actually and necessarily determined in the proceedings.

Because the rules summarized above are consistent with the rules in the other community property states, the decisions in those states will assist in applying the rules in Wisconsin.

The issue of proper plaintiff was addressed in *Amador v. Lara*, 603 P.2d 310 (N.M. Ct. App. 1979). The wife sustained personal injuries in an automobile accident. During the trial, the wife sought to introduce evidence to show that she and her husband lost income because she could no longer help him in his business. The trial court denied the admission of this testimony on the ground that the husband was not a party to the lawsuit and the wife could not properly seek his lost income.

The appellate court reversed, holding that the wife acting alone could bind the community. According to the appellate court, the husband was not an indispensable party in the case. The wife's injuries caused the loss of services to the community, and she was entitled to recover the full amount of the community's loss. The court agreed that it is best for both spouses to join in the prosecution of a claim for community damages. But the best method is not necessarily the only permissible method.

The converse occurs when one spouse's separate property is harmed and the other spouse attempts to recover for the loss. This situation was considered in *Carr v. Galvan*, 650 S.W.2d 864 (Tex. App. 1983). The husband sued an automobile dealer for damages that the defendant's service station caused to the wife's car, which was her separate property; the husband also sued for assault and battery by the station owner, which allegedly occurred when the husband complained about the damage. The court held that the cause of action for damages to the automobile was the wife's separate property; thus, the suit for such damages could not properly be pursued by the husband alone.

➢ ***Comment.*** The above result should also occur in Wisconsin. If the damaged asset is one spouse's individual or predetermination date property, only that spouse should be able to initiate an action. This result is consistent with common law rules that continue for predetermination date property. It should be immaterial whether the asset is potentially deferred marital property or whether, when a recovery occurs, any subsequent income from it is marital property.

c. Spouse as Defendant [§ 4.53]

In all cases in which marital property assets can be reached to satisfy an obligation, the creditor may proceed against the obligated spouse, the incurring spouse, or both spouses. Wis. Stat. § 803.045(1). In addition, when an obligation either (1) arises from a duty of support owed to the other spouse or to a child of the marriage or (2) is incurred in the interest of the marriage or the family, Wis. Stat. § 766.55(2)(a), (b), a creditor may proceed against the nonobligated or nonincurring spouse alone only if the creditor cannot obtain jurisdiction in the action over the obligated or incurring spouse. Wis. Stat. § 803.045(2). However, after a judgment has been obtained, a creditor may proceed against either or both of the spouses to reach marital property assets available for satisfaction of the judgment. Wis. Stat. § 803.045(3); *see Bank One, Appleton, NA v. Reynolds*, 176 Wis. 2d 218, 500 N.W.2d 337 (Ct. App. 1993).

The Wisconsin rules as to proper party under chapter 803 when a spouse is a defendant will probably be applied as follows:

1. If a spouse defaults on a nonsupport and non–family-purpose obligation or on an obligation incurred before January 1, 1986, or before marriage, the creditor may maintain an action against the incurring spouse or against both spouses because marital property assets may be available for satisfaction. Wis. Stat. § 803.045. The nonincurring spouse has no personal liability.

2. If a third-party creditor has a cause of action against one spouse regarding an obligation in the interest of the marriage or the family or for tort liability, the creditor may maintain an action against the incurring spouse or against both spouses. Wis. Stat. § 803.045. This conclusion was adopted by a Wisconsin circuit court in *Rauen v. Kloth*, 87-CV-620 (Wis. Cir. Ct. Marathon County 1988). The nonincurring spouse has no personal liability. In addition, if the

creditor cannot obtain jurisdiction over the incurring spouse, the creditor may proceed against the nonincurring spouse alone. Wis. Stat. § 803.045(2).

Bothe v. American Family Insurance Co., 159 Wis. 2d 378, 464 N.W.2d 109 (Ct. App. 1990), concerned spousal liability for tort obligations resulting from an automobile accident in which the husband was driving a vehicle and the plaintiff was injured. The plaintiff commenced the action against the husband, the wife, and their insurance company. At the time of the accident, the spouses were living apart, and each had a separate liability policy with the same insurance company. The wife was not involved in the accident. The wife and her insurance carrier moved for summary judgment. The circuit court granted the motion and held that section 766.55(2)(cm) does not make an innocent spouse liable for any kind of tort committed by the other spouse.

On appeal, the plaintiff argued that the statute subjects an innocent spouse to liability for tort obligations by virtue of the tortfeasor's interest in the marital property assets of the innocent spouse. The court of appeals held that section 766.55(2)(cm) was not ambiguous, stating that "the statute does nothing to change the traditional concept of *liability* for the tort." *Id.* at 382. The statute "*protects* the innocent spouse's property from, rather than subjects it to, liability for the tortfeasor spouse's obligations." *Id.* Thus, the wife had no liability for her husband's tort, and therefore the plaintiff could not recover from the wife's liability insurance carrier. The insurance carrier had no duty to defend under the policy because there was no proper assertion that the insured was legally liable. Under the analysis in section 4.51, *supra*, the wife could have remained a party to protect her interest in marital property assets.

Oil Heat Co. v. Sweeney, 613 P.2d 169 (Wash. Ct. App. 1980), involved a situation in which a third party was permitted to proceed solely against the noncontracting spouse. The court held that since either spouse may manage community property, service of process on either spouse is permitted in an action involving a community obligation. This case was not, however, based on the same community property rules that exist in Wisconsin. In Washington, both spouses are jointly and severally liable for community obligations, while in Wisconsin, generally only the incurring spouse has personal liability and all marital property assets and the incurring spouse's nonmarital property assets are available

for satisfaction of a family-purpose obligation. *See* Wis. Stat. § 766.55(2)(b).

A separate issue that arises in civil and criminal litigation is the indigent's right to counsel. In *State v. Wing*, No. 91-0362-CR, 1991 WL 285874 (Wis. Ct. App. Nov. 7, 1991) (unpublished opinion not citable per section 809.23(3)), the defendant requested representation by a public defender. Although his wife had income and assets, the defendant asserted he had no interest in the assets because of their marital agreement. The validity of an unsigned copy of a purported agreement could not be established. The court considered the defendant's marital property interest in the assets held by the wife and denied his request for representation by a public defender.

If a third-party creditor of a spouse believes an action involving the spouses may reduce the assets available to satisfy the obligation, the creditor can intervene as a third party claiming an interest in the real and personal property. *Curda-Derickson v. Derickson (Sokaogon Gaming Enter. Corp. v. Curda-Derickson)*, 2003 WI App 167, 266 Wis. 2d 453, 668 N.W.2d 736.

2. Lien [§ 4.54]

Section 806.15(4) provides that a lien does not attach to property that is held solely by the spouse or former spouse of a judgment debtor

> unless the spouse of the judgment debtor is a named defendant in the action for which judgment is rendered, the spouse of the judgment debtor is named in the judgment itself, the obligation is determined an obligation described in s. 766.55(2) and any of the following applies:
>
> (a) With respect to property held by the spouse of the judgment debtor when the judgment is entered in the judgment and lien docket, the property is expressly determined available under s. 766.55 to satisfy the obligation.
>
> (b) The property is acquired after the judgment is entered in the judgment and lien docket.

Thus, if an action is brought only against the incurring or obligated spouse, and a judgment is rendered against that spouse and is properly docketed, the judgment does not become a lien on marital property real estate then held only in the name of the judgment debtor's spouse.

Likewise, it may not become a lien on marital property real estate subsequently acquired solely in the name of the judgment debtor's spouse. *See infra* § 6.58. Thus, it is desirable to commence an action against both spouses.

If a judgment lien has attached to property that is exempt from execution on the judgment lien, a person with an ownership interest in the property may proceed under section 806.04 for declaratory relief if the owner of the judgment fails within 10 days after demand to execute a recordable release of the property from the judgment lien. Wis. Stat. § 806.15(5); *see infra* § 6.58. Property to which a judgment lien attaches under section 806.15(4)(b) that is not available under section 766.55 to satisfy the obligation for which the judgment was rendered is exempt from execution. Wis. Stat. § 815.205(1). A person with an ownership interest in the property may stay an attempt at execution on such property. Wis. Stat. § 815.205(2).

3. Proceedings in Aid of Execution [§ 4.55]

The final step in managing a cause of action is either to obtain satisfaction of a judgment obtained or to defend against an attempt. The first step in many cases is to take a supplemental examination of the judgment debtor to ascertain the assets available to satisfy the obligations. Wis. Stat. § 816.03(1). The judgment creditor may also conduct a supplemental examination of the spouse of the judgment debtor. *Courtyard Condo. Ass'n v. Draper*, 2001 WI App 115, 244 Wis. 2d 153, 629 N.W.2d 38.

If a third party becomes a judgment creditor of a spouse, it may be necessary to levy execution on the judgment. *See* Wis. Stat. § 815.01. In connection with execution, section 815.18(8) provides that, in proceedings to enforce a judgment against a marital property asset on an obligation incurred in the interest of the marriage or the family, each spouse is entitled to and may claim the exemptions under section 815.18. *See infra* § 6.68. If the exempt property is limited to a specific maximum dollar amount, each spouse is entitled to one exemption. That maximum dollar amount may be either combined with the other spouse's exemption in the same property or applied to different property included under the same exemptions. The only exception to this rule is that the exemption for income may not be combined with the other spouse's exemption that

applies to that income. *See* Wis. Stat. § 815.18(8), (3)(h); *see also Bank One, Appleton*, 176 Wis. 2d 218.

In addition to enforcement by execution, enforcement may be by prejudgment attachment. *See* Wis. Stat. § 811.01. For purposes of the attachment statute, the term *defendant* is defined to include the spouse or former spouse of the defendant if the action against the defendant is in connection with an obligation described under section 766.55(2). Wis. Stat. § 811.001(1). *Property of his or her debtor and property of the defendant* are defined to include the marital property interest in an asset of the spouse or former spouse of the debtor or defendant if the action against the debtor or defendant is in connection with an obligation described in section 766.55(2). Wis. Stat. § 811.001(2). These definitions "reflect that a creditor may have reason to attach marital property in which a spouse has an interest even though the spouse is not personally liable to the creditor." Wis. Stat. Ann. § 811.001(2) Legis. Council Notes—1985 Act 37, § 154 (West 2007). Section 811.03(1), providing for attachment based on a contract or judgment, enables the plaintiff to execute an affidavit stating that property of the defendant is available for satisfaction of the indebtedness. It is not necessary to assert that the defendant is indebted to the plaintiff. *See infra* § 6.65.

Enforcement may also be by garnishment after judgment is obtained. Section 812.01(1) authorizes any creditor to proceed against any person who is indebted to the creditor or who has property in his or her possession or control that is subject to the satisfaction of an obligation described under section 766.55(2). The term *defendant* is defined to include a judgment debtor or the spouse or the former spouse of a judgment debtor if the judgment is rendered in connection with an obligation described under section 766.55(2). Wis. Stat. § 812.01(1). Section 812.02(2e) provides that a plaintiff "may not commence any garnishment action affecting the property of a spouse who is not a defendant in the principal action unless the spouse is a defendant in the garnishment action." *See infra* § 6.59. *Bank One, Appleton*, 176 Wis. 2d 218; *In re Possmore*, 156 B.R. 595 (Bankr. E.D. Wis. 1993). A creditor may proceed against either spouse alone or both spouses in the garnishment action to reach marital property (such as wages) available for satisfaction of the judgment. Wis. Stat. § 803.045(3); *Journal Sentinel, Inc. v. Schultz (In re Schultz v. Sykes)*, 2001 WI App 260, 248 Wis. 2d 791, 638 N.W.2d 76.

➢ ***Historical Note.*** The Legislative Council special committee that proposed the explanatory notes to the Act concluded that "s. 812.02(1)(b), which permits commencement of a garnishment action after an execution upon an in *personam* judgment is issuable, covers the situation; an in *personam* judgment does not necessarily imply personal liability." Wis. Stat. Ann. § 812.01 Legis. Council Notes—1985 Act 37, § 156 (West 1994). Thus, the special committee concluded that no amendment to section 812.02(1) was necessary.

State v. Zimmer, No. 91-1553-CR, 1991 WL 319136 (Wis. Ct. App. Dec. 11, 1991) (unpublished opinion not citable per section 809.23(3)), concerned a husband who was convicted of a misdemeanor for his maltreatment of animals owned by the spouses. As part of the penalty for the offense, the circuit court ordered the husband to forfeit the animals. The husband objected to the forfeiture on the basis that his wife owned a one-half interest in the animals pursuant to the provisions of the Act. The court held that the husband lacked standing to assert his wife's alleged interest in the property. The wife was found to have a remedy because she could seek to have her rights declared under the Act and could raise a constitutional due process claim if the forfeiture attempted to reach her property.

First Wisconsin National Bank v. Peterson, No. 91-0995, 1991 WL 319114 (Wis. Ct. App. Dec. 17, 1991) (unpublished opinion not citable per section 809.23(3)), concerned a deficiency judgment against one spouse. The wife had granted a mortgage to the bank on a property owned by her to secure a promissory note of her husband. When the husband defaulted on the promissory note, the bank brought an action to foreclose the mortgage. The circuit court issued a summary judgment granting the foreclosure and rendered a deficiency judgment against the wife personally in the event that the property sale proceeds did not fully satisfy the amount due on the promissory note. The court of appeals, citing section 6.21 of the original edition of the book (section 6.51, *infra*, in this edition), held that the granting of a deficiency judgment against the wife was not appropriate. The indebtedness could only be collected from the individual property assets of the incurring spouse and from all marital property assets. The court stated that "[t]he statute does not render the spouse who did not incur the debt personally liable for the debt of the incurring spouse." 1991 WL 319114, at *8.

Kotecki v. Marek, No. 93-0495, 1993 WL 404321 (Wis. Ct. App. Oct. 12, 1993) (unpublished opinion not citable per section 809.23(3)),

concerned the spouse's responsibility for attorney fees. The plaintiff, an attorney, had obtained a judgment against the wife for attorney fees. The wife's husband was not joined in that action. When the judgment was not satisfied, the attorney commenced a garnishment action against the husband, the husband's employer as garnishee, and the wife and obtained a default judgment against the employer. The husband moved to reopen the garnishment judgment and requested costs on the ground that the action was frivolous. The circuit court reopened and dismissed the default judgment and awarded the husband "frivolous attorney fees and costs."

The court of appeals reversed. The court found that the wife's obligation to the attorney was incurred in the interest of the marriage or the family. Sections 812.01(1) and 812.02(2e) permit a garnishment action against the employer of the nonobligor spouse who was not a party in the principal action if the spouse whose property is affected is a party named in the garnishment proceeding. The court then found that the employer was a proper garnishee because the employer had property in its possession that was subject to satisfaction of a family-purpose obligation. The court of appeals directed the circuit court to vacate its order and directed the employer pay the money owed to the attorney. The court of appeals also reversed the determination that the attorney's proceeding was frivolous.

4. Statute of Limitation [§ 4.56]

Procedural issues also arise when both spouses are obligated on an indebtedness and the statute of limitation has run against one spouse but not the other. May the claim be pursued against that one spouse? This issue was considered in *Roper v. Jeoffroy Manufacturing, Inc.*, 535 S.W.2d 706 (Tex. App. 1976). The husband and wife had signed a promissory note to a third party and subsequently defaulted in its payment. An action was brought against the husband and wife. The statute of limitation had run against the husband, but the wife had been out of the state, so the tolling statute permitted a suit against her. The court held that the suit could proceed against the wife.

This analysis of the statute of limitation when both spouses are personally liable seems to apply in Wisconsin. The statutory limitation on commencement of actions only bars an action against a party for whom the period has expired. *See Spellbrink v. Bramberg*, 245 Wis. 103,

13 N.W.2d 600 (1944); *Caswell v. Engelmann*, 31 Wis. 93 (1872). If there are several party defendants, the applicable statute may run for some and be tolled for others. *See* Wis. Stat. §§ 893.10–.23. If the plaintiff can proceed against one spouse, and if the obligation was incurred in the interest of the marriage or the family, the obligation can be satisfied from all marital property assets. Wis. Stat. § 766.55(2)(b). The nonmarital property assets of the spouse against whom the statute ran cannot, however, be reached to satisfy the indebtedness.

- ***Note.*** If only one spouse is personally obligated on the family-purpose obligation and the statute runs against that spouse, no action against the other spouse should be permitted. To commence an action, there must be an obligation. The liability of the nonobligated spouse is derivative of the incurring spouse's obligation, and if the statute of limitation runs against the incurring spouse, the obligation ends. *See infra* ch. 5 (claims statute at death).

F. Living Separate and Apart [§ 4.57]

Management and control problems can arise when spouses are not living together. In Wisconsin, it is possible for one of the spouses living apart to seek a legal separation and obtain a property division. *See* Wis. Stat. §§ 767.02(1)(d), .255. A legal separation is a dissolution of the marriage, and thereafter the spouses do not acquire assets classified as marital property. *See* Wis. Stat. § 766.01(7). If the spouses have a legal separation, management rights change accordingly. Instead of seeking dissolution, a spouse can use the remedy provisions and request an order, under section 766.70(4)(a)5., that classifies all subsequently acquired property as the individual property of the acquiring spouse. *See infra* § 8.34. In most cases, however, no judicial relief is sought until one or both of the spouses commence an action for dissolution of their marriage.

In Wisconsin, living separate and apart, by itself, regardless of duration, does not change the classification of property or the management and control rights in property. This conclusion is consistent with UMPA, which emphasizes that the property rules track the status of spouses. UMPA § 1 cmt. 8; *see also Aetna Life Ins. Co. v. Bunt*, 754 P.2d 993 (Wash. Ct. App.), *rev'd in part on other grounds*, 754 P.2d 993 (Wash. 1988); *In re Estate of Osicka*, 461 P.2d 585 (Wash. Ct. App. 1969).

In some community property jurisdictions, an equitable analysis is made to determine whether a renunciation of the community has occurred when the spouses live apart. *See Togliatti v. Robertson*, 190 P.2d 575 (Wash. 1948). If a renunciation has occurred, the community property is reclassified and management rights change accordingly.

In most cases from other community property jurisdictions, however, the courts have been unwilling to find a renunciation of the community even though the parties have lived apart for a significant period. *See Rustad v. Rustad*, 377 P.2d 414 (Wash. 1963). When spouses live separate and apart in Arizona, there is a fixed rule that such separation has no effect on the classification process and thus no effect on management and control, except for assets whose management is determined by possession. *Flowers v. Flowers*, 578 P.2d 1006 (Ariz. Ct. App. 1978); *see also* Reppy & Samuel, *supra* § 4.9, at 289. Other states have statutes dealing with the effect of spouses not living together. *See, e.g.*, Cal. Fam. Code Ann. § 771 (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. 20 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot).

Because living apart does not change the Act's application, inequities can arise. For example, debts incurred by one spouse in the interest of the marriage or the family can be satisfied through garnishment of the other spouse's wages. One-half of a spouse's savings from his or her earnings are owned by the other spouse. All interspousal remedies still exist.

However, inequities can also arise in the states whose statutory law provides for all property acquired after separation to be separate property. For example, under the California statute, if one spouse is employed and the other is not, and during separation the nonemployed spouse uses savings accumulated during marriage for support (community property) while the employed spouse saves an equal amount of his or her income (separate property), the expended community savings are in effect transformed into separate property. *See* Carol S. Bruch, *The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change*, 65 Cal. L. Rev. 1015 (1977). In Wisconsin, management basically follows title and possession. In most instances, living apart will not significantly change the spouses' respective management rights.

G. Disability or Absence [§ 4.58]

The Act does not expressly address the effect of a spouse's disability or incompetence on management rights. The rights to manage and control property therefore continue in each spouse as if the disability had not occurred. However, under other rules, the incompetent spouse may be unable to exercise management and control powers over property held in his or her name or in his or her possession. In addition, the incompetent spouse may be unable to act together with the other spouse in making gifts in excess of $1,000 in a calendar year or with regard to marital property assets held in the names of both spouses other than in the alternative. *See* Wis. Stat. §§ 766.51(2), .53.

For these reasons and others, the Act provides that a court may appoint a conservator or guardian to exercise a disabled spouse's rights to manage and control marital property assets. *See* Wis. Stat. § 766.51(7). Once appointed, a guardian of the estate may, with the court's approval, exercise on behalf of the incompetent spouse any management and control right over a marital property asset and any right in the business affairs that the spouse could exercise under chapter 766. Wis. Stat. § 54.20(2)(h). The Act specifically authorizes a guardian or conservator to consent to act together or join in any transaction for which the consent or joinder of both spouses is required and to execute a marital property agreement. *Id*. The guardian or conservator may not, however, make, amend, or revoke the incompetent spouse's will. Wis. Stat. § 54.20(2)(h). It appears that because court approval is required, the other spouse may be the guardian or conservator, even if he or she may have a conflict of interest, and as such may give the required consent for transactions requiring the spouses to act together.

The competent spouse could also proceed under section 766.70(3), the add-a-name remedy, to have his or her name added to any marital property asset (other than certain business interests) held in the other spouse's name. *See infra* § 8.24.

➢ ***Comment.*** Section 766.70(3) does not expressly prevent the add-a-name remedy from being used to name both spouses in the alternative. If the spouses are named in the alternative, the competent spouse would have the right to solely manage the marital property assets. However, it is not likely that the remedy can be used to name the spouses in the alternative. *See infra* § 8.24.

In addition to using the add-a-name remedy, the competent spouse could proceed under section 766.70(4) to limit or terminate the incompetent spouse's management rights. *See infra* ch. 8 (discussion of the remedies under section 766.70).

When assets are held in both names other than in the alternative, the spouses must act together for purposes of management and control. Wis. Stat. § 766.51(2). If an emergency arises when one spouse is away on a trip or hospitalized in a different community, the issue is whether the present spouse can obtain the temporary right to manage this property without the absent spouse's joinder. There is not a clear answer to this question. Section 54.50 permits the appointment of a temporary guardian, but the statute applies only to situations in which a minor, a spendthrift person, or an alleged incompetent person is involved. The spouses could provide for this possibility by executing a durable power of attorney and indicating that the power should go into effect on signing or on determination of lack of capacity.

Section 766.70(4) allows the court to limit or terminate an absent spouse's management rights. However, the statute does not define what constitutes an absence of sufficient duration to invoke the provision. Because the provision is not in UMPA, UMPA does not provide guidance. If a short absence permits invocation of the remedy, it could facilitate management and in some circumstances prevent breaches of contract. *See infra* § 8.30. However, it appears that a permanent or at least a significant, rather than a temporary, absence may be required before this remedy can be granted, since spousal absence is joined in the statute with gross mismanagement and waste. Gross mismanagement and waste are affirmative conduct against the interest of the marriage by the spouse whose rights are being terminated. A temporary, explained absence is not against the interest of the marriage. If an order under section 766.70(4) is not available, no statutory remedy seems to exist when a spouse is temporarily absent. The cases in the other community property states seem to require that a manager spouse have shirked responsibility before an emergency can be deemed to justify the termination of that spouse's management power. *See McKinney v. Boyle*, 447 F.2d 1091 (9th Cir. 1971); *Wright v. Hay's Adm'r*, 10 Tex. 130 (1853); *Marston v. Rue*, 159 P. 111 (Wash. 1916); *see also* Reppy & Samuel, *supra* § 4.9, at 233.

H. Guarantees [§ 4.59]

A guarantee may arise either in a transaction that benefits the marriage or the family or in a gratuitous (i.e., nonbeneficial) transaction. *See infra* § 6.22. If the spouses obtain a benefit from the guarantee, such as when a spouse guarantees a loan to a business that employs a spouse, the guarantee in all likelihood is for a family purpose, and if the principal obligor defaults, the obligation then may be satisfied in the same manner as any other family-purpose obligation. Wis. Stat. § 766.55(2)(b). If the guarantee is gratuitous, such as a guarantee of a relative's note, it is unclear whether the obligation is for a family purpose, and thus the extent to which marital property assets are available in the event of default is unclear.

The Act does not contain any express provision dealing with a spouse's authority to guarantee an obligation. However, both spouses seem to have the management and control power to guarantee an obligation, regardless of whether the guarantee is gratuitous. *See* Wis. Stat. § 766.51; *In re Groff*, 131 B.R. 703 (Bankr. E.D. Wis. 1991). It is unclear whether a gratuitous guarantee is subject to the gift limitations in section 766.53 if marital property assets could be reached when the principal obligor defaults. The better view is probably that section 766.53 does not apply. *See supra* § 4.36. This is particularly true if the guarantor has assets classified as individual or predetermination date property that could also be reached to satisfy any claim based on the guarantee.

I. Transfer to Survivorship Marital Property [§ 4.60]

If a spouse dies while holding marital property assets in his or her name, the surviving spouse owns a one-half interest in the asset and the other one-half interest passes as part of the deceased spouse's estate. The Act also permits marital property assets to be held in a form that provides survivorship ownership. Wis. Stat. § 766.60(4). If the words *survivorship marital property* are used instead of *marital property*, the complete ownership rights vest solely in the surviving spouse by nontestamentary disposition at death. Wis. Stat. § 766.60(5)(a).

Survivorship marital property is an important substantive addition to normal community property concepts made by UMPA and adopted in Wisconsin. *See* UMPA § 11 cmt. It is "not a form of joint tenancy but is

a new statutory estate." *Id*. As the comment to UMPA section 11 explains, "[i]t 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." The survivorship element is consistent with the policy of Uniform Probate Code section 6.101 and with the ability to create a nontestamentary disposition by marital property agreement. *See* Wis. Stat. § 766.58(3)(f).

The spouses may create survivorship marital property by reregistering an existing asset or by expressing the intent to create survivorship marital property in the document of title at the time of acquisition. *See* Wis. Stat. § 766.60(5). Under section 766.605, if either marital property funds or nonmarital property funds are used to acquire a homestead after the determination date, the homestead is survivorship marital property if both names are on the title, unless a contrary intent is expressed on the instrument of transfer or in a marital property agreement. For example, if a deed for a homestead is in the name of "H and W, husband and wife," after the determination date, the homestead is survivorship marital property regardless of the classification of the funds used for the acquisition or the spouses' intent (unless reflected in the deed). Wis. Stat. § 766.605.

- ***Note.*** The above rule applies only if the homestead is held between both spouses when the asset is acquired. Thus, if the homestead is initially held in the name of one spouse and is subsequently transferred into the names of both spouses, section 766.605 will not apply, and, if survivorship is intended, the document of title must so indicate.

A relevant issue concerns whether one spouse who holds a marital property asset may, acting alone, transfer the marital property asset into the survivorship marital property form of holding. There is no express provision that management and control powers either may or may not be used by one spouse acting alone to create survivorship marital property. If one spouse acting alone can transform a marital property asset into survivorship marital property, it deprives the first spouse to die of the right to dispose of one-half of the asset by will or intestate succession to some other person. For example, in a second marriage in which the wills of both spouses give property to children from prior marriages, such a change in form of holding would disinherit the children of the first spouse to die as to any asset so held.

The plural *spouses* in the section 766.60(4) survivorship provisions is also used in the other provisions of the statute that describe forms of holding marital property assets in both names. *See* Wis. Stat. § 766.60(1), (2). It is unlikely that the use of the plural "spouses" in each of these subsections means that joinder is required. Thus, absent an express limitation, a spouse acting alone may probably use his or her management and control powers to create survivorship marital property. The transaction is subject to review to determine if it satisfies the spouse's duty of good faith. *See* Wis. Stat. § 766.15(1).

If property is held as survivorship marital property, another issue concerns whether one spouse may sell the asset and convert the proceeds to marital property without survivorship. One spouse acting alone may can manage and control the asset if it is held in the name of both spouses in the alternative. Wis. Stat. § 766.51(1)(b). Section 766.60(5) appears to require the precise term *survivorship marital property* on the title for all assets held in that form. Two exceptions are that a homestead is survivorship marital property when section 766.605 applies, and attempts by spouses to create joint tenancies after the determination date instead create survivorship marital property. Wis. Stat. § 766.60(4)(b)1. Thus, when a survivorship marital property asset is sold, the proceeds do not seem to be survivorship marital property unless so stated on the check. If one spouse acting alone has management and control rights over an asset held as survivorship marital property, that spouse appears able to change the form of holding to one without survivorship. Wis. Stat. § 766.60(4)(b) Legis. Council Note—1985 Act 37, §§ 124 to 126 (West 2009). This change in holding is also subject to the other spouse's remedies for failure to comply with the obligation of good faith.

J. Transfer of Marital Property in Trust [§ 4.61]

If a spouse has management and control rights with regard to a marital property asset, may that spouse use that power to transfer the marital property asset to a trust? If so, the asset's management and control is subsequently determined by the terms of the trust. Wis. Stat. § 766.51(3).

A trustee may administer, manage, and distribute the trust property in accordance with the terms of the governing instrument regardless of the classification of the property in the trustee's possession unless the trustee has received a written notice of claim in a court order or in the terms of a

trust. Wis. Stat. § 766.575(2). Thus, after the death of a spouse, the trustee may continue to administer the assets pursuant to the trust provisions even though some of the assets may be classified as marital property that will be distributed as part of the decedent's estate.

Under the Act, a spouse may use management and control rights to transfer marital property assets to a revocable trust. *See infra* ch. 10. Section 766.31(5) provides that the transfer of marital property assets to a trust does not by itself change the property's classification. The statute is based on UMPA section 4, the comment to which states that it was designed "to permit the creation of revocable living trusts by one or both spouses without any automatic reclassification of property committed to the trust." Thus, if a marital property asset is transferred to a revocable inter vivos trust, the property retains its classification as marital property, and one-half of the asset is subject to testamentary disposition by each spouse. The transfer is subject to the spouse's obligation of good faith.

It is unclear whether the nondonor spouse can withdraw the marital property assets from the trust during his or her lifetime. If the marital property asset was held solely by the donor spouse, the nondonor spouse probably lacks such power, since the nondonor spouse never had management and control rights regarding the asset. The add-a-name remedy is not available after the asset is transferred to the trust. Wis. Stat. § 766.70(3) (asset titled in trust, not in spouse). If the asset was held in both names in the alternative or was not held, the asset was subject to the nondonor spouse's management and control before its transfer to the trust. It appears, however, that the transfer terminates the nondonor spouse's management and control power, because the terms of the trust determine the right to manage and control a marital property asset transferred to a trust. *See* Wis. Stat. § 766.51(3). This is consistent with general trust law, under which the trustee has legal title. George G. Bogert, *The Law of Trusts and Trustees* §§ 141 (3d ed. 2007), 611 (3d ed. 2003). Thus, if the nondonor spouse no longer has management and control rights, it is likely that he or she cannot remove a marital property asset from the trust.

After the death of the nondonor spouse, it appears that the trustee can continue to manage and control the trust's assets under the terms of the trust. The trustee is not obligated to determine the classification of the trust assets or required automatically to transfer one half of all assets classified as marital property to the nondonor spouse's estate. However, the personal representative of the nondonor spouse's estate can reach the

nondonor spouse's share of the marital property assets. *See infra* ch. 12. If the trust instrument appoints the donor spouse as trustee or otherwise permits the donor spouse to direct distributions to third parties, such power may be exercised by that spouse. The exercise of this power would end the assets' classification as marital property and the transfer would be subject to the limitations on the amount of gifts of marital property assets and the obligation of good faith. *See supra* ch. 2, *infra* ch. 10.

If a marital property asset is transferred to an irrevocable trust, the issue is whether the property retains its classification as marital property or whether other factors indicate an intention to make a gift. *See* Wis. Stat. § 766.31(5); *see also supra* § 4.36. The comment to UMPA section 4 does not discuss a transfer to an irrevocable trust. Whether a gift was made can be decided on the facts of each case. If there was no gift, the asset remains marital property, and management and control rules for marital property transferred to a revocable trust should apply.

➢ ***Note.*** The classification of assets in a trust can have tax implications. In Private Letter Ruling 199908032 (Nov. 30, 1988), the Internal Revenue Service approved the transfer as a one-half interest in a community property residence to each of two identical personal residence trusts as provided for in I.R.C. § 2702(a)(3)(A)(ii). Each trust was to terminate on the termination date, which was the earlier of: (1) the date 15 years after the date of the trust agreement, and (2) the date of the trustor's death. The trustor was the sole beneficiary during the initial trust term. Did the transfer change the classification by gift? If not, do both spouses have a one-half interest in the trust created by the other spouse and, at death, does the surviving spouse have a right to withdraw one half of the trust assets? These issues were not considered in the ruling. To obtain the tax advantages of a personal residence trust it is necessary that the residence no longer be classified as marital property.

K. Change of Domicile to Another Jurisdiction [§ 4.62]

If spouses move to another jurisdiction, the marital property assets they acquired while domiciled in Wisconsin generally retain their classification in the new jurisdiction. *See infra* § 13.19. The property remains marital property as long as it can be traced to marital property

assets acquired while the spouses were married and domiciled in Wisconsin.

What management and control rights exist as to such property after the change of domicile? Logically, the management and control rights applicable while the spouses were Wisconsin residents should remain applicable to the marital property assets in the new jurisdiction because these rights arguably are an incident of marital property classification. This should be the result under the conflict-of-laws principles discussed in chapter 13, *infra*. However, courts in the new domicile may not always recognize these rights.

Under section 766.03(3), a change of domicile to a new jurisdiction by one or both spouses does not affect the property available to satisfy any obligation incurred by a spouse while both spouses are domiciled in Wisconsin. Similarly, under section 766.03(6), the property available to satisfy an obligation incurred by a spouse while one or both spouses are not domiciled in Wisconsin is not affected by chapter 766. Wis. Stat. § 766.03(6).

➢ ***Comment.*** Whether these statutes will achieve the legislative objectives will depend on the willingness of the courts in other states to use these provisions. *See infra* §§ 6.45, 13.19.

IV. Bona Fide Purchaser [§ 4.63]

A. Definition and Statutory Protection [§ 4.64]

The effectiveness of the Act's management and control provisions is determined to a large extent by the ease with which a third party can become a bona fide purchaser. A *bona fide purchaser* is defined as "a purchaser of property for value who was not knowingly a party to fraud or illegality affecting the interest of the spouses or other parties to the transaction, does not have notice of an adverse claim by a spouse and acted in the transaction in good faith." Wis. Stat. § 766.57(1)(a). The word *purchase* is broadly defined to mean "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." Wis. Stat. § 766.57(1)(b). Because the Act does not define the word *gift*, existing Wisconsin law must be used for the definition. *See, e.g.*, *Geise*

v. Reist (In re Estate of Reist), 91 Wis. 2d 209, 281 N.W.2d 86 (1979); *Wierman v. Wierman*, 130 Wis. 2d 425, 387 N.W.2d 744 (1986).

As a bona fide purchaser, a party is protected from subsequent disputes between the spouses. Section 766.57(3) provides:

> [m]arital property purchased by a bona fide purchaser from a spouse having the right to manage and control the property under s. 766.51 is acquired free of any claim of the other spouse and of any claim asserted through or under the other spouse. The effect of this subsection may not be varied by a marital property agreement.

The statute is designed to protect any third party who acquires property in a nondonative transaction. A secured lender is also protected. S*ee infra* § 5.28. Section 766.57(1)(c) states that "[a] purchaser gives 'value' for property acquired in return for a binding commitment to extend credit, as security for or in total or partial satisfaction of a preexisting claim." A security interest is an interest in property, and its acquisition confers bona fide purchaser status. It is unclear whether an unsecured lender is a bona fide purchaser. *See infra* § 5.28. If the transaction is not a gift, the Act protects the bona fide purchaser even if the managing spouse's disposition violated the spouse's obligation of good faith.

B. Effect of Marital Property Agreement [§ 4.65]

When is a purchaser deemed to have notice of a marital property agreement such that the purchaser is subject to the agreement's terms, and, as a result, may not become a "bona fide" purchaser? The Act defines when a person has notice: "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." Wis. Stat. § 766.01(13). However, the Act provides that 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. Wis. Stat. § 766.57(2). Knowledge of the existence of an agreement does not create an obligation to request a copy and review its provisions. Knowledge of the provisions is necessary, however. A marital property agreement may be recorded with the register of deeds, but the recording does not constitute notice to a purchaser. *See* Wis. Stat. §§ 59.43(1)(r), 766.58(11), .57(2). If the

agreement contains a legal description of real property, is recorded in the county where the real estate is located, and becomes part of the property's chain of title, a third party receiving a conveyance of the real estate appears to have actual notice of the agreement and its provisions and therefore is subject to any terms relevant to the transaction. *See* Wis. Stat. § 706.09; *see infra* § 4.73. The same result would apply to a recorded writ of attachment or lis pendens. *See* Wis. Stat. § 59.43(1)(a).

➢ ***Query.*** What occurs if the marital property agreement classifies all property of the spouses as nonmarital property? By its terms, section 766.57(3) only protects a bona fide purchaser who purchases *marital property assets* from a spouse. If the spouses by agreement do not have any marital property assets, does this mean the statute does not apply to a sale by either spouse of an asset to a third party? That is clearly one possible interpretation, and it would be necessary to look to other law to determine if the purchaser qualified as a bona fide purchaser. The other possible interpretation is that the property classification in the marital property agreement varies the effect of section 766.57(3) and thus is inoperative against the bona fide purchaser as to any property that would have been marital property but for the agreement. *See* Wis. Stat. § 766.57(3) ("The effect of this subsection may not be varied by a marital property agreement.") The statutory provision comes from UMPA section 9(c), but the comment to that section does not indicate which analysis is correct. If the marital property agreement is inoperative, the purchaser is in a better position than a creditor, since knowledge by a purchaser of the existence of a marital property agreement does not constitute notice. The purpose of section 766.57(3) is to protect a purchaser dealing with a spouse, and the statute should be construed to provide that protection.

C. Notice of Adverse Claim [§ 4.66]

Under the Act, a purchaser with notice of a spouse's adverse claim is not protected as a bona fide purchaser. *See* Wis. Stat. § 766.57(1)(a). The key question concerns when a purchaser has notice of an adverse claim by a spouse. *See* Richard V. Wellman, *Third Party Interests Under the Uniform Marital Property Act*, 21 Hous. L. Rev. 717, 725–26 (1984). Except for recording documents in the chain of title for Wisconsin real estate, a spouse can generally do little to ensure that a third party has actual notice of an adverse claim. Knowledge of the

existence of a marital property agreement is not actual notice of an adverse claim. Wis. Stat. § 766.57(2). However, a purchaser of real estate should be considered to have actual notice of an adverse claim to a parcel of real estate if the claim has been recorded as part of the chain of title; a third party cannot acquire a parcel of real estate and expect it to be free of claims without checking the title. If a marital property agreement were recorded in the chain of title, the purchaser should be required to inquire about the terms of the agreement. *See infra* § 5.134.

If a court has entered an order restricting a spouse's management of an item of marital property that is not real estate, the burden should be on the spouse desiring protection either to have the restrictions indicated on the title to the asset or to have the title transferred out of the name of the spouse who has been deprived of management authority. It would be unduly burdensome if purchasers were required to check all Wisconsin court records to determine whether a spouse holding property has been deprived of present authority to manage it.

For this same reason, if a spouse has commenced an action to limit the other spouse's management powers, a third party should not have the burden of inquiring about the litigation or attempting to ascertain independently whether litigation exists. Nor should a court determination terminating the marriage or limiting one spouse's management powers have greater status than that afforded to marital property agreements, unless the marital property asset is real estate and the determination is recorded in the chain of title.

The Act protects a bona fide purchaser in transactions occurring after termination of the marriage, even though an order of dissolution or an order in the probate proceedings may have reclassified assets or restricted management of those assets. *See* Wis. Stat. § 766.57(2). A former spouse's sale of property held in his or her sole name, or of untitled property in his or her possession, should not be voidable. *See id*. In summary, the effect of section 766.57 is that actual notice of an adverse claim is necessary to prevent a purchaser from attaining bona fide purchaser status.

D. Bona Fide Purchaser Status Requires Purchaser to Determine Spouses' Management and Control Rights [§ 4.67]

One uncertainty for purchasers arises from the definition of the word "held." Wellman, *supra* § 4.66, at 732. To determine which spouse has management and control powers under the Act, a purchaser must be able to determine whether a marital property asset is held. In addition to certain account relationships, documents of title, uncertificated securities and general partnership interests, the definition of the word held also recognizes a writing that "customarily operates as a document of title to the type of property" involved and that is issued in the person's name. *See* Wis. Stat. § 766.01(9)(a). Under this definition, it is unlikely that a bill of sale for household tangible personal property or a receipt for the purchase price paid for tangible personal property qualifies as a writing in the person's name that customarily operates as a document of title to the type of property; therefore, this property would not be held by a spouse. *See supra* § 4.5; *see also* Wellman, *supra* § 4.66, at 732–35. Accordingly, not every document can be accepted by a purchaser as proof of management and control rights under section 766.51. Likewise, bona fide purchaser status should not be subsequently threatened as a result of casual documents that the purchaser may or may not actually know are in existence.

When property is held in the name of both spouses other than in the alternative, a purchaser who does not obtain both spouses' signatures probably is acting at his or her peril since the rules for management and control for such property require that the spouses act together. *See* Wis. Stat. § 766.51(2). Thus, if the purchaser obtains only one signature, the purchaser will not become a bona fide purchaser.

If an asset is held in the names of both spouses in the alternative, the purchaser may want to request both spouses' signatures unless the property's classification as marital property is clear. If the asset is marital property, only one signature is required. *See* Wis. Stat. § 766.51(1)(b). However, the signature of both spouses is required to convey the entire interest if the asset is individual property or predetermination date property, or if it is mixed property having a marital property component, or if it is held by the spouses in co-ownership, as tenants in common, or in joint tenancy.

E. Spouses' Right to Commence Action for Breach of Contract Against Purchase [§ 4.68]

The Act expands a purchaser's liability in one way that did not exist under the common law. When there is a breach of a contract involving a marital property asset, each spouse acting alone may have the right to commence an action to protect the spouses' interest in the marital property asset, rather than only the spouse who was a party to the contract. *See supra* § 4.52. However, when an action is commenced by only one spouse, that spouse can bind both spouses' interests in the marital property asset, and the other spouse can be joined as a party. Wis. Stat. § 803.04. In addition, while the chance of a suit is expanded, the exposure is not increased. Thus, this change does not appear to significantly expand the purchaser's risk. *See* Wellman, *supra* § 4.66, at 735.

F. Summary [§ 4.69]

The Act is intended to permit third persons to enter into transactions involving marital property assets with one spouse without concern for the other spouse's rights if the participating spouse holds the marital property asset, has a right under or contract to deal with the asset or claim, or has apparent management of the marital property asset through possession. A marital property agreement may change the statutory management and control provisions, Wis. Stat. § 766.58(3)(b), but the agreement cannot prevent a third party who purchases from a spouse with management rights under section 766.51 from becoming a bona fide purchaser and therefore cannot expand the purchaser's risk. Wis. Stat. § 766.57(3). If a marital property asset has been reclassified by judicial determination but the title has not been changed in accordance with the order, the third party may reasonably deal with the spouse in whose name the asset is held. Actual knowledge of the existence of an agreement or court order does not constitute actual notice to affect a purchaser's attaining the status of bona fide purchaser. Notice that eliminates bona fide purchase status exists only if the purchaser actually knows or should have known the terms of the agreement or court order at the time of purchase.

V. Management of Real Estate [§ 4.70]

A. In General [§ 4.71]

Sections 4.72–.74, *infra*, describe the Act's management rules to the management of real estate. The discussion relies on and refers back to the chapter's more detailed analysis of the rules in previous sections. Sections 4.72 and 4.73, *infra*, discuss management and control of real estate at the time of and after acquisition, respectively. Section 4.74, *infra*, offers two examples that apply the rules to specific facts.

➢ ***Note.*** The discussion in sections 4.72–.74, *infra*, assumes that all or part of the real estate is classified as marital property. The right to manage and control individual or predetermination date property is exclusively in the owner spouse or spouses, *see* Wis. Stat. § 766.51(1)(a), and is not discussed here.

B. Management and Control at Acquisition [§ 4.72]

Under the Act, either spouse acting alone, or both spouses acting together, may purchase real estate that will be classified as marital property. The right to manage the real estate is distinct from its classification and does not determine its classification. Wis. Stat. § 766.51(5). In general, classification is determined by the source of the funds used for the asset's acquisition, whereas management and control rights are determined by how the asset is held. The concept of holding is discussed in section 4.5, *supra*, and generally depends on how the asset is titled. Consideration of how an asset is held is relevant only for assets classified at least in part as marital property. *See* Wis. Stat. § 766.51(1)(am), (b).

As mentioned above, the initial classification of the real estate generally depends on the classification of the funds or property used for its acquisition. If an asset is acquired during marriage through incurring debt, the portion of the asset attributable to the debt proceeds may well be classified as marital property. *See supra* § 3.33. If more than one classification of funds is used, a mixed asset is created involving pro rata ownership interests. *See supra* § 3.32.

In other cases, the statute specifies classification or form of holding, without regard to the source of funds used. For example, a homestead acquired in both names exclusively between spouses after the determination date is held as survivorship marital property if no intent to the contrary is expressed on the instrument of transfer or marital property agreement. Wis. Stat. § 766.605. Thus, if the spouses prefer to have both names on the title but do not wish to hold their homestead as survivorship marital property, the acquiring spouse could specify a contrary intent in the contract to purchase or execute a marital property agreement. The intention also must be reflected on the document of transfer (normally, the deed of conveyance). The Act also appears to permit a different form of holding for a homestead to be accomplished by other means, such as by a gift. Wis. Stat. § 766.31(10). Management and control exercised in the contract to purchase includes the right to determine how an asset will be held.

After the determination date, the Act also governs attempts by spouses to create a tenancy in common or a joint tenancy. An attempt to create a tenancy in common instead creates marital property, and an attempt to create a joint tenancy instead creates survivorship marital property. Wis. Stat. § 766.60(4)(b). Under the common law, both tenants in common or both joint tenants must join in managing the asset or in conveying the entire asset. Acting alone, one tenant can only manage his or her one-half interest in the asset. Under the Act, if the form of holding is in the alternative (i.e., "or"), either spouse acting alone may manage the entire asset. After the determination date, a joint tenancy or tenancy in common exclusively between spouses may be created only under the express provisions of a marital property agreement. The same rule applies to property gifted to both spouses by a third party. The asset is classified marital property or survivorship marital property unless the donor provides otherwise.

If the acquired real estate will be classified as marital property, the real estate is not "held" until the closing occurs and title is received. Management rights based on how the real estate is held can only be analyzed after the ownership interest is acquired; before receipt of title, there is only a contract to purchase the property, and the contract is not held by either spouse. *See supra* § 4.5. Although an equitable conversion may have occurred, the purchase contract does not make the real estate held by the acquiring spouse. *See* Wis. Stat. § 766.01(9). The purchase contract determines how title will be received, and this

provision at least initially determines the management and control of the real estate after the closing.

The contracting spouse acting alone may incur purchase-money indebtedness in connection with the acquisition of the property. *See* Wis. Stat. § 766.51(1m). The contracting spouse acting alone may create a security interest in the property being acquired. *See* Wis. Stat. § 766.51(1m). After the property is acquired, a security interest or mortgage can only be created by a spouse having the right to manage and control the asset. *See* Wis. Stat. § 766.51(1m)(b).

A purchase contract that designates how the asset is to be held after acquisition affects the property's subsequent management and control. If both spouses' names are on the title to the property, the Act expressly authorizes that those names be listed either in the conjunctive or in the alternative (i.e., "and" or "or"). *See* Wis. Stat. § 766.51(1)(b), (2). The use of the alternative ("or") is only permissible if the asset is entirely marital property. If the asset is marital property and both names are listed in the conjunctive ("and"), both spouses must act together in managing the property. Wis. Stat. § 766.51(2); *see supra* §§ 4.44–.48. If a portion is not classified as marital property (i.e., is individual or predetermination date property in joint tenancy or tenancy in common), the form of holding should be in the conjunctive ("and") to reflect the management rules applicable to such co-tenancies.

➢ ***Comment.*** If the asset is initially acquired using debt proceeds, is classified as marital property, and is held in both names in the alternative, a classification question occurs if the debt obligation is satisfied using nonmarital funds. In this situation, part of the ownership interest probably becomes nonmarital property. *See supra* § 3.41. As a result, because part of the ownership interest is nonmarital property, neither spouse can manage the entire asset acting alone, and thus the management rules applicable to the alternative form of holding are no longer believed effective.

A marital property agreement can specify how an asset is held and the management of specific assets. The Act authorizes spouses to enter into marital property agreements and to vary the Act's provisions by those agreements. Wis. Stat. § 766.58. A marital property agreement can affect the rights in and obligations with respect to any property, as well as the management and control of any property. Wis. Stat. § 766.58(3)(a), (b). Thus, spouses can classify presently owned or

subsequently acquired real property in any manner they desire by a specific agreement relating to that asset or by a general agreement classifying most or all of their assets. Likewise, they can specify each spouse's management and control rights in any or all of their property. A marital property agreement is binding between the spouses if it complies with the statutory requirements. *See infra* ch. 7. The agreement provisions are binding on a creditor only if the creditor has actual knowledge of the provisions before extending credit. Wis. Stat. § 766.55(4m). The agreement affects third-party bona fide purchasers only if the purchaser has notice at the time of purchase of an adverse claim by the other spouse arising under the agreement because of the transaction. *See* Wis. Stat. § 766.57; *see also supra* § 4.66.

C. Management and Control After Acquisition [§ 4.73]

Under the Act, either spouse acting alone may manage and control that spouse's property that is not marital property and all marital property held in that spouse's name alone. Wis. Stat. § 766.51(1)(a), (am). If the real estate is classified as marital property and is held in one spouse's name, the spouse in whose name the property is held has exclusive management and control rights. Wis. Stat. § 766.51(1)(am). If the real estate is classified as marital property and the nonholding spouse wishes to obtain management and control rights without the holding spouse's consent, the nonholding spouse may initiate an action to have his or her name added to the document that evidences ownership. *See* Wis. Stat. § 766.70(3). This remedy is not available if the real estate is part of a sole proprietorship business operation and the nonholding spouse is not involved in operating or managing the business. Wis. Stat. § 766.70(3)(c).

A spouse exercising management and control powers over marital property assets has an obligation to exercise these powers in good faith. Wis. Stat. § 766.15(1). If a spouse exercises management rights by making a gift of marital property real estate to a third party, the nondonor spouse may have a remedy to recover the asset or obtain a compensatory judgment. Wis. Stat. §§ 766.53, .70(6)(b); *see infra* § 8.45. However, if there is a purchase instead of a gift, under section 766.57(3) a third party will become a bona fide purchaser if the third party acquires marital property real estate for value from a spouse having management and control of the property under the Act. That third party acquires the property free of any claim of the other spouse and free of any claim

asserted through or under the other spouse. Wis. Stat. § 766.57(3). Section 766.57(3) may not be varied by a marital property agreement. *See supra* §§ 4.63.–.69.

The general rules are summarized as follows:

Ownership or Classification of Property	**Forms of Holding**	**Management and Control**
I. Individual Property	Sole name of one spouse	Exclusive with owner (Wis. Stat. § 766.51(1)(a))
	By marital property agreement —tenancy in common and joint tenancy with spouse	Both spouses together for whole asset; each alone for his or her interest
	Tenancy in common or joint tenancy with third party	Both parties together for whole asset; each alone for his or her interest
	Trust	Trustee, under trust provisions (Wis. Stat. § 766.51(3))
	Not titled, such as lease interest of less than one year, adverse possession claim, or prescription right	Exclusive with owner (Wis. Stat. § 766.51(1)(a))
II. Marital Property	Sole name of one spouse	Exclusive with holding spouse (Wis. Stat. § 766.51(1)(am))
	Names of both spouses Alternative (i.e., “H or W” Conjunctive (i.e., "H and W"	Either spouse acting alone (Wis. Stat. § 766.51(1)(b)) Both spouses must act together (Wis. Stat. §766.51(2))
	Survivorship marital property (i.e., “H and W, as survivorship marital property”	Determined by whether holding in conjunctive or alternative
	Trust	Trustee, under trust provisions (Wis. Stat. § 766.51(3))

Ownership or Classification of Property	Forms of Holding	Management and Control
	Not held, such as lease interest of less than one year, adverse possession claim, or prescription right	Either spouse acting alone (Wis. Stat. § 766.51(1)(am))
III. Predetermination Date	Same as individual property, except joint tenancy and tenancy in common between spouses can exist without marital property agreement	Rules same as for individual property (Wis. Stat § 766.51(6))
IV. Mixed Property	Any form of holding for categories I-III	Same rules for each component, as set forth in categories I-III

The Act requires that the spouses act together in managing marital property real estate held in the names of both spouses in the conjunctive. Wis. Stat. § 766.51(2); *see also* Wis. Stat. § 766.53 (gifts to third parties). It appears unlikely that the requirement that spouses act together has the same meaning in sections 766.51(2) (management and control of marital property) and 766.53 (gifts of marital property to third persons). *See supra* §§ 4.35–.42, .44–.48. The requirement probably necessitates that both spouses join in any conveyance of real estate. It is unlikely that one spouse can sign a conveyance on one date and the other spouse can later consent to the transaction and have that consent be sufficient to create a valid transfer as of the date the first spouse signed. *See supra* §§ 4.35–42, .44–.48. Because the form of holding is known through the chain of title, a third party would have actual notice and would know he or she was not receiving a conveyance from all parties required to exercise management and control rights under the Act. Thus, the purchaser would not become a bona fide purchaser at the initial date of the transaction. Therefore, all intervening transactions involving the real estate and placed on record would have precedence.

What is required for an effective contract to repair, maintain, or remodel marital property real estate? It is unlikely that the rule that spouses must act together in the management and control of marital property assets held in the conjunctive form ("and") requires that both spouses affirmatively participate in management transactions other than conveyances and leases for more than one year. In other community

property states where joinder is required for managing real estate, this requirement has not been extended to contracting for routine services to repair or maintain the real property. *See supra* § 4.46. It is likely that this conclusion will be adopted in Wisconsin.

If both spouses must act together and one spouse becomes incompetent, a guardian can be appointed for that spouse so that both spouses can act together in managing the property. *See* Wis. Stat. § 54.20(2)(h). While management by a guardian is subject to court approval, it appears that the other spouse may be appointed as the guardian even though a conflict of interest may arise. *Id*. Subsequent management and control could also be authorized by the spouses through a durable power of attorney. *See* Wis. Stat. ch. 244 (created by 2009 Wis. Act 319).

A third party becomes a bona fide purchaser if he or she purchases the real estate for value, is not knowingly a party to fraud or illegality affecting the spouses' interests, does not have notice of an adverse claim by a spouse, and acts in the transaction in good faith. Wis. Stat. § 766.57(1); *see supra* §§ 4.63–.69. Notice of the existence of a marital property agreement, a marriage, or the termination of a marriage does not affect a purchaser's status as a bona fide purchaser. Wis. Stat. § 766.57(2). It appears, however, that if a marital property agreement is recorded with the register of deeds and becomes a part of the chain of title to the real estate, then any provisions in that agreement changing the real estate's classification or changing the related management and control rights are binding on the third party. Wis. Stat. § 706.09. If a marital property agreement is recorded in the chain of title, the third party has notice of any change by the agreement of the basic statutory management and control rights. If the recording is not in the chain of title or there has been no recording, it appears that the purchaser would become a bona fide purchaser only if the purchaser dealt with the spouse having management and control powers under section 766.51.

- ***Comment.*** It is believed that if the third party obtains a copy of the agreement, whether through its being in the chain of title or otherwise, the third party must read the agreement and follow its provisions or otherwise act at his or her peril. This is required regarding other documents in the chain of title.

The power of management and control includes the power to change how the asset is held, based on the holding spouse's authority to transfer,

exchange, or dispose of the asset. *See* Wis. Stat. § 766.01(11). Thus, if initially real estate is held exclusively in the name of one spouse, that spouse may change the form of holding to the names of both spouses. This may or may not include a change in classification, depending on the holding spouse's intent. Likewise, a spouse holding marital property real estate in both names in the alternative may change that form of holding to survivorship marital property. A spouse holding real estate in the alternative as survivorship marital property may change the form of holding to marital property without the survivorship incident. *See supra* § 4.60. A spouse having the right of management and control of marital property real estate may also transfer the property to a trust. *See supra* § 4.61. The transfer of the real estate to the trust by itself does not change the property's classification. Wis. Stat. § 766.31(5). Thus, if real estate classified as marital property is transferred to a revocable trust, it is likely that the asset remains classified as marital property. Management and control rights, however, pass to the trustee following the transfer. Wis. Stat. § 766.51(3). If the real estate classified as marital property is transferred to an irrevocable trust for the benefit of a third person, additional facts are present that probably indicate a gift of the property, ending its classification as marital property.

D. Examples [§ 4.74]

➢ ***Example 1.*** A husband wants to purchase a parcel of rental real estate. Bank X will loan 80% of the purchase price. The loan is expected to be repaid from cash flow generated by the property. The title is to be held by the husband alone.

1. The husband acting alone may:
   a. Negotiate terms of purchase and sign the offer to purchase;
   b. Direct in the offer to purchase how title is held;
   c. Incur purchase money indebtedness, *see* Wis. Stat. § 766.51(1m);
   d. Negotiate the lease of the property;
   e. Contract for maintenance of the property;
   f. Contract for capital improvements to the property;
   g. Mortgage the property as security for new or existing indebtedness;
   h. Commence an action regarding the property, *see supra* §§ 4.50–.53;

i. Defend an action regarding the property, *see supra* §§ 4.50–.53
j. Determine when and at what price to sell the property and sign a listing contract with a broker;
k. Accept an offer to purchase and thereby contract to sell the property; and
l. Execute a conveyance of the property.

2. The husband's actions in each case are subject to the obligation of good faith in section 766.15.

3. Because of the debt financing, at least 80% of the real estate is likely to be classified as marital property. Classification of the interest attributable to the 20% down payment depends on the source of the funds.

4. The wife has no management and control rights under the Act. As to the marital property component, the wife obtains management and control rights under the Act only through a remedy, *see* Wis. Stat. § 766.70(3), (4).

Although the Act grants management and control to the holding spouse, the nonholding spouse may exercise some management and control activities. For example, it is believed that the wife can exercise at least some management and control rights relating to the property's maintenance. *See supra* § 4.46. The wife should be able to contract for fire insurance to protect her interest in the building. Likewise, she should be able to contract for maintenance that if not done could result in damage to the property, such as repair of a leaking roof or malfunctioning furnace. If the roof or furnace cannot be repaired, the wife should have the management authority to contract for a new furnace or roof to protect her interest in the building. If this conclusion regarding the wife's management authority is correct, the wife can contract for maintenance and capital improvements even though a lien against the property could be created by nonpayment for the services or improvement. The permitted exercise of management and control regarding the property is to protect the wife's ownership interest and does not otherwise infringe on the husband's exclusive management and control rights.

➢ ***Query 1.*** What if the capital improvement or maintenance is not necessary to protect the wife's interest in the property but rather is discretionary and intended to improve the property's value (for example, an addition to the building)? It is inappropriate to require the third-party contractor to determine how the property is held and then to determine whether the improvement is discretionary or the maintenance is necessary. Thus, the contract should be enforceable. However, is this contract by the wife a breach of the duty of good faith or subject to some other remedy by the husband? It is believed that a contract by the wife for a discretionary capital improvement or maintenance would breach her duty of good faith. Operational management and discretionary capital improvements can only be properly exercised by the holding spouse, and remedies exist if the wife wishes to participate in such management.

➢ ***Query 2.*** If the rent is not paid, may the wife bring an action to recover the rent? In general, an action for damage to a marital property asset may only be maintained by the spouse or spouses who hold the asset, while an action for loss of earned income can be maintained by either spouse. *See supra* §§ 4.50–53. It is believed the right to payment for the use of rental property is an incident of the property, and thus, W acting alone may not commence the action.

➢ ***Example 2.*** The husband and wife want to purchase a parcel of rental real estate. Bank X will loan 80% of the purchase price. The loan is expected to be repaid from cash flow generated by the property. The title is to be held by the husband and wife as survivorship marital property.

1. The husband or the wife acting alone or both acting together may:
   a. Negotiate the terms of the purchase and sign the offer to purchase;
   b. Direct in the offer to purchase how the title is held; and
   c. Incur purchase-money indebtedness, *see* Wis. Stat. § 766.51(1m).
2. The husband or the wife acting alone may:
   a. Lease the property for one year or less, *see supra* § 4.46;
   b. Contract for maintenance of the property, *see supra* § 4.46; and
   c. Contract for capital improvements to the property. *See supra* § 4.46.

3. The husband and the wife must act together to:
   a. Exercise management and control rights under the Act, Wis. Stat. § 766.51(2); *see supra* §§ 4.44–.48;
   b. Mortgage the property as security for new or existing indebtedness, *see supra* §§ 4.44–.48;
   c. Lease the property for more than one year, *see supra* § 4.46;
   d. Commence an action regarding the property, *see supra* §§ 4.50–.53;
   e. Determine when and at what price to sell the property and sign a listing contract with a broker;
   f. Accept an offer to purchase and thereby contract to sell the property; and
   g. Execute a conveyance of the property.
4. The husband's and the wife's actions in each case are subject to the section 766.15 obligation of good faith.

VI. Management of a Business [§ 4.75]

A. General Rules [§ 4.76]

If marital property funds are invested in a business organized as a corporation or a partnership, any stock of the corporation or partnership interest received is classified as marital property. *See supra* ch. 2. The investment of marital property funds or property does not cause the underlying assets of the corporation or partnership to be classified as marital property. *See supra* § 3.47; *see also* Wis. Stat. § 178.21 (partnerships). The corporation or partnership owns the business assets and has all management rights with regard to those assets.

The rules regarding management of a business interest that is marital property do not differ in any significant respects from those applicable to all other marital property assets. For example, a spouse's right to manage stock in a corporation depends on how the stock is held. *See* Wis. Stat. § 766.01(9) (defining held).

A spouse holding an interest in a partnership or corporation can use his or her management right to purchase the marital property interest in the business of the nonholding spouse from the estate of the nonholding spouse and thereby retain full control over the business interest. Specifically, section 857.015 permits a spouse holding an interest in a

business other than a sole proprietorship to direct a purchase of the nonholding spouse's marital property interest in the business. The directive may be made by will or other signed writing. If the holding spouse is the surviving spouse, the directive must be issued within 90 days after the nonholding spouse's death. *See* Wis. Stat. § 857.015.

The management and control rules governing the assets of an unincorporated business differ from those governing business assets owned by a corporation or partnership. Because the assets of an unincorporated business are not owned by a business entity, they are subject to normal management and control rights under the Act, with the exception that a nonmanaging spouse may not use the add-a-name remedy, *see* Wis. Stat. § 766.70(3). The use of business interests to obtain credit is discussed in chapter 5, *infra*. Thus, the classification of each asset owned by an unincorporated business must be determined. If the asset is individual or predetermination date property, management and control rests with the owner spouse or spouses. Wis. Stat. § 766.51(1)(a).

If the asset of the unincorporated business is marital property, it is necessary to determine whether the asset is held by a spouse within the meaning of section 766.01(9). Many such assets, such as real estate, securities, and bank accounts, are held by a spouse. For example, if the bank account for the business is in one spouse's name, that spouse has the sole right to manage that business asset under the Act's general management and control provisions. Likewise, if the business inventory consists of titled assets, such as automobiles, title determines which spouse has the right to manage an asset.

Management and control rights as to marital property assets that are used in an unincorporated business and that are not held by a spouse may be exercised by either spouse, and effective management is determined by possession. *See* Wis. Stat. § 766.51(1)(am); *see also supra* §§ 4.3–.7. Thus, if the business inventory consists of assets that are not held by a spouse, such as animals, steel products, or commodities, either spouse may manage the assets and convey good title to a third party. *See* Wis. Stat. §§ 766.51(1)(am), .57(3). However, a third party may be unwilling to accept an assignment or bill of sale from a spouse who is not active in the business, particularly if that spouse is unable to establish that the inventory or asset being transferred is marital property. If the inventory or asset is not marital property, the inactive spouse would not have the right to manage and control it. *See* Wis. Stat. §§ 766.51(1)(a), .57(3).

B. Management and Control Remedies [§ 4.77]

If a nonmanaging spouse wishes to obtain management and control rights or is concerned that business assets are being wasted, several procedures may be available to that spouse to protect the marital property assets. *See infra* ch. 8. In addition, if the managing spouse is incompetent, a guardian may be appointed to manage and control the spouse's assets. *See* Wis. Stat. ch. 54.

The Act contains remedies giving a spouse the right to seek to manage marital property assets held in the other spouse's name. One remedy is to add the nonholding spouse's name to the title and thereby obtain the right to manage the property by acting together with the other spouse. *See* Wis. Stat. § 766.70(3). This remedy is not available, however, for any of the following:

1. Assets of an unincorporated business if only one spouse is involved in managing or operating the business;

2. Any general partnership interest, joint venture interest, or interest in a professional corporation, professional association, or limited liability company; or

3. An interest in a closely held corporation.

Wis. Stat. § 766.70(3)(a)–(d).

The add-a-name remedy was not available for interests in a closely held corporation only if the other spouse was an employee of the corporation until the 1988 Trailer Bill removed the employment limitation. *See* Wis. Stat. § 766.70(3)(d) (1985–86). The 1988 Trailer Bill also expanded the business interests to which the remedy under section 766.70(4) is not available to include interests in certain corporations.

The remedy under section 766.70(4) to limit or eliminate a spouse's right to manage marital property assets in the event of gross mismanagement, waste, or absence is generally available if marital property assets have been or are likely to be substantially injured. In this situation the court can also change the classification of an asset, which would change management rights. However, the remedy is not generally available for (1) general partnership interests and joint venture interests,

(2) interests in professional corporations or professional associations; (3) interests in closely held corporations, and (4) any other property if the addition would adversely affect the rights of a third person. *See* Wis. Stat. § 766.70(4)(c). If the remedy is granted by the court, the spouse originally holding the asset could lose all management and control rights.

C. Spousal Creditors [§ 4.78]

The right of a spouse holding a marital property business asset or interest to exclusively manage and control the business asset or interest can be affected by the other spouse's conduct. If the nonmanaging spouse incurs a family-purpose obligation, the obligation can be satisfied from any marital property asset, including an interest in a closely held business. *See infra* § 5.102. Thus, if the nonmanaging spouse defaults on a contract indebtedness or incurs a tort obligation, the creditor can satisfy that obligation from the marital property business interest even though other assets are available for satisfaction. *See infra* § 6.8. This approach differs from the judicially imposed marshalling system in some other community property states, which requires satisfaction from certain assets before others.

D. Buy-sell Agreements [§ 4.79]

1. In General [§ 4.80]

Frequently, businesses—either corporations or partnerships—use buy-sell agreements to provide a mechanism for the disposition of a stockholder's stock or of a partner's partnership interest in the business. Typically, the agreement provides for the purchase of the interest upon either the death of the owner or an attempted lifetime disposition to a third party. If the owner is an employee of the business, the agreement also frequently provides for purchase upon the employee's retirement or withdrawal.

- ***Note.*** A buy-sell agreement involves at least one third party, another owner or the entity. Section 857.015 is sufficient if the only objective is for the holding spouse to end up as the sole owner of the business interest after the death of either spouse.

Buy-sell agreements can provide for purchase of the interest by the business entity itself or can be structured as a cross-purchase agreement under which one or more shareholders or partners have the right or obligation to purchase. The agreement normally restricts the parties' ability to transfer the business interest outside the contract provisions. If transfers, such as gifts to family members, are permitted, the donees generally must accept the provisions of the agreement as a condition of their receiving the interest. The purchase provision can be mandatory or optional. Frequently, to acquire the funds necessary to make the purchase, the party with the right to purchase obtains insurance on the life of the owner of the business interest.

2. Provision Under the Act [§ 4.81]

The Act contains a provision directed to buy-sell agreements. Section 766.51(9) provides as follows:

> If an executory contract for the sale of property is entered into by a person having the right of management and control of the property, the rights of all persons then having or thereafter acquiring an interest in the property under this chapter are subject to the terms of the executory contract. This subsection applies to contracts entered into before or after the determination date.

This provision is not found in UMPA. Clearly, under section 766.51(9), the spouse who holds a marital property business interest has a right, acting alone, to enter into a buy-sell agreement and commit all the marital property interest to the terms of the agreement. The exercise of the management right by one spouse acting alone is subject to the obligation of good faith. *See* Wis. Stat. § 766.15(1). The nonparty spouse's rights in the property disposed of by the agreement attach to the proceeds of the sale; the sale of the stock or partnership interest is not affected by the nonparty spouse's ownership rights in that asset. *See* Wis. Stat. Ann. § 766.51(9) Legis. Council Notes—1985 Act 37, §§ 84 to 87 (West 2009). The statute is significant because it permits a holding spouse to direct a completed purchase of all former marital property stock even though the surviving nonholding spouse may desire to retain his or her one-half interest in the stock as a tenant in common. *See infra* § 12.29.

➢ ***Note.*** Section 766.51(9) contains a possible oversight in its reference only to interests acquired "under this chapter" (i.e., chapter 766). For example, if the nonholding spouse acquires a marital property interest in the stock or partnership and dies first, leaving a will giving his or her estate to the children, the children obtain one-half of the marital property interest under the Probate Code, not under chapter 766. This appears to be an unintentional drafting error that should not be given substantive effect.

3. Classification Issues [§ 4.82]

Section 766.51(9), *see supra* § 4.81, does not eliminate the need to include additional provisions in many buy-sell agreements. To decide whether an existing buy-sell agreement needs revision and the appropriate provisions for new agreements, the classification of the stock or partnership interest must first be determined. Three possible situations exist.

One possible situation involves stock or a partnership interest that was fully paid for and owned before the determination date and therefore is either individual or predetermination date property. If the business interest is individual property, the owner spouse has management and control. *See* Wis. Stat. § 766.51(1)(a). If it is predetermination date property, it is property that would have been either marital property or individual property if acquired after the determination date. During marriage, predetermination date property is treated as if it were individual property, Wis. Stat. § 766.31(9), and management and control rights are determined accordingly. Wis. Stat. § 766.51(1)(a). Although the business interest may be individual or predetermination date property at the outset, a marital property component may arise if, after the determination date, a spouse applies substantial undercompensated efforts to the business and these efforts cause substantial appreciation in the value of the business interest. *See supra* §§ 2.151, 3.45. The mixing of property resulting from a spouse's effort can be avoided by paying reasonable compensation for the services rendered. *See* Wis. Stat. § 766.63(2). A marital property component may also arise in the business interest if a spouse uses marital property funds to make a capital contribution to the business after the determination date. If no marital property interest arises, a buy-sell agreement entered into by the owner spouse before or after the determination date is fully operative. *See* Wis. Stat. § 766.51(9).

Without the buy-sell agreement, at the owner spouse's death the business interest would become part of that spouse's probate estate, possibly subject to the deferred marital property election. With a buy-sell agreement, the agreement takes precedence. If the spouse who owns the interest dies or if another event triggers the purchase, the agreement applies, and the purchase or option provisions become operative. The deferred marital property election gives an interest in the proceeds, not in the business interest. *See* Wis. Stat. Ann. § 766.51(9) Legis. Council Notes—1985 Act 37, §§ 84 to 87 (West 2009). If the nonowner spouse dies first, no portion of the business interest is included in that spouse's estate. Absent mixing with marital property funds or the application of spousal efforts, the business interest is at most property subject to a deferred marital property election. The deferred marital property election does not apply if the nonowner spouse predeceases the owner spouse. Buy-sell agreements applicable to business interests acquired after the determination date using individual property or predetermination date property funds are likewise fully effective.

A second possible situation involves stock or a partnership interest acquired before the determination date, but with outstanding acquisition indebtedness that is satisfied after the determination date, using marital property funds. Whether the payments after the determination date create a marital property component depends on the mixing rules applied to the transaction in Wisconsin. *See supra* §§ 3.34–.37.

A third possible situation involves stock or a partnership interest initially acquired with marital property funds after the determination date. In this situation the stock or partnership interest is classified as marital property, and under the Act, each spouse owns an equal one-half interest. *See* Wis. Stat. § 766.31(3).

4. Consequences When Business Interest Is Partly or Entirely Marital Property [§ 4.83]

After the stock or partnership interest has been classified and has been found to have a marital property component under the second or third set of circumstances discussed in section 4.82, *supra*, it is necessary to determine whether the spouse holding the interest may, acting alone, enter into a buy-sell agreement governing the entire interest. Regardless of how the business interest is held, if both spouses are parties to the agreement, the agreement should in all cases be sufficient to bind and

obligate their successors in interest. After the determination date, if the stock in a corporation is marital property and is held by only one spouse, that spouse has the exclusive right to manage and control the stock. *See* Wis. Stat. § 766.51(1)(am).

If the business interest subject to a buy-sell agreement is partly or entirely marital property, what happens upon the death of a spouse? If the decedent spouse holds the business interest and is a party to the agreement, no unanticipated consequences should occur, because the death typically triggers a purchase, and section 766.51(9) specifically allows the executory contract to be performed.

However, if the nonholding spouse is not a party to the agreement, and his or her death is not a triggering event, upon his or her death one-half of the marital property component of the business interest is included in his or her probate estate and passes to his or her beneficiaries. The beneficiaries become tenants in common with the surviving spouse. *See* Wis. Stat. § 861.01(2). Typically, the death of a nonholding spouse has not been an event giving rise to any purchase option, especially under agreements entered into before the Act's effective date. Thus, if the beneficiaries of the deceased nonholding spouse are other than the holding spouse, the disposition at death reduces the holding spouse's interest in the business. The beneficiaries of the deceased nonholding spouse's estate ultimately have the right to manage and control the deceased spouse's interest, including the right to vote, or to manage and control the partnership interest or stock received from the estate. The beneficiaries also have the right to receive all distributions from the partnership or corporation in connection with those interests.

The vote of the interest following distribution of the nonholding spouse's estate can be controlled by the holding spouse through the use of a voting trust, notwithstanding beneficial ownership by the beneficiaries of the nonholding spouse. However, the parties to the buy-sell agreement must create the voting trust before the nonholding spouse's death.

If the agreement does not deal with the marital property interest of the nonholding spouse, a further difficult question arises if after the nonholding spouse's death an event such as the death or retirement of the holding spouse triggers a purchase option or obligation. The question is whether the buy-sell agreement is operative as to the stock or partnership interest owned by the beneficiaries of the predeceased nonholding

spouse's estate. Normally, neither the deceased nonholding spouse nor the beneficiaries of his or her estate would be parties to the buy-sell agreement, especially in agreements executed before the Act's effective date. The answer to the above question depends on how the situation is interpreted.

One possible interpretation is that the executory contract created a lien on the stock or partnership interest that passes with the asset to whoever received the asset. This alternative is most likely to apply when the transfer restriction is part of the corporation's articles or bylaws and is reflected on the stock certificate, rather than being merely part of a buy-sell agreement between the corporation and a shareholder or between shareholders alone. *See* Wis. Stat. § 408.204. In any event, however, if the restriction is not reflected on the stock certificate, a third party could purchase the interest and become a bona fide purchaser entitled to unencumbered ownership.

A second possible interpretation is that the buy-sell agreement merely creates a contractual obligation that, to be binding on the beneficiaries, necessitates the timely filing of a contingent claim, on behalf of the other parties to the agreement, in the deceased spouse's estate. This conclusion appears most likely for cross-purchase agreements. It is difficult to find that a lien exists when the certificate on its face does not have any evidence of the agreement.

A third possible interpretation is that the interest is totally unencumbered by the terms of the buy-sell agreement.

The Act does not state which interpretation is the correct one. It appears, however, that for corporate stock, unless the stock is without legend, the third interpretation is the least likely.

Between the spouses these concerns can be resolved by entering into a limited marital property agreement that classifies the stock as the holding spouse's individual property. *See infra* ch. 7. However, since a marital property agreement can be amended by the spouses at any time, the existence of a marital property agreement is not protection for the entity or other shareholders or partners who are parties to the buy-sell agreement. There is a similar lack of protection if the property is held as survivorship marital property.

Accordingly, it is desirable in buy-sell agreements to expressly provide for what happens at the death of the nonholding spouse. At least two approaches can be used:

1. *Grant a first option to purchase*. The holding spouse who is a party to the agreement can provide in the agreement that upon the death of the nonholding spouse, the right exists in the holding spouse or others to purchase all the nonholding spouse's marital property interest. For example, the agreement could grant the holding spouse a first option to purchase, and if the purchase is not made, the agreement could then grant a purchase option to the business entity or, alternatively, to the other parties to the agreement. This appears to be the more desirable alternative if the holding spouse is willing and able to purchase the nonholding spouse's marital property interest if the nonholding spouse dies first. This alternative preserves the right of the holding spouse to vote the entire interest and to receive all distributions, and it keeps the entire interest subject to the buy-sell agreement. Because of the management and control provisions in the statute, this provision can be incorporated in the agreement without the nonholding spouse's consent. The disadvantage of this alternative is that it requires the holding spouse, or other purchasers, to obtain the necessary funds to make the purchase at the nonholding spouse's death, and life insurance is typically not owned on the life of that spouse.

2. *Make the nonholding spouse a party to the agreement*. If the holding spouse is unwilling or unable to purchase the property if the nonholding spouse dies, a second alternative is for the nonholding spouse to be made a party to the agreement. Under the Act, the nonholding spouse does not have power to manage the business interest. *See* Wis. Stat. § 766.51. The right to manage and control an asset includes the ability to sell or transfer the asset. Wis. Stat. § 766.01(11). Even though the nonholding spouse does not have management and control authority under the Act, it appears that the nonholding spouse can contract regarding the subsequent disposition of his or her *ownership interest* in the asset. This includes agreement by the nonholding spouse as to the method of determining the purchase price and the events that will give rise to a sale. The agreement of the nonholding spouse should be binding on his or her transferees. Under this approach the nonholding spouse's interest in the business (including the voting, dividend, and other rights) passes to the beneficiaries of the deceased spouse's estate subject to the

provisions of the buy-sell agreement. The agreement can provide that the stock or partnership interest remains subject to the provisions of the buy-sell agreement so that the interest is sold on the holding spouse's death or on any other triggering event.

➢ ***Caution.*** The Act may cause an unintended triggering event. Most agreements restrict a party's ability to transfer any part of his or her interest in the business to a third party before the designated triggering event (a prohibited disposition). If the nonparty spouse obtains a marital property interest in the stock, this could violate this restriction and trigger an accelerated purchase. Thus, all agreements should attempt to avoid such unintended results. Existing agreements should be reviewed and possibly amended, and all new agreements should provide that the creation of a marital property interest by itself does not trigger the sale provisions. Normally the parties are not concerned that a marital property ownership interest is created but wish only to limit nonparty spouses from obtaining management and control rights. Thus, in most agreements a solution is to provide that the creation of a marital property interest in the business interest is not a prohibited disposition as long as management and control rights under the Act remain exclusively in the spouse who is a party to the agreement.

5. Funding of Buy-sell Agreements with Life Insurance [§ 4.84]

A final concern relating to buy-sell agreements involves the funding of agreement obligations with life insurance on the lives of the parties to the agreement. *See infra* ch. 10. If the business entity owns such policies, the entity receives the proceeds and can use them to satisfy its purchase obligations under the contract. However, if a cross-purchase agreement is used, the other shareholder or partner owns the life insurance policy. This life insurance is not subject to the special life insurance provisions because it is not an insurance policy insuring the life of the spouse. *See* Wis. Stat. § 766.61(1)(c). It may be subject in part to these provisions, however, if the insured spouse pays any part of the premiums with marital property funds.

➢ ***Example.*** Assume that a buy-sell agreement is between a father and son, and the son owns a policy on the father's life. If the father

pays a premium, it is either a gift to the son or the payment creates a fractional marital property interest in the policy. In most cases, a gift will have occurred. If not, the marital property interest is owned by the father and his spouse. *See* Wis. Stat. § 766.61(3)(d).

Whether the policy in the above example is also the marital property of the son and his wife is determined under the general classification rules of sections 766.31 and 766.63(1). If the policy on the father's life contains a marital property component between the son and his wife, and the father dies, the proceeds are received by the son and are wholly or partly marital property. The son holds the check and is able to use the funds to satisfy his obligations under the buy-sell agreement. This assumes that the daughter-in-law has not invoked the add-a-name remedy, so that she would be able to hold an interest in the policy and designate the beneficiary of the interest. *See* Wis. Stat. § 766.70(3).

However, if the daughter-in-law in the example dies first, her marital property interest in the policy on the father's life is an asset of her estate. The special purchase provisions of section 766.70(7) do not appear applicable because no marital property funds of the insured father's marriage were used to pay the premiums, and thus the policy is not covered by section 766.61. Thus, the decedent daughter-in-law's marital property interest in the life insurance policy passes to the beneficiaries of her estate, and those beneficiaries are entitled to exercise ownership rights with regard to it, including designation of the beneficiary of that interest. As a result, upon the father's subsequent death, less than the intended proceeds may be paid to the son, who may be less able to fulfill his obligations under the buy-sell contract.

A number of approaches can be adopted to deal with the marital property interest in life insurance.

1. *Use a limited marital property agreement that provides that the life insurance policy is the individual property of the spouse who is a party to the agreement*. This approach makes the entire proceeds available to satisfy the obligation.

2. *Require the insurance in the buy-sell agreement and make both spouses parties to the agreement*. This approach makes both parties personally obligated under the agreement, and thus, if the nonholding spouse dies first, a claim can be filed in his or her estate. *See infra* ch. 10.

➢ ***Note.*** The insured may be deemed to possess an incident of ownership in the policy if the agreement prohibits a change in beneficiary on the policy. *See Estate of Infante*, 29 Tax Ct. Mem. (CCH) 903 (1970).

3. *Have the nonparty spouse make a gift of his or her interest in the policy to the spouse who is a party to the agreement.*

VII. Government Benefits [§ 4.85]

A. In General [§ 4.86]

Two primary questions are involved in dealing with government benefits:

1. Is the amount of benefits payable to a spouse affected by the marital property rule that each spouse has an undivided one-half interest in each spouse's income stream?

2. Is a spouse's qualification for benefits affected by the other spouse's income or assets that exceed the income or asset limitation?

See supra § 2.21. A spouse applying for benefits is managing marital property rights. Sections 4.87–.92, *infra*, discuss the likely results for various kinds of benefits.

➢ ***Comment.*** The effect, if any, of the 2010 health-care reform legislation, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), on Medicare, Medicaid, and other government benefits is not known at this time. Attorneys should check for updates and revisions to the relevant statutes and regulations as the law is implemented.

B. Federal Old-age, Survivors, and Disability Insurance Benefits [§ 4.87]

The benefits from the Old-age, Survivors, and Disability Insurance program (OASDI), *see generally* 42 U.S.C. §§ 401–434 (Title II of the Social Security Act), are based on the employed spouse's total wage

income, and the Act should not affect qualification for benefits or the amount of benefits. For more information on Social Security, see Social Security Online, http://www.ssa.gov/; *see also* 1 Betsy Abramson et al., *Advising Older Clients and Their Families* ch. 8 (State Bar of Wisconsin CLE Books 2d ed. 2007 & Supp.) [hereinafter *Advising Older Clients*]. Further, federal preemption exists, and the benefits are not community property. *Sherry v. Sherry*, 701 P.2d 265, 271 (Idaho 1985).

Under OASDI, benefits are payable to a fully insured individual who has attained age 62. 42 U.S.C. §§ 401–433. To be fully insured, an individual needs to have accrued at least 6 but not more than 40 quarters of coverage (QCs). 42 U.S.C. § 414(a); 20 C.F.R. §§ 404.110, .115. Traditionally, an individual has needed to earn at least a certain amount during each of the applicable quarters to satisfy the QC requirement.

- ***Note.*** Under the current program, since 1978, an individual's total annual earnings are considered in determining how many QCs the individual will be credited with for a given year; consequently, an individual with the requisite annual income may be credited with four full QCs for the year, even though he or she may not have worked during one or more quarters in the year. 42 U.S.C. § 413(a)(2)(A); 20 C.F.R. § 404.140.

The amount of OASDI benefits that an individual is entitled to receive is based on the individual's earnings. 42 U.S.C. § 415; *see also* 20 C.F.R. §§ 404.201–.290 (computing primary insurance amounts). Earnings include wages, *see* 42 U.S.C. § 409, which are defined as remuneration to an employee for employment. 20 C.F.R. § 404.1041(a). Earnings may also include self-employment income, *see* 42 U.S.C. § 411; 20 C.F.R. § 404.1096(a), military wage credits, *see* 42 U.S.C. § 417; 20 C.F.R. §§ 404.1301–.1371, certain railroad compensation, *see* 20 C.F.R. §§ 404.1408, .1027, and wage credits for Japanese-Americans interned during World War II, *see* 42 U.S.C. § 431; 20 C.F.R. § 404.1059. A worker's spouse or dependent child may also be entitled to benefits based on the worker's earning record. 42 U.S.C. § 402.

Individuals who wait until they have reached their full retirement age to begin receiving OASDI benefits will be entitled to their applicable full benefit amount. Full retirement age is currently age 65 but is scheduled to increase incrementally to age 67 by the year 2027. 42 U.S.C. § 416(l). Although an individual may begin receiving OASDI benefits as soon as he or she has attained age 62, *see* 42 U.S.C. § 402(a); 20 C.F.R.

§ 404.310, the benefits received will be less than the amount to which the individual would have been entitled by deferring the receipt of benefits when a beneficiary, who is under the full retirement age or who reaches full retirement age in a given year, has earned income that exceeds a certain amount.

➢ ***Note.*** Effective January 1, 2000, Congress amended the earnings test to exempt all OASDI beneficiaries who have reached their full retirement age. *See* Senior Citizens' Freedom to Work Act of 2000, Pub. L. No. 106-182, 114 Stat. 198. Before this amendment, beneficiaries were only exempted from the earnings test after reaching age 70.

The auxiliary benefits payable to an employee's spouse or dependent children may also be reduced because of the earnings test. 42 U.S.C. § 403(b).

The OASDI program provides that, in a community property jurisdiction, when spouses have a trade or business other than a partnership, the gross income and deductions are attributed in most circumstances to the spouse carrying on the trade or business. If the trade or business is jointly operated, the gross income and deductions are attributed to each spouse on the basis of their respective distributive share of the gross income and deductions. 42 U.S.C. § 411(a)(5)(A).

C. Health Insurance for the Aged and Disabled: Medicare [§ 4.88]

If an individual is age 65 and is eligible for OASDI benefits or auxiliary benefits, he or she is eligible for Medicare. 42 U.S.C. §§ 426, 1395c. *See generally* 2 *Advising Older Clients*, *supra* § 4.87, ch. 10 (detailed discussion of Medicare). Thus, the Act does not affect Medicare eligibility. Nor are Medicare benefits affected by the Act. Those benefits are based on hospital and other medical costs and are not tied to the recipient's assets or income. 42 U.S.C. §§ 426, 1395d.

D. Unemployment Insurance [§ 4.89]

Unemployment insurance is a state-administered program that is funded in part by the federal government. Eligibility and benefit

calculation standards are essentially set by the state. The Wisconsin statute provides that "[b]enefits shall be paid to each unemployed and eligible employee." Wis. Stat. § 108.03(1). The term *employee* is defined, in part, as "any individual who is or has been performing services for an employing unit." Wis. Stat. § 108.02(12)(a). The applicant's marital property interest in his or her spouse's wages does not affect eligibility. *See* Wis. Stat. §§ 108.04 (eligibility for benefits), .02(4m) (base period wages). Thus, qualification is not affected by the Act.

The amount of benefits is based on the eligible employee's average quarterly wage. Wis. Stat. § 108.05. Wages are defined as remuneration for personal services. Wis. Stat. § 108.02(26). Under this definition of wages, the Act has no effect on the amount of unemployment insurance benefits paid to an employee spouse.

E. Supplemental Security Income for Aged, Blind, and Disabled [§ 4.90]

Supplemental Security Income (SSI) is a federally administered program for aged, blind, and otherwise disabled persons with few or no resources. *See generally* 42 U.S.C. §§ 1381–1383f (Title XVI of the Social Security Act); 1 *Advising Older Clients*, *supra* § 4.87, ch. 9 (detailed discussion of SSI). The states are permitted to institute additional supplemental payment programs. 42 U.S.C. § 1382e; Wis. Stat. § 49.77. Under SSI, an applicant's benefit is based on the cost of living for an individual, or if he or she is married, on the cost of living for a couple. 42 U.S.C. § 1382(b). For married individuals, all income of both spouses is counted in determining eligibility. 42 U.S.C. § 1382(a)(2). There is also a limit on resources, which is computed differently depending on whether an individual or a couple is applying for benefits. *Id*. Because all income and assets of both spouses are considered, the Act should not affect eligibility.

States may adopt a supplemental program providing greater benefits or lower standards for qualification. California, for example, has adopted a program that provides supplemental benefits. One of the factors considered in calculating eligible income levels for married applicants under that program was challenged in a class action in *Disabled & Blind Action Committee v. Jenkins*, 118 Cal. Rptr. 536 (Ct. App. 1974). The court held that in determining a married applicant's

eligibility for the supplemental program, all the noneligible spouse's income must be considered. The court pointed out that the legislature could have excluded consideration of spousal income but chose not to do so. A concurring opinion stated that, rather than considering all the ineligible spouse's income, only the applicant's one-half interest should have been considered. *Id*. at 547–48 (Friedman, acting P.J., concurring).

F. Personal Responsibility and Work Opportunity Reconciliation Act [§ 4.91]

The program providing aid to families with dependent children (AFDC) was restructured by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, which replaced the program with block grants to the states to provide temporary assistance to needy families. *See* 42 U.S.C. §§ 601–619. The Wisconsin plan, Wisconsin Works (W-2), is set forth in sections 49.141–.161. Eligibility for benefits considers the income of both spouses if they live in the same home as the dependent child. Wis. Stat. § 49.145(3)(b). In other situations, spousal income is not considered. Only the income of a parent is considered and, thus, stepparent income should not be considered.

An applicant's need is determined by the number of family members and area shelter costs. Wis. Stat. §§ 49.141, .19(11). If an applicant's total income, earned and unearned, exceeds 185% of the standard of need, or if the total earned and unearned income after disregarded items are applied exceeds 100% of the standard of need, the family is ineligible. Wis. Stat. § 49.19(4)(es).

G. Medicaid—Title XIX [§ 4.92]

Medicaid is the chief welfare medical assistance program under the Social Security Act. *See generally* 42 U.S.C. § 1396–1396v; 2 *Advising Older Clients*, *supra* § 4.87, ch. 11 (detailed discussion of Medicaid). It is a state-administered program with partial federal funding. Medicaid is available to recipients of Social Security aids, such as SSI and aid to families with dependent children, and to certain other individuals. Wis. Stat. § 49.46(1). Thus, eligibility is not affected by the Act. *See supra* §§ 4.90, .91.

In addition, Medicaid is available to certain persons who are medically indigent. Wis. Stat. § 49.47. A person is medically indigent if his or her property does not exceed certain amounts (with separate amounts depending on family size) and his or her income does not exceed limits that are tied to SSI and AFDC. *See* Wis. Stat. § 49.47(4). These programs consider the nonapplicant spouse's income.

A Wisconsin circuit court considered whether a veteran's disability pension and a civil service pension are classified as marital property or whether federal preemption applies and precludes division of those benefits. *Yde v. Yde*, No. 740-850 (Wis. Cir. Ct. Milwaukee County Dec. 18, 1987). In this case, the benefit recipient was receiving Medical Assistance and was required, as a condition of Medical Assistance, to turn over all his income to the veterans home. The court held that, because of federal preemption, the benefits could not be classified as marital property and thus were not divisible between the spouses. *Id*.

Once an applicant qualifies for Medicaid, the benefits, like Medicare, are based on care costs and are subject to payment limitations. Wis. Stat. § 49.46(2). Thus, the benefit levels are not affected by the applicant's interest in marital property income.

In administering this program, the federal Secretary of Health and Human Services has developed a rule known as the "name-on-the-check" rule for determining an applicant's available income. Under this rule, when one spouse is in a nursing home and the other resides in a private residence, the name on the check determines the income of the nursing home resident. The Supreme Court of Louisiana has considered this rule and the resulting preemption of its community property laws. *In re Hamner*, 427 So. 2d 1188 (La. 1983). In that case, the husband was denied Medicaid assistance because his retirement income exceeded the federal eligibility standard (300% of the SSI benefit amount). The trial court ruled that under Louisiana community property law, the husband and his wife each owned an equal share in the husband's retirement income. Thus, the court held that the husband was entitled to only one-half of such income, and since his one-half of the total income met the test, he qualified for Medicaid assistance. The Louisiana Supreme Court reversed the ruling and held that all the income received in the husband's name should be considered. The court found that Congress intended uniform national standards of eligibility for medical benefit programs. Variations should not be allowed to develop because some states have community property and others do not.

Two decisions involving Washington law reached the opposite result. In *Purser v. Rahm*, 702 P.2d 1196 (Wash. 1985), the court noted that the income rule was not contained in the federal statutes or regulations but was merely a practice of the Washington Department of Social and Health Services, based on the department's interpretation of federal law. The court reasoned that for a federal law to preempt state community property law, the state property law must do major damage to clear and substantial federal interests. *Id*. at 1199. Because the Medicaid statute did not set a criterion for determining ownership of income, the court ruled that substantial federal interests were not affected. The court noted that community property law was used in determining eligibility for AFDC and stated that this fact strongly supported its use in determining Medicaid eligibility. The court further stated that application of community property law "does not have a disproportionately negative impact on the intended beneficiaries of Medicaid." *Id*. at 1203. The court rejected the analysis in *Hamner* as being incorrectly based on the uniformity provisions of the Medicaid statute. Thus, the court applied community property ownership rules in determining Medicaid eligibility.

Before the Washington Supreme Court's decision in the *Purser* case, the state of Washington submitted to the federal Secretary of Health and Human Services a proposal to amend the Washington statutes to use community property laws rather than the name-on-the-check rule to determine income eligibility. The Secretary denied the application, and the state challenged the denial in *Washington Department of Social & Health Services v. Bowen*, 815 F.2d 549 (9th Cir. 1987). The court found that most elderly couples received more income in the husband's name than the wife's name. The court also found that the name-on-the-check rule is an administrative interpretation of a Medicaid regulation. *Id*. at 553. In cases involving elderly spouses, income of the nonapplicant spouse is often deemed the applicant spouse's income after the period for attribution has expired; this is contrary to legislative intent. In addition, the court found the Washington proposal less restrictive in eligibility than the secretary's rule, and there was a legislative moratorium in effect preventing denials of expanded coverage. Finally, the court said that "[s]tate family property law cannot be preempted by federal law … unless 'Congress has positively required [preemption] by direct enactment.'" *Id*. at 556. Thus, the Washington proposal was approved.

California submitted a similar proposal to apply community property laws to determine eligibility; this proposal was also rejected by the Secretary of Health and Human Services. The rejection was challenged

in *Department of Health Services v. Secretary of Health & Human Services*, 823 F.2d 323 (9th Cir. 1987). The court made the same analysis as in *Bowen* and found *Bowen* controlling in the Ninth Circuit. Thus, the court approved the California proposal to determine eligibility consistent with its community property law.

➢ ***Comment.*** Whether the Act affects Wisconsin residents' eligibility for Medicaid depends on the final resolution of whether the federal name-on-the-check rule preempts Wisconsin marital property law.

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Obtaining and Granting Credit

I. Common-Law Experience [§ 5.1]

A. Basis of Credit System [§ 5.2]

1. Marriage Relationship Generally Irrelevant [§ 5.3]

With the exceptions noted in section 5.4, *infra*, the existence of the marriage relationship is irrelevant for the purpose of obtaining or granting credit in common-law states. A spouse's ability to contract for debt, and hence to obtain credit, generally depends on that spouse's income and property, taking into account his or her personal liabilities. *See* W.S. McClanahan, *Community Property Law in the United States* §§ 2:23, 10:1 (1982). It does not generally depend on the marriage relationship or the other spouse's assets, income, or liabilities. *Id.*[1]

Similarly, with the exceptions noted in section 5.4, *infra*, a creditor in a common-law state may satisfy a debt incurred by one spouse only from that spouse's personal assets and income; the creditor may not collect from the assets or income of the spouse who did not incur the debt.

The nonincurring spouse may voluntarily alter this situation, however. This may happen in one of two ways. First, the spouse may join in or guarantee the credit instrument involved. Personal liability of that spouse would result, and the creditor could proceed against the income and assets of either spouse. Second, by executing a security agreement, the nonincurring spouse can grant a security interest in assets titled in his or her name. Those assets of the nonincurring spouse would be available to satisfy the obligation secured, although personal liability would still be limited to the debtor spouse. In either case, the additional

[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.) are current through Public Law No. 111-154 (excluding Pub. L. Nos. 111-148, 111-152) (Mar. 31, 2010), all references to the Code of Federal Regulations (C.F.R.) are current through 75 Fed. Reg. 17,023 (Apr. 2, 2010), and all references to the Wisconsin Administrative Code are current through rules promulgated in the Wisconsin Administrative Register, No. 652, Apr. 30, 2010 (effective May 1, 2010). Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

liability or the availability of additional assets to satisfy an obligation is based on contract, not on the marital relationship of the spouses. The joinder or grant of a security interest is voluntary on the part of the nonincurring spouse and therefore subject to that spouse's control.

Under the common-law property system outlined above, if one spouse owns more property or earns more income, that spouse may control both spouses' access to credit and thus generally will wield greater influence over the spouses' mutual economic destiny.

2. Exceptions [§ 5.4]

In common-law property states, there are certain limited exceptions to the general rule that the marriage relationship is irrelevant for the purpose of obtaining or granting credit. These exceptions generally fall into two categories: obligations based on the duty of support and obligations based on the doctrine of necessaries. *See infra* §§ 5.105–.110. Under these exceptions, the nonincurring spouse may be personally liable for the credit obtained by the incurring spouse.

Common-law property states also have various joinder rules requiring the spouses to act together with respect to some types of assets, such as the homestead. *See infra* §§ 5.16, .134. In addition, certain assets held by spouses may be exempt from execution by judgment creditors and therefore unavailable for consideration in obtaining credit. *See infra* §§ 5.39, 6.30.

B. Equal Access to Credit [§ 5.5]

One significant criticism of the common-law system is spouses' lack of equal access to credit based on marital assets and the income stream of both spouses. In fact, a major goal of the Uniform Marital Property Act (UMPA), which is reprinted in appendix A, *infra*, was to ensure such equal access to credit. As characterized by one commentator, UMPA "should function so that each marital partner may obtain unsecured credit backed by the entire pool of marital assets. A potential for increased trading arises with the advent of an additional marital partner with full power to charge against the interests of both participants." Richard V. Wellman, *Third Party Interests Under the Uniform Marital Property Act, Uniform Marital Property Act Symposium*, 21 Hous. L. Rev. 717 (1984).

In Wisconsin, a recurring argument made by the proponents of marital property reform was that spouses who earned no wages or lower wages than their marriage partners, as well as spouses with no assets or fewer assets than their marriage partners, were being unfairly denied access to credit. Regarding the prohibition in section 138.20 against discrimination in the granting of loans or credit, see section 5.57, *infra*. Regarding the rules promulgated by the Wisconsin Division of Banking in connection with discrimination in the granting of credit, see section 5.58, *infra*. In position papers and legislative hearings, the Wisconsin Marital Property Act, 1983 Wis. Act 186, by which a form of community property ultimately was adopted in Wisconsin, was presented as the means to achieve equal access to credit by Wisconsin spouses. *See* Wis. Stat. § 766.001(2) (stating legislative intent that marital property is form of community property); *see also infra* § 5.60 (purpose and intent of Act in connection with obtaining credit). The bulk of the Wisconsin Marital Property Act (or the Act) is codified as amended at chapter 766 and scattered sections of the Wisconsin Statutes.

II. Community Property Fundamentals [§ 5.6]

A. In General [§ 5.7]

To understand the system for obtaining and granting credit under the Wisconsin Marital Property Act, one needs a general understanding and appreciation of the basic concepts and historical background of community property. This is because a number of concepts from other community property states were incorporated into UMPA and, from there, into Wisconsin's Act. However, the Wisconsin Marital Property Act also contains unique provisions relating to credit not found in UMPA or in the laws of any other community property state. Anyone researching the cases from other community property states or the comments to UMPA will therefore need to be aware that, despite basic similarities, significant differences do exist among the community property states and between UMPA and the Wisconsin Marital Property Act. *See, e.g.*, *infra* §§ 5.14, .18.

B. Basic Concepts [§ 5.8]

Under a community property system, a theory of a separate community entity can be useful in analyzing debts and creditors' rights.

Under this theory, community property assets are sometimes viewed as owned by the community, a type of legal person or entity with the power to incur debts. The concept of a community entity is analogous to that of a partnership that is treated as an entity separate from its partners. McClanahan, *supra* § 5.3, § 10:2. It is interesting to note that—as a reflection of the independent nature of the community entity—under the federal Bankruptcy Code, even if only one spouse is in bankruptcy, generally all community property is brought into the bankruptcy estate and all community debts may be filed as claims. *Id*. § 10:10; *see infra* §§ 6.72–.77.

Under historic community property concepts, many of which still apply in community property states, obligations are classified to determine which spouse is personally liable for them and which assets may be reached to satisfy them. McClanahan, *supra* § 5.3, §§ 10:3–10:4; *see also* Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 Baylor L. Rev. 20, 60 (1967). An obligation may be classified as a community debt, the husband's separate debt, or the wife's separate debt. With respect to assets that may be reached, community property generally is available to satisfy community debts, and each spouse's separate property is available to satisfy each spouse's separate debts. Further rules govern which spouse can incur a community debt.

Different community property states have dealt with the acquisition of credit by spouses in different, and sometimes inconsistent, ways. Similarly, different community property states have taken a variety of approaches to the rights of creditors to reach community and separate property assets.

A leading casebook characterizes California, Idaho, Louisiana, Nevada, and Texas as following a *managerial system* for determining liability to a creditor. *See* William A. Reppy Jr. & Cynthia A. Samuel, *Community Property in the United States* 251–55 (2d ed. 1982). That is, the property (community or separate) that a spouse has the authority to manage is available to repay the obligations incurred by that spouse. Such availability is in addition to the personal liability of that spouse. Under the managerial system, the rights of creditors do not depend on whether the obligation was incurred for a separate or a community purpose. It is important to note, however, that there are a number of exceptions to these rules in the managerial system. The exceptions

include the necessaries doctrine, the duty of support, and the family-purpose doctrine. *See infra* §§ 5.29–.39, .105–.110.

Another approach to obtaining and granting credit that some community property states follow is based on a *community debt system*. The previously cited casebook characterizes Arizona, Washington, and New Mexico as following this approach. *See* Reppy & Samuel, *supra*, at 255–67. Under the community debt system, debts generally are classified as separate or community when the creditor seeks payment, with the debt's characterization determining the property the creditor can reach.

UMPA, on the other hand, has been characterized as neither a purely managerial nor a purely community debt system; rather, it appears to contain elements of both, with a number of compromises. *See* Wellman, *supra* § 5.5, at 738–41.

C. Family-purpose Doctrine [§ 5.9]

A doctrine has developed in some community property states—notably Arizona, Louisiana, and Washington—that obligations resulting from a contract made on behalf of the community are community obligations. *See* Reppy & Samuel, *supra* § 5.8, at 265 n.2; UMPA § 8 cmt. Similarly, under this doctrine, judgments arising from torts committed while a spouse was attempting to benefit the community are community obligations. *See* McClanahan, *supra* § 5.3, § 10:4, at 485–86; *see also* William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* § 182, at 432–33 nn.1–3 (2d ed. 1971). Known as the *family-purpose doctrine*, this doctrine sometimes is buttressed by a presumption that a debt incurred by a spouse was incurred for a family purpose and hence is a community obligation. *See* UMPA § 8 cmt. Thus, in general, in addition to the separate property assets of the debtor or tortfeasor spouse, community property assets can be reached by the creditor to satisfy a community obligation.

D. Management and Control as Basis of Credit [§ 5.10]

In most community property states, the ability to contract for debt, and correspondingly, creditors' ability to collect, are now based primarily on a spouse's power of management and control. *See*

McClanahan, *supra* § 5.3, § 9:9.a. *See generally* de Funiak & Vaughn, *supra* § 5.9, §§ 111–130. Historically, however, the husband was the sole manager of the community (and sometimes of his wife's separate property as well). The husband's authority as manager rendered him analogous to a partner or an agent for the community. His authority included the power to manage, possess, convey, and encumber community property and enter into contracts binding on the community. However, these powers were subject to a type of fiduciary duty requiring the husband, as manager of the community, to act only for the benefit of the community or the spouses. McClanahan, *supra* § 5.3, § 9:1.

Eventually, the rule that the husband was the sole manager of the community was altered by legislative enactments, the first significant variation being the statutory changes Texas made in the late 1960s to provide for separate management of community property by the spouses. *Id.* § 9:8, at 450, 452; *see also* Reppy & Samuel, *supra* § 5.8, at 205, 228–32. This change granted each spouse sole management powers over that part of the community property he or she would have owned absent the marriage. With respect to assets that had become commingled, dual management applied.

Between 1972 and 1980, other community property states adopted equal-management statutes. *See* McClanahan, *supra* § 5.3, § 9:12. In general, these statutes grant spouses a concurrent right to act unilaterally to bind community property, except for real estate, which requires concurrent action (dual management). Various exceptions to these rules exist in the community property states.

Finally, with respect to credit, the management power provided under the equal-management system usually includes the power of either spouse to obtain credit and to incur liability on behalf of the community, in addition to the power to encumber community assets. The statutes in various community property states contain exceptions that require (1) concurrent action (dual management) or joinder under certain circumstances (such as when real property is involved), and (2) sole management under other circumstances (such as when management of business assets is involved).

E. Effect of Equal Management Statutes on Credit [§ 5.11]

Under equal-management statutes, each spouse is granted the right to independently create community debts and obtain credit accordingly on the basis of community assets. *See* John A. Adamske, *Equal Management and Control in California*, 2 Comm. Prop. J. 25, 29–32 (1975). In theory, this should promote greater access to credit by spouses. However, the joinder rules, various "commercial practicality" exceptions, and a carryover of earlier attitudes have limited equal access to credit in practice. *See* Anne K. Bingaman, *Equal Credit Opportunity: The Impact of Equal Management of Community Property*, 4 Comm. Prop. J. 157 (1977). *See generally infra* §§ 5.95–.96 (federal Equal Credit Opportunity Act joinder rules).

Equal access to credit is also limited by the fact that a number of the states with equal-management statutes rely on documents of title. *See* McClanahan, *supra* § 5.3, § 9:14.a (titled property); Reppy & Samuel, *supra* § 5.8, at 206–08; *see also* McClanahan, *supra* § 5.3, § 9:13 (business interests). For example, in Louisiana, sole management is vested in the "title owner" of "movables," including automobiles, securities, insurance policies, and certain bank accounts. Similar exceptions exist in New Mexico. In Texas, a presumption that sole management applies is based on title, or on possession in the case of assets not subject to title evidence. Likewise, various presumptions of sole management arise based on record title in California and Washington. *See* McClanahan, *supra* § 5.3, § 9:14.

III. Wisconsin Marital Property Act Approach: Overview [§ 5.12]

A. In General [§ 5.13]

Credit is one of the areas of law most affected by the Wisconsin Marital Property Act. Although the Act did not significantly change the personal liability aspects of the credit system in Wisconsin, the general approach to obtaining and granting credit by married persons has been fundamentally altered.

Two factors lie at the heart of creditor-debtor relationships under the Act, particularly in unsecured credit transactions:

1. The Act's adoption of the family-purpose doctrine; and

2. The concept that specific classes of property are "obligated" for nontort debts, in the sense that such property may be reached by the creditor to satisfy certain obligations, independent of personal liability.

See infra §§ 5.29–.39. Classes of property are available to satisfy an obligation based on the category of the obligation rather than simply on the personal liability of the owner of the property. In fact, marital property assets may be available as the result of a credit transaction of one spouse, without any personal liability for the other spouse who is, of course, the owner of a one-half interest.

The provisions of the Act that result in specific classes of property becoming obligated are based on the UMPA *creditors' remedy approach* to obtaining and granting credit. Under that approach, an essential element in obtaining and granting credit is the extent of the assets or income the creditor is able to reach to satisfy the debt. In addition to the UMPA approach, the Act adopts specific, detailed provisions governing credit transactions with married persons. *See infra* §§ 5.19, .41–.104.

Another concept adopted by the Act but not in UMPA is that of expanded application of management and control of marital property assets for the purpose of obtaining credit. When a family-purpose obligation is involved, the system for obtaining unsecured credit under the Act (and secured credit when purchase money security interests are involved) is based on the concept of a spouse's expanded rights of management and control of marital property assets in credit transactions. The Act expands the application of management and control rights in such credit transactions beyond those provided in UMPA. *See infra* §§ 5.15, .41–.75.

With respect to secured transactions, the credit system under the Act is based on the Act's concepts of management and control of marital and nonmarital property assets (excluding the expanded application of management and control under section 766.51(1m)). *See infra* §§ 5.15, .16, .89. With respect to granting a security interest in a purchase money secured transaction, see section 5.25, *infra*.

B. Management and Control Rights [§ 5.14]

1. In General [§ 5.15]

Under the Act (as under other community property systems), management and control rights, and in most cases even title, do not affect classification (i.e., ownership) of property. *See* Wis. Stat. § 766.51(5). Nor do these rights rebut the presumption under section 766.31(2) that all property of spouses is presumed to be marital property. Wis. Stat. § 766.51(5); *see* de Funiak & Vaughn, *supra* § 5.9, § 102; *see also supra* § 2.26. Management and control rights do apply, however, in credit transactions. Under the Act, spouses, acting alone or together, have certain rights to enter into credit transactions affecting marital property assets over which they have rights of management and control. Section 766.01(11) defines *management and control* as "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."

➢ ***Note.*** With respect to management and control rights generally, see chapter 4, *supra*.

In addition to the management and control rights discussed in this section and section 5.16, *infra*, spouses are granted expanded management and control rights to incur credit for family-purpose obligations. *See infra* §§ 5.41–.75.

2. Sole Management and Control [§ 5.16]

Based on concepts of title or how the property is "held," each spouse has sole management and control rights under section 766.51(1)(a)–(f) in third-party transactions, including those involving secured and unsecured credit, with respect to the following items of property:

1. *That spouse's property that is not marital property*. Each spouse may manage and control, by his or her sole action, his or her individual property assets and his or her other nonmarital property assets (i.e., predetermination date property, *see supra* § 2.13). As to predetermination date property, section 766.51(6) specifically

provides that the enactment of the Act does not affect the right to manage and control such property. As to such property held in joint tenancy or tenancy in common, the normal rules of title-based management in effect before the determination date apply. *See supra* chapter 4.

2. *Marital property assets held in that spouse's name alone or marital property assets that are not held in the name of either spouse (i.e., nontitled property)*. Regardless of the other spouse's ownership interest in the assets, marital property assets held (or titled) in only one spouse's name may be used by that spouse for secured or unsecured credit purposes as if the property were owned by an unmarried person. Under this rule, both the management and control rights of the title-holding spouse and the rights of bona fide purchasers are unaffected by either (a) a claim by the other spouse, such as for mismanagement in violation of the good-faith duty under section 766.15, or (b) an objection by the other spouse to a particular transaction. The other spouse's claim is limited to his or her remedy against the managing spouse. *See* Wis. Stat. §§ 766.70 (interspousal remedies), .57 (protection of bona fide purchasers dealing with spouses); *see also supra* ch. 4, *infra* ch. 8. Similarly, marital property assets not held in the name of either spouse (such as bearer bonds, jewelry, or a coin collection) may be used for credit purposes by the spouse having possession as if they were owned by and in the sole possession of an unmarried person. A creditor dealing with a spouse having management and control rights is protected, assuming the requirements for a bona fide purchaser are met. *See infra* § 5.28; *see also supra* § 4.4.

3. *Marital property assets held in the names of both spouses in the alternative*. The Act provides that marital property assets may be held in the alternative (the "or" form). *See* Wis. Stat. § 766.60(1). In that case, either spouse acting alone has full rights of management and control and may deal with the property, for secured or unsecured credit purposes, as if it were held solely in that spouse's name. With respect to property in this category, creditors are afforded the same protection as when property is held solely in the applicant spouse's name. *See infra* § 5.28.

4. *A policy of life insurance, when that spouse is designated as the owner on the insurance company's records*. With respect to life insurance, the rule of item 2. above applies. That is, the spouse may

use the life insurance policy for credit purposes as if the spouse were unmarried. The life insurance company's protection is similar to that of a bona fide purchaser; it is protected when dealing with the person named as owner on its records unless it has actual knowledge of an inconsistent decree, agreement, or adverse claim. *See* Wis. Stat. § 766.61(2).

5. *Any right of an employee under a deferred-employment-benefit plan*. As with life insurance, the rule of item 2. above applies, and the administrator of a deferred-employment-benefit plan is protected if the administrator acts in accordance with the plan and the administrator's records. *See* Wis. Stat. § 766.62(4). With respect to tax-qualified retirement plans (and possibly other plans as well), the application of spendthrift provisions and the effects of the Employee Retirement Income Security Act of 1974 (ERISA) and other applicable federal and state laws may affect the extent of the spouse's management and control rights. *See supra* §§ 2.184–.218, 4.25.

6. *A claim for relief vested in that spouse by other law*. The rule of item 2. above also applies to this situation.

3. Joint Management and Control [§ 5.17]

The rules of management and control described in section 5.16, *supra*, permit one spouse to act alone; in contrast, spouses have joint management and control rights over marital property assets held in the names of both spouses, other than in the alternative form. Section 766.51(2) provides that when marital property assets are held in both names (not in the alternative), the assets may be managed and controlled only by the spouses acting together. Joint action also is required for certain transactions involving the homestead. *See* Wis. Stat. § 706.02(1)(f); *see also infra* § 5.134 (joinder in connection with homestead).

These management and control rights apply in all nontort transactions with third parties, including secured and unsecured credit transactions.

C. Nature of Marital Property Subject to Management and Control and Required to Be Considered in Credit Transactions [§ 5.18]

1. In General [§ 5.19]

From a creditor's perspective (and consequently from the perspective of a spouse seeking credit), an essential element in granting credit is what assets or income the creditor can reach to satisfy the resulting debt. UMPA bases its system for obtaining and granting credit on this essential element and is therefore remedy-oriented. *See supra* § 5.13. Under the UMPA system, if an obligation comes within the family-purpose doctrine, all marital property assets can be reached to satisfy the obligation; in addition, the creditor can reach the individual and other nonmarital property assets of the incurring spouse, based on that spouse's personal liability.

The Wisconsin Marital Property Act adopts the same basic approach. For instance, consistent with UMPA's creditors' remedy approach, in credit transactions with a spouse involving a family-purpose obligation, the Wisconsin Act requires the creditor to consider all marital property assets available to satisfy a family-purpose obligation in evaluating the spouse's creditworthiness. *See* Wis. Stat. § 766.56(1).

- ***Note.*** Although consistent with UMPA, the approach of the Wisconsin Act goes beyond UMPA's approach by *requiring* such consideration rather than merely relying on what the creditor may consider to be in the creditor's own interest.

Although UMPA and the Wisconsin Act follow the same basic approach to credit, the sponsors of the Act apparently concluded that sole reliance on the UMPA approach was insufficient to obtain the goal of equal access to credit by each spouse. *See* Lynn Adelman et al., *Departures from the Uniform Marital Property Act Contained in the Wisconsin Marital Property Act*, 68 Marq. L. Rev. 390 (1985); *infra* § 5.42. As a result, in addition to the UMPA creditors' remedy approach, the Act relies on the concept of management and control by spouses in credit transactions. This was accomplished, first, by expanding the application of management and control in unsecured family-purpose credit transactions in section 766.51(1m), and second, by creating entirely new sections concerning credit transactions with

married persons, *see* Wis. Stat. §§ 766.555, .56, .565. *See infra* §§ 5.14–.17, .41–.104.

The Act's addition to UMPA of the expanded application of management and control rights in unsecured credit transactions, and its addition of new procedures concerning credit transactions with spouses, were not accompanied by explicit changes in UMPA's corresponding sections dealing with the assets or income an unsecured creditor may reach to satisfy the resulting obligation. However, since the expanded management and control rights apply only in unsecured credit transactions when a family-purpose obligation is involved, and since the requirements for evaluation of creditworthiness (involving attribution of marital property assets to the spouse applying for credit, *see infra* §§ 5.52–.55) apply only to the extent that the marital property assets can be reached to satisfy the family-purpose obligation, there appears to be no conflict or inconsistency.

➢ ***Note.*** There is an inconsistency between section 766.51(1m)(b) and section 766.55(2)(b). Even though management and control rights in marital property business assets are restricted under section 766.51(1m)(b), the excepted marital property assets are nevertheless available to the creditor of a family-purpose obligation under section 766.55(2)(b). *See infra* § 6.8.

With respect to secured credit, the creditor may rely on the normal management and control rules in section 766.51—that is, the rules other than those under section 766.51(1m)—to determine whether the debt-incurring spouse has the power to grant a security interest in the particular marital property assets. *See infra* §§ 5.129–.135.

However, particularly in circumstances involving unsecured credit, it is necessary to determine the scope of the term *property*, as used in the credit sections that were added to UMPA by the Wisconsin Act. In this context, the UMPA definition of property was not modified. The expanded application of management and control rights applies to marital property, and the attribution of creditworthiness is based on marital property. The scope of the term property is especially significant with respect to the property nature of future income in the credit context. *See infra* § 5.23.

2. Marital Property Broadly Defined [§ 5.20]

The Marital Property Act defines *marital property* in the broadest possible terms. For purposes of the Act, the term property is defined to mean "an interest, present or future, legal or equitable, vested or contingent, in real or personal property." Wis. Stat. § 766.01(15). Further, the Act is subject to a rule of liberal construction; section 766.001(1) states that "[t]his chapter is remedial in nature and shall be liberally construed." The Act also is to be construed to promote an intent "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). (Section 765.001(2) applies by its terms to chapters 765–68.) Finally, the Act promotes the principle that "[u]nder the laws of this state, marriage is a legal relationship between 2 equal persons." *Id.*

3. Future Earned Income [§ 5.21]

a. In General [§ 5.22]

As noted in section 5.19, *supra*, the scope of the term property under the Act is especially significant with respect to the nature of future income in the credit context. Because of the importance of a spouse's future income stream in obtaining credit, and because of the previously mentioned expanded application of management and control rights in credit transactions under section 766.51(1m) and the attribution of creditworthiness under section 766.56(1), *see supra* § 5.19, it may be necessary to determine whether, under the Act, the spouses' future earned income is marital property subject to the expanded management rights. It also may be necessary to determine whether future earned income of the nonapplicant or nonobligated spouse is marital property for purposes of management and control and attribution of creditworthiness. This inquiry is also necessary under the federal Equal Credit Opportunity Act. *See infra* §§ 5.77, .92–.96; *see also infra* § 5.94 (discussing *United States v. ITT Consumer Finance Corp.*, 816 F.2d 487 (9th Cir. 1987), holding that, under state law of seven community property states involved, creditors may not be required to consider future income of nonapplicant (nonobligated) spouse in determining creditworthiness of applicant spouse because such future income is not community property until earned).

Two background points relevant to the question of whether future income is marital property under the Act must be made. First, consideration of the nature of marital property does not, for these purposes, relate to what property can be "held." *See supra* §§ 2.19, 4.5. Instead, it relates to broader questions, namely the following:

1. What property is subject to management and control under the expanded application of section 766.51(1m), for the purpose of obtaining an extension of credit for a family-purpose obligation?

2. Is future income generated by the nonapplicant spouse property to be considered in attributing creditworthiness under section 766.56(1)?

Second, in evaluating creditworthiness, reliance is placed on the family-purpose doctrine, regardless of whether the spouses' future income constitutes property for management and control purposes. *See infra* § 5.31. Section 766.55(2)(b) fully retains UMPA's remedy approach based on the family-purpose doctrine. *See supra* § 5.13.

b. Nature of Future Income in Property Law Context [§ 5.23]

For property law purposes, future income from personal efforts does not constitute property under the Wisconsin Marital Property Act. *See infra* § 5.20 (regarding broader definition); *see also infra* §§ 5.91–.96 (applicability of Equal Credit Opportunity Act). See also *In re Pietri*, 59 B.R. 68 (Bankr. M.D. La. 1986), discussed at section 6.82, *infra*.

Although section 766.01(15) defines property in the broadest possible terms to include an interest—present or future, legal or equitable, vested or contingent—in real or personal property, the import of the Act is that, to constitute property, income from services or efforts first must be earned or accrued. Further, it appears that a marital property interest cannot exist until an asset (such as cash or a transferable item) exists or until the right to receive the asset has accrued. At that point, the interest is classified as marital property, individual property, or other (i.e., predetermination date) property. *See supra* ch. 2.

This view is supported by an analysis of the Act and the comments to UMPA. Section 766.01(10) defines *income* to mean "wages" and wage substitutes, or "economic benefits having value attributable to the effort

of a spouse" (among other items not here relevant). However, the comment to UMPA section 1 points out that the classification section classifies income earned or accrued during marriage and after the determination date as marital property; this comment clearly implies that the income, whether in the form of wages or otherwise, must first be earned or accrued to constitute marital property.

Section 766.31, which addresses the classification of spouses' property, by its terms deals with "property." This, of course, leads back to the definition of property in section 766.01(15). However, when section 766.31(4) specifically refers to income, it provides that "income *earned or accrued* by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property." (Emphasis added.) The UMPA section 4 comment, relating to the interest of spouses as a present equal undivided interest in marital property, states as follows:

> 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 UMPA section 4 comment covering transitional matters makes a similar point in discussing the "income rule" (i.e., the rule that all income from whatever source is marital, except as specifically provided): "income is marital only if '*earned or accrued*' after the determination date [and] during marriage" (emphasis added). The UMPA section 4 comment refers yet again to "earned or accrued." The "principal" of predetermination date property retains its prior classification, with the income rule affecting income earned or accrued after the determination date and during marriage by classifying it as marital property; the income "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 [the determination date and during marriage]." UMPA § 4 cmt. (emphasis deleted).

It is also significant to note that neither the Act nor the comments to the management and control section of UMPA refer to future wages or, indeed, future income. However, in some instances in which there could

be doubt about the Act's treatment of these items, a specific statutory provision is included. Thus, for example, section 766.51(1)(e) provides that a spouse acting alone may manage and control "[a]ny right of an employee under a deferred employment benefit plan that *accrues* as a result of that spouse's employment" (emphasis added).

Beyond an analysis of the Act and the comments to UMPA, the experience of other community property states leads to divergent conclusions regarding the treatment of future income, based on the peculiarities of those states' constitutional, statutory, and case law. Most of the decisions relating to defining community property interests have arisen at the dissolution of the marriage. *Compare Speer v. Speer*, 25 Cal. Rptr. 729 (Ct. App. 1962) (characterizing future earnings as "mere expectancy") *and Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984) (holding that although spouse's time or effort "belongs" to community, there is no community property until that time or effort has produced an asset; that asset becomes community property "when received") *with* cases cited § 5.23, *infra*. These cases may have less relevance in determining the nature of a spouse's rights in the credit context during an ongoing marriage, particularly under the Act, given its purposes. *See infra* § 5.55.

The treatises—for example, de Funiak and Vaughn, *supra* § 5.9—do not lend significant support to a position that future wages constitute community property. For example, with reference to the Spanish roots of modern community property in the United States, de Funiak and Vaughn state that "[o]rdinarily, whatever was acquired, earned, gained or purchased by the husband and wife during the marriage [through labor and industry] belonged to both by halves." *Id.* at 140. The non-wage-earning spouse's ownership in half of the wages passed to that spouse "automatically *ipso jure* without the necessity of delivery," and did not depend on the earning spouse placing the earnings or gains in the non-wage-earning spouse's hands, but was "related . . . to the very inception of the right to such earnings and gains." *Id.* at 142. The emphasis seems to be that the equal ownership arose when the wages were "earned." *Id.* at 146.

Similarly, in discussing various employment benefits, de Funiak and Vaughn point out that in determining whether the benefits are community or separate, the status of the employee spouse "at the time the right is acquired becomes important." *Id.* at 148–49. This analysis also applies at dissolution of the marriage and in determining control of

community property. *Id.* at 152, 260. The analysis is based on what is "earned or gained" and does not support a proposition that community property exists at any earlier point.

Similar reasoning is also evident in the prefatory note to UMPA:

> Some of the root concepts [of marital property] 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. . . . Under [UMPA], 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.

(Emphasis added.)

Consideration of the treatment of future wages under pre-Act law in Wisconsin is not particularly helpful. Future wages have been discussed in the context of wage assignments as a matter of Wisconsin property law, but the best that can be said is that their nature is unclear. In the early case of *State ex rel. State Bank v. Hastings*, 15 Wis. 83 (1862), the court characterized future wages from existing employment as representing a "possibility coupled with an interest, and as such capable of being assigned," based on their "potential existence." *Id.* at 85. The court also characterized future wages as having sufficient "hope or expectation of means founded on a right *in esse*" and analogized to the "next cast of the fisherman's net, or fruits or animals not yet in existence, or the good will of a trade." *Id.*

On the other hand, the court in *Porte v. Chicago & Northwestern Railway Co.*, 162 Wis. 446, 156 N.W. 469 (1916), emphasized the policy consideration that wage assignments tend to subject wage earners to unreasonable conditions operating against the general welfare. The court in *Porte* held that wages relating to future employment are "a mere possibility not coupled with an interest" and accordingly are not assignable. *Id.* at 449.

In any event, it can legitimately be questioned whether Wisconsin common law is relevant in determining the nature of future wages for

purposes of management and control in a marital property context. In fact, some authors have asserted that common-law concepts should not be applied to community property. For example, one author calls it "utter folly" to attempt to "interpret community doctrine through common law eyes. One is the antithesis of the other, and the use of common law dogma to interpret community problems is a perversion of the highest order." Vaughn, *supra* § 5.8, at 28; *see also id.* at 48–49.

An analysis of the Wisconsin statutes relating to wage assignments reveals that, as a matter of general public policy and except with respect to the support of dependents, Wisconsin discourages the assignment of future wage income. *See generally* Wis. Stat. §§ 422.404 (wage assignments with respect to credit transactions), 767.75 (assignment of income for payment obligations), 241.09 (wage assignments generally). These statutes have not been affected by the Act, although future legislation may clarify their application. *See supra* §§ 4.18, *infra* § 8.40.

c. Nature of Future Income in Credit Context [§ 5.24]

As noted in section 5.23, *supra*, future income from personal efforts does not constitute property under the Act for property law purposes. Does such future income constitute property subject to management and control under the Act in the credit context? Decisions in other community property states may be helpful in answering this question. A broad definition of property is emerging in community property states, particularly in the divorce context, and may assist in interpreting the Wisconsin Act.

Divorce cases in several states, including both community property and common-law jurisdictions, have considered earning capacity in a broad sense to be part of the community or the marital estate. These cases have recognized the value (if not property rights) in an education, degree, or license obtained by a spouse during the marriage, as well as in the enhanced future earning capacity of both spouses as a result of an education. These considerations have been held relevant in making an equitable distribution of the marital estate.

The cases are based on a recognition that efforts during the marriage have produced something of value, akin to an asset, that can be expected to provide future returns beyond those that could or would have been

generated in its absence. *See* Carol S. Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L.J. 769, 813 n.170 (1982), and cases cited therein. *See also generally* Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 Kan. L. Rev. 379 (1980); Thomas D. Schaefer, *The Interest of the Community in a Professional Education*, 10 Cal. W. L. Rev. 590 (1974); Jon A. Chandler, *A Property Theory of Future Earning Potential in Dissolution Proceedings*, 56 Wash. L. Rev. 277 (1981); Michael G. Walsh, Annotation, *Spouse's Professional Degree or License as Marital Property for Purposes of Alimony, Support, or Property Settlement*, 4 A.L.R.4th 1294 (1981). Wisconsin decisions are consistent with this analysis in recognizing that earning capacity may be part of the marital estate. *See Haugan v. Haugan*, 117 Wis. 2d 200, 343 N.W.2d 796 (1984); *Roberto v. Brown*, 107 Wis. 2d 17, 318 N.W.2d 358 (1982); *Lundberg v. Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982). The court in *Settipalli v. Settipalli*, 2005 WI App 8, 278 Wis. 2d 339, 692 N.W.2d 279, distinguished the *Haugan* and *Lundberg* decisions by limiting the earning capacity that may be considered part of the marital estate to only that which is enhanced *during* the marriage, as opposed to that which is enhanced *before* the marriage or that which is simply *not* enhanced during the marriage.

Deferred employment benefits trigger a similar analysis in community property states in the divorce context. Even when such benefits are nonvested and depend entirely on the voluntary future actions of the divorced spouse, courts have recognized the value of these benefits and have divided the marital estate on the basis of the spouses' "property interests" in them. *See In re Marriage of Brown (Brown v. Brown)*, 544 P.2d 561 (Cal. 1976); *see also* William A. Reppy, Jr., *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 U.C.L.A. L. Rev. 417 (1978).

Wisconsin cases appear to be generally consistent with the above analysis of deferred employment benefits. *See Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d 235 (1978); *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1978); *Heatwole v. Heatwole*, 103 Wis. 2d 613, 309 N.W.2d 380 (Ct. App. 1981). However, Wisconsin courts have made it clear that any employer or employee contributions to be made to a retirement plan after a divorce are not to be considered in the division of the marital estate at divorce. *Bloomer*, 84 Wis. 2d at 127 n.1.

➢ ***Comment.*** It can be argued that application of the findings in the Wisconsin cases discussed above should be limited to the divorce context, in contrast to considerations that apply in an ongoing marriage or to considerations of property law issues.

A commentator on community property law has suggested that characterizing future employment (and, hence, future earnings) as a "mere expectancy" is an insufficient analysis and that a concept of an "earned expectancy" belonging to the community should be recognized. Reppy, *supra* § 5.24, at 440–42 (footnotes omitted).

In view of the nature of community property and the necessity of adapting its concepts to modern needs, some commentators and courts, especially in the divorce context, have extended the scope of community property beyond assets in hand, earned or accrued wages or income, present or future property interests, or contractual rights. For example, one commentator has stated that "[c]redit may constitute a community asset." *Washington Community Property Deskbook* 4-23 (2d ed. 1989). Similarly, it has been suggested that "[t]he major asset of the community is the labor and industry of the spouses, and the wealth that is gained by the expenditure of this commodity, jointly or individually, is community property." Vaughn, *supra* § 5.8, at 55.

Indeed, in many (if not most) marriages, the major resource available to the spouses for credit purposes is their labor and industry. Obtaining equal access to this resource—and hence, to future wage income—appears to be a major reason for the expanded application of management and control rights in credit transactions under section 766.51(1m) and the other unique credit provisions added by the Act to UMPA. *See supra* § 5.19, *infra* § 5.55. Accordingly, for the purposes of relying on marital property and the income stream of the spouses to obtain credit, a persuasive argument can be made that the Wisconsin Marital Property Act requires future wages to be recognized as marital property in the nature of an "earned expectancy."

Various provisions of the Act, when read together, form a further basis for arguing that future wages are marital property. Section 766.31(4) states that when earned or accrued by a spouse or attributable to the property of a spouse, income is marital property. When earned, wages are recoverable to satisfy credit acquired in expectation of their being earned. Moreover, in addition to wages, income is defined as "economic benefits having value attributable to the effort of a spouse."

Wis. Stat. § 766.01(10). It can be argued that the availability of credit based on future wage income (and past payment history, i.e., creditworthiness) is an economic benefit that can be used to acquire assets and that must, according to this reasoning, fall within the Act's definition of property for management purposes in the credit context.

Thus, it appears consistent with the realities and purposes of the Act to conclude that the availability of credit (i.e., creditworthiness) is a (nontitled) marital asset under the Act, subject to the management and control of either spouse, and hence usable by either spouse in obtaining credit.

d. Nature of Management and Control; Purchase Money Security Interest [§ 5.25]

The Act's management and control rights over marital property include the right to "assign, create a security interest in, mortgage, encumber . . . or otherwise deal with [marital] property as if it were property of an unmarried person." *See* Wis. Stat. § 766.01(11). Under section 766.51, the allocation of management and control rights is based on title—that is, how the asset is "held"—except as to the expanded application of management and control rights in credit transactions under section 766.51(1m). Section 766.51(1m) specifically excludes the right to manage and control the five types of business assets and "the right to assign, create a security interest in, mortgage or otherwise encumber marital property" unless the applicant spouse alone may otherwise manage and control the property. However, an applicant spouse does have the power to create a security interest in marital property in a purchase money secured transaction. A *purchase money security interest* is a security interest that is created when a buyer uses a lender's money to make a purchase and immediately gives the lender security. *Black's Law Dictionary* 1478 (Bryan A. Garner ed., 9th ed. 2009). A common example of a purchase money security interest is a home mortgage. This is because the property acquired with the credit is initially "untitled" property (not held in the name of either spouse), and section 766.51(1)(am) provides that a spouse acting alone may manage and control such property. The purchasing spouse may have the property titled solely in his or her name and may grant the security interest. *See* Wis. Stat. Ann. § 766.51(1m) Legis. Council Notes—1985 Act 37, §§ 84 to 87 (West 2009).

In sum, the Act's expanded application of management and control rights in a credit transaction by a nontitled spouse is not by itself sufficient to permit the creation of a secured interest in marital property, other than a purchase money security interest. *See supra* § 5.19, *infra* § 5.42 (concerning management and control, especially for purposes of obtaining unsecured credit); *see also infra* §§ 5.111–.135 (concerning practical considerations, especially sections 5.129–.135, *infra*, regarding Act's effect on secured credit).

e. Conclusion [§ 5.26]

Despite the fact that future income from personal efforts does not constitute property under the Act for property law purposes, in the context of obtaining credit under the Act the more persuasive view is that future wages constitute an economic benefit analogous to marital property. It appears in practice that creditors treat an anticipated future stream of martial property income as marital property for the purpose of granting credit, and this is consistent with the policy of the law.

4. Future Unearned Income [§ 5.27]

Although the discussion in sections 5.21–.25, *supra*, focuses on future *earned* income of the spouses, the issue of whether, in the credit context under the Act, property includes future *unearned* income of the spouses is essentially the same. Under the Act, unless within specific exceptions (such as, for example, the exceptions for income from trusts or income subject to a unilateral statement), income from all assets of either or both spouses (whether from marital property or nonmarital property) is classified as marital property, just as earned income is classified as marital property. *See* Wis. Stat. § 766.31(4). With respect to the proper characterization of future unearned income, the conclusions reached in sections 5.21–.25, *supra*, would similarly appear to apply to future unearned income in the credit context.

D. Bona Fide Purchaser Protection [§ 5.28]

Under the Act as well as under UMPA, a creditor dealing with a spouse or spouses having management and control rights is protected if the creditor meets the definition of a *bona fide purchaser*. *See supra*

§ 4.64. If the definition is met, any claims of the other spouse (and any claims asserted through or under the other spouse), or any objections that either of the spouses may have between themselves regarding the exercise of management and control rights, will not affect the creditor. *See* Wis. Stat. § 766.57; UMPA § 9 cmt. The intent of the Act and UMPA is to arrange spouses' property interests and management rights in such a way as to avoid disrupting commercial interests and complicating third parties' transactions with married persons. This objective is accomplished in part by insulating from marital property claims commercial interests, including creditors, who rely on title. According to one commentator, under UMPA, nondonees can safely deal with each spouse, and collection remedies of unsecured creditors are improved (although UMPA may tend to shrink the assets available to creditors of a deceased spouse who leaves a surviving spouse). *See* Wellman, *supra* § 5.5, at 718; *see also infra* § 5.102.

Under section 766.57, a secured creditor constitutes a purchaser, since section 766.57(1)(b) defines *purchase* to include the acquisition of property (which, under section 766.01(1), would include the creditor's acquisition of an interest in property) by "discount, negotiation, mortgage, pledge or lien, or otherwise [dealing] with property in a voluntary transaction other than a gift." (For purposes of the Act, the term *acquiring* includes "reducing indebtedness on encumbered property and obtaining a lien on or security interest in property." Wis. Stat. § 766.01(1).) Thus, creditors are included as purchasers as long as they give "value" for property. Wis. Stat. § 766.57(1)(a). Under the Act, a creditor (as a purchaser) gives value if the creditor acquires the property "in return for a binding commitment to extend credit, as security for or in total or partial satisfaction of a pre-existing claim, … or, generally, in return for any consideration sufficient to support a simple contract." Wis. Stat. § 766.57(1)(c).

To constitute bona fide purchasers, creditors, as purchasers of property for value, must satisfy several conditions:

1. They must not have been "knowingly a party to fraud or illegality affecting the interest of the spouses or other parties to the transaction";

2. They must not "have notice of an adverse claim by a spouse"; and

3. They must have "acted in the transaction in good faith."

Wis. Stat. § 766.57(1)(a). For these purposes, "[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." Wis. Stat. § 766.01(13). Notice of the existence of a marital property agreement, a marriage, or a termination of a marriage (by death or by decree of dissolution) does not affect a creditor's status as a bona fide purchaser. Wis. Stat. § 766.57(2); *see infra* § 5.36. Finally, the effect of the bona fide purchaser protection provision may not be altered by a marital property agreement. Wis. Stat. § 766.57(3).

➢ ***Comment.*** It is clear that the language referring to "termination" of a marriage was intended to ensure protection of bona fide purchasers who have notice of the termination of the marriage, whether by death or otherwise. Wis. Stat. Ann. § 766.57(2) Legis. Council Notes—1985 Act 37, §§ 110, 111 (West 2009).

In routine credit transactions, secured creditors will be bona fide purchasers if the property involved is marital property and the spouse involved has the right to manage and control the property. When a secured creditor acquires marital property from a spouse under those circumstances, the creditor's acquisition is free from any claim of the other spouse. However, the status of unsecured creditors as bona fide purchasers is not as clear.

It can be argued that only a secured creditor can achieve the status of a bona fide purchaser. This may be the rule since, under section 766.57(1)(a), the term *bona fide purchaser* means one who purchases property, and under section 766.57(1)(b), the term *purchase* means "to acquire property." An unsecured creditor does not acquire property, at least not until the unsecured creditor has obtained a judgment on the debt (and with respect to real estate, until the judgment is docketed, or with respect to personal property, until an execution is levied). In the credit context, one commentator appears to characterize bona fide purchaser protection as available only to secured creditors. *See* Wellman, *supra* § 5.5, at 721. On the other hand, it also can be argued that acquiring a promise from a debtor to repay a debt is sufficient to bring an unsecured creditor within the definition of *purchaser* for the purposes of the Act's rules relating to bona fide purchasers. The latter argument seems more consistent with the purposes of the Act's credit provisions.

E. Relationships Based on Categories of Obligations [§ 5.29]

1. In General [§ 5.30]

The effect of the Wisconsin Marital Property Act, together with other Wisconsin statutes and Wisconsin case law, is to create a two-element system. The first element is the personal liability of a spouse or the spouses. The second element is the Act's system of categories of obligations that determine the property that can be reached to satisfy the type of obligation involved. *See infra* § 5.32.

2. Family-purpose Doctrine [§ 5.31]

Like UMPA, the Act adopts the family-purpose doctrine by providing that:

1. "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," Wis. Stat. § 766.55(1); and

2. An obligation so incurred may be satisfied from *all* marital property, Wis. Stat. § 766.55(2).

This chapter generally refers to this rule as the *family-purpose doctrine* and to an obligation within that doctrine as a *family-purpose obligation*.

The Act's version of the family-purpose doctrine is drawn from, and is analogous to, the family-purpose doctrine in other community property states. *See supra* § 5.9. The doctrine's scope under the Act is extremely broad. The comment to UMPA section 8 indicates that the doctrine covers any contract or tort obligation having a "relation to the marriage, or the family, or the community"; this coverage is in contrast to "those obligations incurred for the purely personal purposes of an incurring spouse." UMPA § 8 cmt. According to one commentator, the exception under the family-purpose doctrine for purely personal obligations will arise "only in unusual situations of little concern to commercial interests." Wellman, *supra* § 5.5, at 745. This commentator suggests that nonfamily-purpose obligations should apply only to attempted "tort

claim collections arising from activity devoid of any marital interest." *Id.* at 747.

The family-purpose doctrine is further buttressed by the presumption under the Act that an obligation incurred by a spouse is within the doctrine's scope. *See* Wis. Stat. § 766.55(1). The burden is on the party asserting that the obligation is not within the family-purpose doctrine to establish that this fact is more probable than not. *See* Wis. Stat. § 903.01. In addition, in connection with family-purpose obligations, the presumption can be made irrebuttable (other than as to remedies between the spouses) if, at or before the time the obligation is incurred, a separately signed statement of family purpose is given to the creditor by the obligated or incurring spouse. Wis. Stat. § 766.55(1). Such a separate statement is included in most credit applications.

Since UMPA borrowed the family-purpose doctrine from the community property states that rely on it, case law in those states is relevant to an appreciation of the doctrine's very broad scope. For example, under Washington's version of the family-purpose doctrine, the presumption of a community debt seems to apply even if the funds are subsequently used for a purpose that does not benefit the spouses or family. These rules "so favor the creation of community debts, that, if the court can find merely a community property benefit, it will find community liability." Todd M. Johnson, *Limitations on Creditors' Rights to Require Spouses' Signatures Under the ECOA and Washington Community Property Law*, 4 U. Puget Sound L. Rev. 333, 342 (1981).

3. Categories of Obligations [§ 5.32]

To determine what property is available to creditors to satisfy obligations after the spouses' determination date, it is necessary to categorize the obligations in question. *See infra* ch. 6. The following table summarizes the categories of obligations, the personal liability of the spouse or spouses, and the property available to satisfy each category of obligation.

Categories of Obligations	Personal Liability	Property Available to Satisfy Obligation
Support of the other spouse or a child of the marriage § 766.55(2)(a)	Each spouse[1]	All marital property and all other property of obligated spouse
An obligation incurred in the interest of the marriage or family § 766.55(2)(b)	Incurring spouse	All marital property and all other property of incurring spouse[2]
An obligation arising before marriage (or, for spouses married before 1/1/86, a pre-Act obligation) § 766.55(2)(c)	Incurring spouse	Incurring spouse's nonmarital property and that part of marital property that would have been incurring spouse's property but for marriage (or but for enactment of Act, as case may be)[3]
Liability of a spouse arising from a tort committed by that spouse during marriage § 766.55(2)(cm)	Tortfeasor spouse	Tortfeasor spouse's nonmarital property and that spouse's one-half interest in marital property
Any other obligation a spouse incurs during marriage, including obligations that are not in the interest of the marriage or the family[4] § 766.55(2)(d)	Incurring spouse	Incurring spouse's nonmarital property and that spouse's one-half interest in marital property, in that order[5]

[1] Wis. Stat. §§ 49.90(1m), 765.001(2); *see infra* §§ 5.105–.110 (extent of duty of support and doctrine of necessaries).

[2] Accordingly, if the obligation was incurred in the interest of the marriage or the family, the creditor is able to reach assets beyond those held by the incurring spouse and beyond those over which the incurring spouse has rights of management and control.

[3] Regarding rights of reimbursement, see chapter 8, *infra*.

[4] *See supra* § 5.31 (broad scope of family-purpose doctrine and hence narrow scope of excluded obligations).

[5] This is the only category in which there is an order-of-satisfaction requirement. Regarding rights of reimbursement, see chapter 8, *infra*.

The Act (including the provisions in the above table) applies to spouses after their determination date, *see* Wis. Stat. § 766.55(2), but only "during marriage." As defined by the Act, the term *during marriage* means "a period in which both spouses are domiciled in this state," which begins at their determination date and which ends at (1) the dissolution of the marriage, (2) the death of one of the spouses, or (3) the date when one of the spouses ceases to be domiciled in Wisconsin. Wis. Stat. § 766.01(8).

➢ ***Note.*** In view of the definition of the term during marriage under section 766.01(8), there appears to be a gap in section 766.55(2), in that the section does not specify the property available to a creditor to satisfy an obligation incurred by a spouse after 1985 while the spouses are married but during a period when one or both of the spouses are not domiciled in Wisconsin. For a discussion of such obligations, see sections 5.137 and 6.30, *infra*.

With respect to tort obligations, in view of the completeness of the coverage of torts under section 766.55(2)(cm) and the fact that only one-half of marital property may be reached to satisfy a spouse's liability arising from a tort committed by that spouse during marriage, it appears that the family-purpose doctrine has no application to tort liabilities. Hence, there appears to be no distinction under the Act between family-purpose torts and nonfamily-purpose torts; it appears that all torts committed by a spouse during marriage are fully covered by section 766.55(2)(cm) and do not fall within section 766.55(2)(d) (covering any other obligation incurred by a spouse during marriage). *See infra* §§ 6.27, 12.106.

F. Additional Special Rules [§ 5.33]

1. In General [§ 5.34]

The Act contains additional special rules that apply to creditor-debtor relationships. These rules relate to the Act's attempt to protect creditors with respect to predetermination date obligations; the effects of marital property agreements, unilateral statements (as to income on nonmarital property), and decrees; the effects of the termination of the marriage by dissolution or death; and the effects of a change in domicile. Also, the Act does not affect exemptions otherwise provided in the law or certain

provisions of chapter 706 with respect to real estate. These special rules are summarized below.

2. Predetermination Date Obligations [§ 5.35]

Section 766.55(3) addresses predetermination date obligations. This section provides that the Act does not "alter the relationship between spouses and their creditors with respect to any property or obligation in existence on the determination date." *See supra* § 2.8 (definition of *determination date* under Act). Presumably, to the extent that significant modifications are made in contractual relationships after the determination date, the provisions of the Act would apply.

As a practical matter, however, the operation of the Act may adversely affect the collection rights of a predetermination date creditor of one spouse. This could occur as a result of the other spouse's ability (after the determination date) to incur obligations that can be satisfied from marital property, including wages on which the predetermination date creditor may have relied. *See infra* § 5.138. Similarly, in extending credit to one spouse after the determination date (particularly when reliance is placed on marital property, including wages of the other spouse), creditors will need to consider predetermination date obligations of the other spouse that can be satisfied from marital property, including wages of the other spouse.

3. Marital Property Agreements, Unilateral Statements, and Decrees [§ 5.36]

A provision of a marital property agreement does not affect the relationship between a creditor and a married person unless the creditor consents or has actual knowledge of the provision when the obligation was incurred (or is furnished a copy of the agreement under certain circumstances). The following provisions of the Act are relevant with respect to the effects of marital property agreements on creditors.

1. Section 766.55(4m) provides that "[e]xcept as provided under [section] 766.56(2)(c), no provision of a marital property agreement or of a decree under [section] 766.70 [, which concerns spousal remedies,] 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, regarding open-end plans, when the plan was entered into). The statute also provides that this statutory protection may not be altered by such an agreement or decree. This protection for the creditor extends to any subsequent renewal, extension, modification, or use of the obligation or open-end plan.

➢ ***Note.*** If a copy of the document is furnished to the creditor before credit is granted, the creditor is bound by the document's provisions even without actual knowledge. *See* Wis. Stat. § 766.56(2)(c).

➢ ***Comment.*** It is unclear how much information, short of a copy of the complete document, must be given to the creditor for that creditor to have actual knowledge under section 766.55(4m). For instance, it is not clear if a letter alerting the creditor to the existence of the agreement and the nature of the provision would suffice. *See infra* § 5.64.

Section 766.55(4m) specifically states that it does not affect the application of chapter 706 regarding the effect of recording interests in real property. Accordingly, the recording of a marital property agreement does not constitute actual or constructive notice of any of its provisions, except as the marital property agreement may affect specific parcels of real estate referred to in the agreement and such other matters as are governed by chapter 706.

2. Section 766.56(2)(a) provides that recording a marital property agreement (or unilateral statement regarding income on nonmarital property) does not provide third parties (including creditors) actual or constructive notice of the agreement. Again, however, the provisions of this paragraph are subject to the application of chapter 706 regarding the effect of recording interests in real property.

3. Section 766.56(2)(b) provides that creditors in credit transactions under the Wisconsin Consumer Act, Wis. Stat. chs. 421–427 (hereinafter the Wisconsin Consumer Act or the Consumer Act), are to include in written credit applications a notice stating the lack of effect on the creditor of a marital property agreement, unilateral statement as to income on nonmarital property (under section 766.59), or court decree (under section 766.70) unless the creditor,

before the credit is granted, is furnished a copy of the agreement, statement, or decree, or has actual knowledge of the adverse provision in the agreement.

If the applicant spouse in any credit transaction (whether or not governed by the Consumer Act) discloses the existence of a marital property agreement and provides a copy of it to the creditor before credit is granted or before an open-end plan is entered into, "the creditor is bound by any property classification, characterization of an obligation, or management and control right contained in the agreement or decree." Wis. Stat. § 766.56(2)(c); *see also infra* § 5.51 (applicability of section 766.56(2)(b) and (c)).

These sections, when applicable, apparently control at the time a spouse applies for credit; they seem to override the general provision in section 766.57(2), which provides that "[n]otice of the existence of a marital property agreement . . . does not affect the status of a purchaser as a bona fide purchaser."

➢ ***Query.*** When section 766.56 applies, what is the effect, other than the $25 penalty provided in section 766.56(4)(b), if a Consumer Act creditor fails to include the required notice under section 766.56(2)(b) in the written credit application? Is the creditor bound by adverse provisions contained in a marital property agreement of which the creditor is not aware? It would appear not, since this result would be inconsistent with the "actual knowledge" requirement of section 766.55(4m) or the copy provisions of section 766.56(2)(c). *See Park Bank-West v. Mueller*, 151 Wis. 2d 476, 444 N.W.2d 754 (Ct. App. 1989) (creditor's failure to give notice to nonapplicant spouse under section 766.56(3)(b) resulted only in statutory $25 penalty); *see also infra* § 5.70 (discussing *Park Bank-West*).

There seems to be no penalty imposed on an applicant spouse vis-à-vis the applicant's creditor if the applicant, when asked, does not provide a copy of the agreement. The nonapplicant spouse may have a remedy, however, against the applicant spouse who failed to provide the copy. *See* Wis. Stat. § 766.70(1); *see also infra* § 8.18.

➢ ***Practice Tip.*** A practical problem arises for a creditor when the applicant spouse furnishes a copy of the marital property

agreement, thereby binding the creditor by its provisions. Since the provisions of the marital property agreement may be unclear, and professional help may be required to interpret them, a creditor may be justified in charging a fee to cover the cost of obtaining a professional opinion concerning the agreement.

4. Section 766.55(4) provides that a written consent signed by a creditor that diminishes the creditor's rights with respect to the satisfaction of obligations is binding on the creditor.

4. Dissolution of Marriage [§ 5.37]

The dissolution of a marriage may affect the rights of creditors. A *dissolution* is defined as a termination of a marriage by decree of dissolution, divorce, annulment, declaration of invalidity, legal separation, or separate maintenance. Wis. Stat. § 766.01(7). Termination of a marriage by death is not included in the definition of dissolution. *See* Wis. Stat. §§ 766.55(8), 859.18(6); *see also infra* § 5.99.

Under section 766.55(2m), in the event of a dissolution, *unless* the decree or any amendment to the decree provides otherwise, "no income of a nonincurring spouse is available for satisfaction of an obligation [incurred by a spouse in the interest of the marriage or family] after entry of the decree." However, marital property assigned to a spouse under the decree is available to satisfy an obligation incurred in the interest of the marriage or family, up to the value (as of the date of the decree) of the marital property so assigned. Further, if the decree provides that the nonincurring spouse is responsible for satisfaction of the obligation, it may be satisfied as if both spouses had originally incurred it. Wis. Stat. § 766.55(2m).

The clear import of section 766.55(2m) is that the decree may provide that future income of the nonincurring spouse must be made available to satisfy an obligation incurred within the family-purpose doctrine during the marriage, regardless of personal liability. In addition, future income or assets of the nonincurring spouse are available, regardless of the divorce, to satisfy an obligation arising from the duty of support or under the necessaries doctrine. *See St. Mary's Hosp. Med. Ctr. v. Brody*, 186 Wis. 2d 100, 519 N.W.2d 206 (Ct. App. 1994) (discussed at sections 5.106 and 5.110, *infra*); *see also infra* § 5.98 (practical problems for creditors).

5. Change in Domicile [§ 5.38]

As noted in section 5.32, *supra*, the existence of marital property under the Act depends on both spouses' being domiciled in Wisconsin. Thus, a change in domicile to another state by one or both spouses may affect the accrual of additional marital property after the date of the change. *See* Wis. Stat. §§ 766.01(5)(b), (8), .03; *see also supra* § 2.8. Although the change in domicile of either spouse or both spouses would not affect marital property assets owned by both spouses at the time of the change, it might affect the nature of the income from the asset. *See infra* ch. 13. This creates practical problems for creditors. *See infra* § 5.100.

➢ ***Historical Note.*** As originally enacted, the Marital Property Act required that spouses have their "marital domicile" in Wisconsin in order for the Act to apply. The 1988 Trailer Bill eliminated the concept of *marital domicile* effective May 3, 1988. As a result, the Act applies only while both spouses are domiciled in Wisconsin.

6. Exemptions [§ 5.39]

Section 766.55(5) states that the Act does not affect any exemptions, as provided by any other law, of any property of spouses from availability for satisfaction of an obligation. *See* Wis. Stat. §§ 425.106 (property exempt under Wisconsin Consumer Act), 815.18 (property exempt generally), .20 (homestead exemption); *see also infra* § 6.68.

G. Conclusion: Means for Obtaining and Extending Credit [§ 5.40]

Under the Act, as in the past, a spouse can use his or her nonmarital property (individual property or other, i.e., predetermination date, property) to obtain unsecured and secured credit. A creditor may reach such property based on the personal liability of the incurring spouse and any security interest granted. *See supra* § 5.32. In addition to incurring a personal obligation as a basis for obtaining credit, under the Act a spouse may use marital property over which he or she has normal (i.e., title-based) or expanded (i.e., section 766.51(1m)) management and control rights as a basis for obtaining unsecured credit. The Act also

enables a spouse having normal management and control rights over marital property to grant a creditor a security interest in that property.

If the credit will be used for a family purpose, *see supra* § 5.31, the applicant spouse may obtain credit by attribution of creditworthiness under section 766.56(1). *See infra* §§ 5.52–.55. If a family-purpose obligation is involved, the creditor may reach all nonexempt marital property assets, even those marital property assets over which the incurring spouse has no normal or expanded management and control rights. These assets would include, for example, marital property assets held by the spouses in the conjunctive ("and") form, marital property assets held solely by the nonincurring spouse, the homestead, and the wages or other income of the nonincurring spouse. Further, under the necessaries doctrine, the nonincurring spouse may be personally liable as well, in which case the creditor also may be able to reach his or her nonmarital property assets. *See infra* §§ 5.109–.110.

IV. Expanded Application of Management and Control and Attribution of Creditworthiness in Credit Transactions [§ 5.41]

A. In General [§ 5.42]

The Wisconsin Marital Property Act expands the application of management and control rights in credit transactions with married persons. *See* Wis. Stat. § 766.51(1m). This expanded application is in addition to the rights of management and control that normally apply under the Act in all relationships and transactions with married persons, including creditor-debtor relationships and transactions. *See supra* §§ 5.12–.40. Further, in credit transactions with married persons, specific provisions of the Act define duties, responsibilities, and consequences pertaining to granting and obtaining credit. These provisions, together with adoption of the family-purpose doctrine, were designed to provide each spouse full and equal access to credit based on marital property, including the income stream (i.e., wages or income from assets) of either or both spouses. *See supra* § 5.19, *infra* § 5.53.

For the purpose of obtaining credit involving a family-purpose obligation, section 766.51(1m) provides that a spouse acting alone may manage and control (but, by its terms, not encumber) all marital property

except those items of marital business property for which the "add-a-name" remedy is not available under section 766.70(3)(a)–(d) (unless that spouse may otherwise manage and control such property under the normal management and control rules). *See supra* § 5.25 (effect of section 766.51(1m) in purchase money secured transaction), *infra* §§ 8.24–.27 (add-a-name remedy and its exceptions). Briefly, these management and control exceptions are the following:

1. A partnership interest or interest in a joint venture held by the other spouse as a general partner or as a participant;

2. An interest in a professional corporation or 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 the business;

4. The stock of a nonpublicly traded corporation, as defined in section 766.70(3)(d); and

5. An interest in a limited liability company held by the other spouse as a member.

These exceptions were made to allow spouses who are actively engaged in businesses or professional enterprises to have sole management of these activities. The exceptions to the add-a-name remedy under the Wisconsin Act are broader than those under UMPA, which does not contain the second and fifth exceptions listed above.

It appears that the primary reason for the expanded application of management and control rights in family-purpose credit transactions was to trigger application of the Equal Credit Opportunity Act (ECOA), *see infra* §§ 5.77–.86, particularly Regulation B, which was promulgated by the Board of Governors of the Federal Reserve System to implement the ECOA. *See* Wis. Stat. Ann. § 766.51(1m) Legis. Council Notes—1985 Act 37, §§ 84 to 87 (West 2009); *see also infra* § 5.89. In fact, some people argue that the expanded application of management and control rights in family-purpose credit transactions, as provided in section 766.51(1m), has no significance in actual practice and that the triggering of Regulation B is the only reason for the section.

Some creditors in Wisconsin have argued that, although they are legally required to rely on the credit applicant spouse's management rights over marital property assets held by the other spouse as well as the income of the other spouse, the applicant spouse often lacks practical control over such assets or income and therefore has no real ability to apply them to repay the debt incurred. *See infra* §§ 5.97–.104. These creditors argue that they should not be forced to consider marital property to which the applicant spouse lacks effective access, and therefore, before granting the credit, they should be allowed to require the signature of the other spouse since the applicant spouse may not have access to that marital property. *See infra* § 5.102.

Under the Act, however, statutory remedies are provided to promote effectiveness of the nontitled spouse's rights of management and control. Without these remedies, it could be argued that section 766.51(1m) lacks sufficient substance to support access to credit. Among other remedies, a spouse may bring a court action to obtain an accounting of the other spouse's property and obligations. *See* Wis. Stat. § 766.70(2). More importantly, perhaps, the court can determine the classification of property and order access to marital property. *Id.* Also, under the previously mentioned add-a-name remedy, the court may order the name of a spouse added to a document evidencing ownership of marital property held in the name of the other spouse alone (except for the five excluded types of business assets). *See* Wis. Stat. § 766.70(3). Finally, under certain circumstances, the court may order limitations on the other spouse's management and control rights, including rights with respect to property to be received in the future. *See* Wis. Stat. § 766.70(4). An action based on a violation of the good-faith duty might also be available, for example, if the other spouse is using his or her rights of management and control to frustrate the applicant spouse's exercise of his or her rights in obtaining credit (e.g., by obtaining lines of credit beyond his or her reasonable needs, thereby reducing the amount of credit available to the other spouse). *See* Wis. Stat. §§ 766.15, .70(1); *see also infra* ch. 8.

Probably more important from a practical viewpoint, to promote expanded access to credit for the nonpropertied (or less propertied) or nonwage-earning (or lower-wage-earning) spouse, when a family-purpose obligation is being incurred, the Act requires a creditor to consider *all* available marital property in deciding whether to grant credit and the extent and terms of the credit. *See* Wis. Stat. § 766.56(1); *see infra* § 5.55. It should be noted that with respect to an obligation

incurred in the interest of the marriage or family, the five types of assets excepted from the management and control rules under section 766.51(1m)(b) are not included in the assets that the creditor must consider and may reach to satisfy the obligation. *See* Wis. Stat. §§ 766.56(1), .55(2)(b).

Further, the 1985 Trailer Bill amendment to section 766.55(1) removed the prior concern of creditors that, although the creditor was required to consider all marital property, the creditor would be foreclosed from reaching marital property if the incurring spouse, or the spouses, could convince a court that the obligation was not incurred in the interest of the marriage or the family. Section 766.55(1), as amended by the Trailer Bill, provides that a statement separately signed by the obligated or incurring spouse at or before the time the obligation is incurred, reciting that the obligation is or will be in the interest of the marriage or the family, is conclusive evidence of that fact. Pursuant to the statute, the statement does not, however, affect any right or remedy as between the spouses themselves.

B. Definitions [§ 5.43]

1. In General [§ 5.44]

As outlined in section 5.42, *supra*, when a spouse applies for credit that will result in a family-purpose obligation, in addition to considering the applicant spouse's creditworthiness (based on that spouse's personal liability, individual property, and predetermination date property), the creditor is required to consider all marital property available to satisfy the obligation. In considering these rules, it is necessary to clarify some definitions and to understand the purpose of the Act.

2. Definitions of Credit and Creditor Under Marital Property Act and Their Application [§ 5.45]

a. In General [§ 5.46]

Application of the special provisions of the Act governing the obtaining and granting of credit requires definitions of the terms credit and creditor. The special provisions subject to these definitions include:

1. Subsections relating to the categories of obligations on the basis of which classes of assets may be reached by creditors, *see* Wis. Stat. § 766.55;

2. The expanded application of management and control rights in credit transactions, *see* Wis. Stat. § 766.51(1m); and

3. The procedures for credit transactions with married persons, *see* Wis. Stat. §§ 766.555, .56.

The interplay between the Act's definitions of credit and creditor under section 766.01(2m) and (2r) and the special provisions of the Act governing the obtaining and granting of credit produces differing applications of the special provisions.

The basic definition of the term *credit* is in section 766.01(2m)(a). That section provides that, subject to stated exceptions, "credit" means "the right granted by a creditor to defer payment of a debt, incur debt and defer its payment or purchase property or services and defer payment for the property or services." Wis. Stat. § 766.01(2m)(a).

The basic definition of the term *creditor* is in section 766.01(2r)(a). That section provides that, subject to stated exceptions, "creditor" means "a person that *regularly* extends credit." Wis. Stat. § 766.01(2r)(a) (emphasis added).

Sections 5.47–.50, *infra*, summarize the application of these definitions and their exceptions to the special provisions of the Act governing the obtaining and granting of credit. However, it is important to keep in mind the blanket rule that if a Wisconsin Consumer Act transaction is involved, the Consumer Act's definitions apply. Wis. Stat. § 766.01(2m)(b), (2r)(b).

b. Relationships Between Spouses and Creditors [§ 5.47]

The basic definition of creditor as "a person that regularly extends credit" does not apply to subsections 766.55(3)–(4m), because of the exception to the definition contained in section 766.01(2r)(c). Hence, all creditors, whether they are incidental creditors or creditors who regularly extend credit, are subject to:

1. The provision in section 766.55(3) that chapter 766 does not alter the relationship between spouses and their predetermination date creditors (with respect to property or obligations existing on the determination date);

2. The provision in section 766.55(4) concerning the effect of a written consent signed by a creditor that diminishes the creditor's rights; and

3. The provisions in section 766.55(4m) concerning the effect on creditors of marital property agreements or decrees.

See also Wis. Stat. Ann. § 766.01 Legis. Council Notes—1985 Act 37, §§ 69–73 (West 2009) (stating that, regarding provisions to which the defined terms do not apply, "the terms are used in a broad sense and applying the defined terms to those provisions may inappropriately limit the provisions' scope").

c. Expanded Application of Management and Control Rights [§ 5.48]

The basic definition of credit under section 766.01(2m) applies to the expanded concept of management and control under section 766.51(1m) for the purposes of obtaining an extension of credit for a family-purpose obligation. Since the definition of the word credit uses the word creditor, which is defined as "a person that regularly extends credit," and since section 766.51(1m) is not included among the exceptions to the definition in section 766.01(2m)(c) and (2r)(c), the expanded management concept applies only to creditors who regularly extend credit.

d. Credit Procedures [§ 5.49]

With respect to the requirement for evaluating creditworthiness in credit transactions under section 766.56(1), the basic definitions of credit and creditor apply. *See* Wis. Stat. § 766.01(2m)(c), (2r)(c) (not listing section 766.56(1) among exceptions to definitions of credit and creditor). Hence, the requirement applies only to creditors who regularly extend credit and not to incidental creditors. *See* Wis. Stat. § 766.01(2r)(a) (defining creditor to mean "a person that regularly extends credit").

By contrast, the basic definitions of credit and creditor do *not* apply to section 766.56(2)(c) (establishing the binding effect on a creditor in a credit transaction of an applicant's disclosure of the existence of, or provision of a copy of, a marital property agreement or decree) or section 766.56(2)(d) (relating to inquiries by a creditor as to an applicant's marital status). *See* Wis. Stat. § 766.01(2m)(c), (2r)(c) (listing section 766.56(2)(c) and (d) among exceptions to definitions of credit and creditor). Accordingly, the rules of these sections apply to all types of credit transactions, regardless of whether the creditor regularly extends credit. *See* Wis. Stat. § 766.01(2r)(a) (defining creditor to mean "a person that regularly extends credit").

e. Predetermination Date Open-end Plans [§ 5.50]

The basic definitions of credit and creditor apply to section 766.555, which specifically deals with open-end plans that exist on the spouses' determination date but that were entered into by only one spouse. *See* Wis. Stat. § 766.01(2m)(c), (2r)(c) (not listing section 766.555 among exceptions to definitions of credit and creditor). Hence, section 766.555 applies only to creditors who regularly extend credit. *See* Wis. Stat. § 766.01(2r)(a) (defining creditor to mean "a person that regularly extends credit"). By contrast, the notice provisions of section 766.56(3)(b), which apply to postdetermination date open-end credit plans (and credit other than open-end credit), use the credit and creditor definitions of the Wisconsin Consumer Act, because the notice requirements of that section apply only to credit transactions governed by the Consumer Act. *See* Wis. Stat. §§ 766.56(3)(b), .01(2m)(b), (2r)(b).

3. Definitions of Credit and Creditor Under Wisconsin Consumer Act and Their Application [§ 5.51]

All creditors ("persons that regularly extend credit") may be subject to civil suit for failure to properly evaluate creditworthiness under section 766.56(1). As noted in sections 5.45–.50, *supra*, the Act's definitions of credit and creditor provide that if the terms are used in connection with a transaction governed by the Wisconsin Consumer Act, they have the meanings specified in the Consumer Act. Wis. Stat.

§ 766.01(2m)(b), (2r)(b). To understand the application of the Consumer Act, it is critical to note the specific exclusions to its application contained in section 421.202. For purposes of applying the Marital Property Act, the most significant of these is the exclusion of "consumer credit transactions in which the amount financed exceeds $25,000 . . . or other consumer transactions in which the cash price exceeds $25,000." Wis. Stat. § 421.202(6).

Under the Wisconsin Consumer Act, the term *credit* is defined as "the right granted by a creditor to a customer to defer payment of debt, to incur debt and defer its payment or to purchase goods, services or interests in land on a time price basis." Wis. Stat. § 421.301(14). The Consumer Act defines the term *creditor* as a "merchant who regularly engages in consumer credit transactions or in arranging for the extension of consumer credit by or procuring consumer credit from 3rd persons." Wis. Stat. § 421.301(16). A *consumer credit transaction* means a "consumer transaction between a merchant and a customer in which real or personal property, services or money is acquired on credit." Wis. Stat. § 421.301(10). A *customer* is defined as a person (other than an organization) "who seeks or acquires real or personal property, services, money or credit for personal, family or household purposes, or, for purposes of ch. 427 only, for agricultural purposes." Wis. Stat. § 421.301(17).

With respect to violations based on a creditor's failure to attribute creditworthiness under section 766.56(1), penalties are imposed only on a "financial organization or any other credit-granting commercial institution." Wis. Stat. § 766.56(4)(a). This is accomplished by incorporating section 138.20 into section 766.56(4)(a). The result is the imposition of penalties on a narrower class of creditors than the class of creditors that meets the basic definition of creditor under the Marital Property Act.

With respect to violations of the notice provisions of section 766.56(2)(b) and (3), this section applies only to creditors who regularly engage in Consumer Act transactions, and hence, only such creditors are subject to the $25 liability of section 766.56(4)(b). However, although only financial organizations or other credit-granting commercial institutions may be subject to penalties under section 766.56(4)(a), and only Wisconsin Consumer Act creditors may be required to pay the $25 liability under section 766.56(4)(b), by the terms of section 766.56(1), all "creditors" (by reference to the basic definition of creditors as "persons

that regularly extend credit") are subject to that section's requirements of attribution of creditworthiness.

Further, virtually all credit grantors are subject to the ECOA. *See infra* §§ 5.57 (failure to satisfy requirements of section 766.56), 5.77–.86 (ECOA). For a discussion of procedural requirements in actions alleging violations of the ECOA, see *Bolduc v. Beal Bank, SSB*, 994 F. Supp. 82 (D.N.H. 1998).

C. Attribution of Creditworthiness [§ 5.52]

1. In General [§ 5.53]

When a spouse applies for credit that will result in a family-purpose obligation, section 766.56(1) requires the creditor, "in evaluating the spouse's creditworthiness," to consider all marital property of the spouses available to satisfy the obligation. Section 766.56(1) further requires the creditor to consider the spouse's creditworthiness in the same manner that the creditor, "in evaluating the creditworthiness of an unmarried credit applicant," considers the property of that applicant that will be available to satisfy the obligation. In other words, all the marital property is attributed to the applicant spouse as if the applicant spouse were the sole owner (as would be the case with all property of an unmarried applicant). Thus, it is necessary to examine the nature of creditworthiness and the extent of the assets that the creditor must consider.

2. Definition of Creditworthiness [§ 5.54]

The Wisconsin Marital Property Act does not define *creditworthiness*, and the word is not a defined term in any other Wisconsin statute, in the ECOA, or in Regulation B interpreting the ECOA. *See infra* §§ 5.76–.96. However, in its consideration of the ECOA, Congress used definitions similar to the following: "Generally [creditworthiness is] considered to be a function of both the applicant's willingness and ability to pay the debt and the creditor's rights and remedies with respect to property available for debt payment." Ralph C. Clontz, Jr., *Equal Credit Opportunity Manual* 1-19 (3d ed. 1979 & Cum. Supp. No. 2 1984). The Senate report by the Committee on Banking, Housing and Urban Affairs (accompanying the amendment to the Truth-in-Lending Act that adopted

the ECOA) refers to a person being creditworthy "by virtue of willingness and ability to repay any obligations." S. Rep. No. 93-278 (1974).

> ➢ ***Note.*** In assessing the creditworthiness of a person who applies for credit in a community property state, a creditor may assume that the applicant is a resident of the state unless the applicant indicates otherwise. 12 C.F.R. pt. 202, Supp. I cmt. 7(d)(3)-1.

Thus, normally a creditor's evaluation of creditworthiness involves a two-pronged test:

1. The creditor must consider an applicant's willingness and ability to repay the debt; this may be measured by such factors as the applicant's payment history, employment status, expected duration of employment, and control over assets. However, this prong of the test might not be appropriate under the Act since a nontitled, nonwage-earning spouse may not have the practical ability to pay the debt.

2. The creditor must consider the assets or income stream that may be reached to satisfy the debt in the event of a default. It is on this prong of the test that the Act relies.

> ➢ ***Comment.*** The analysis of the nature of creditworthiness also demonstrates an inconsistency under the Act between what the unsecured creditor is required to consider in granting credit and what the debtor, as a practical matter, can reach to pay the debt voluntarily. In fact, the unsecured creditor is forced to take additional risks that would not exist if that creditor were dealing with an unmarried applicant and were considering that applicant's property. These include risks of divorce, change of marital domicile with a resultant change in property rights with respect to income, and future credit actions of the nonapplicant spouse and of the nonapplicant spouse's creditors. *See infra* §§ 5.97–.104.

3. Assets to Be Considered [§ 5.55]

When a family-purpose obligation is being incurred, the only assets a creditor may exclude under section 766.56(1) in evaluating creditworthiness are the nonapplicant spouse's individual property and

predetermination date property. The five excepted items of marital business property under section 766.70(3)(a)–(d) are not included in the property to be considered. The homestead is included in the property to be considered. The example below illustrates the application of section 766.56(1).

➢ ***Example.*** Assume that, before the effective date of the Act, a wife's creditworthiness would have supported credit of $5,000 on the basis of her income stream (represented by her wage income). After the effective date of the Act, the purpose and effect of section 766.56(1) is to enable the husband, the nonwage-earning spouse, acting alone, to obtain credit up to this amount. (This assumes that the wife has not fully used this credit and that the husband's creditworthiness does not adversely affect the total credit available to the spouses.) Section 766.56(1) requires that, when the husband applies for credit, the creditor must evaluate his creditworthiness as if the wages were his.

The actions and creditworthiness of one spouse may affect the creditworthiness of the other spouse. Since the credit grantor must consider all marital property, all obligations that might affect the marital property also are relevant to the consideration of creditworthiness (as would be the case if the wages were the wages of the applicant spouse).

It appears that future income, including future wage income of the nonapplicant spouse, must be considered by the creditor. *See supra* §§ 5.21–.24. Also, it appears that future income on the nonapplicant spouse's individual or predetermination date property must be considered by the creditor, *see supra* § 5.25, since, at a minimum, it will become marital property when received, unless a marital property agreement (that has been made binding on the creditor) classifies that income as the nonapplicant spouse's individual property, or unless the nonapplicant spouse has executed a unilateral statement under section 766.59 (that has been made binding on the creditor) designating income on nonmarital property as individual property.

D. Penalties; Rule-Making Authority [§ 5.56]

1. Violation of Marital Property Act [§ 5.57]

A creditor that is a "financial institution or any other credit-granting commercial institution" and that violates the attribution-of-creditworthiness responsibilities under section 766.56(1), *see supra* §§ 5.52–.55, is subject to the penalties provided in section 138.20. *See* Wis. Stat. § 766.56(4)(a). Section 138.20 provides that no financial organization, as defined under sections 71.04(8)(a) and 71.25(10)(a), or any other credit-granting commercial institution may discriminate on the basis of the applicant's sex or marital status (or other prohibited bases) in granting or extending credit. The penalty for violating section 138.20, and, hence, section 766.56(1), is $1,000, and a separate violation arises for each individual who is discriminated against.

2. Violation of Division of Banking Rules Under Wisconsin Consumer Act [§ 5.58]

Section 426.108 grants the Wisconsin Division of Banking the authority to promulgate rules prohibiting as unconscionable specific conduct in consumer-credit transactions subject to the Wisconsin Consumer Act. Pursuant to this section, the division has adopted rules with respect to discrimination on the basis of sex or marital status in connection with the granting or extending of credit. These rules are similar to the requirements under the ECOA. *See infra* §§ 5.78–.86.

The Division of Banking rules declare it to be Wisconsin policy that "no person shall be discriminated against in the granting or extension of any form of credit, or in the capacity or privilege of obtaining any form of credit," on a prohibited basis, such as on the basis of the applicant's sex or marital status. Wis. Admin. Code § DFI-WCA 1.85(1). Such discrimination is unconscionable conduct under section 426.108 and can therefore be the subject of injunctive relief, class actions, damages, and recovery of attorney fees under sections 426.109 and 426.110. This rule applies to merchants as defined in the Consumer Act; it does not apply, however, to "merchants chartered by any Wisconsin administrative agency which issues a regulation prohibiting discrimination in the granting of consumer credit on the basis of sex or marital status." *Id.*

Discrimination under this rule is defined to mean, among other things, a denial of credit or an increase in the charge for credit based on the customer's sex or marital status. Discrimination includes requiring a spouse to co-sign credit documents, unless such a signature is required by statute or "is imposed without regard to sex or marital status on all similarly qualified customers who apply for a similar type and amount of credit." Wis. Admin. Code § DFI-WCA 1.85(2)(d). An exception is made when it is necessary with respect to secured credit to create a valid lien, as long as the merchant's standards of creditworthiness require the signature without regard to sex or marital status. *Id.*

➢ ***Note.*** The questions that can arise under these rules as a result of the Act are basically similar to the questions that arise under the ECOA. *See infra* §§ 5.88, .91–.96.

3. Rulemaking Authority [§ 5.59]

Because of the interrelationships between the credit provisions of the Wisconsin Marital Property Act and the provisions of the Wisconsin Consumer Act, and the need to accommodate the sometimes differing purposes of the two acts, the 1985 Trailer Bill added section 766.565. *See* Wis. Stat. Ann. § 766.565 Legis. Council Notes—1985 Act 37, § 109 (West 2009). Under section 766.565(7), the Division of Banking is authorized to promulgate rules to interpret chapter 766 and the Consumer Act, "consistent with [their] purposes and policies." As of the date of publication, no such rules had been promulgated.

E. Purpose and Intent of Credit Provisions of Marital Property Act [§ 5.60]

In addition to the general considerations involving construction of the Act, *see supra* § 5.19, the reasons for including the special provisions of the Act governing the obtaining and granting of credit should be recognized.

The movement to adopt community property in Wisconsin was largely based on four goals: (1) achievement of equal rights for spouses; (2) tax reform (i.e., tax-free interspousal transfers and joint income tax returns); (3) spousal equality in management and control during marriage and at death; and (4) equal access to credit by spouses. *See, e.g.*, Tony

Earl, *Tony Earl on Women's Issues* (Tony Earl for Governor Comm., no date); *see also* Anthony S. Earl, *Marital Property: Reform in the Wisconsin Tradition*, 68 Marq. L. Rev. 381 (1985).

In the marital property bills introduced in the 1979, 1981, and 1983 legislative sessions—whether in the form of "marital partnership property," community property, alternatives to community property, or UMPA—special provisions were included in attempts to achieve equal access to credit. The Act's provisions expanding the application of management and control rights and governing credit transactions with married persons are unique to Wisconsin and are additions to UMPA. Accordingly, these provisions are to be construed liberally and in a manner to achieve their purposes. *See* Wis. Stat. §§ 765.001(3), 766.001(1).

The following quote is from the March 8, 1984, major floor debate speech of State Senator Donald J. Hanaway, cosponsor of 1983 Senate Substitute Amendment l to Assembly Bill 200, which ultimately became the Act. It illustrates the importance and purpose of the Act's unique credit provisions:

> A non-uniform section [not included in UMPA] that has already been mentioned [is] the credit provisions. There is an argument as to whether or not the uniform law [UMPA] really does extend access to credit and get into the credit area. So that there was no question about our attitude about this problem in Wisconsin, we wanted to make it very clear in this bill that there was going to be access to credit for *all* spouses, and that's why we included the credit provisions. It provides access, it requires creditors to consider the creditworthiness of both spouses, and the creditors, as indicated before, are fully protected.

See also Adelman et al., *supra* § 5.19, at 394.

V. Procedures in Creditor-Applicant Transactions [§ 5.61]

A. In General [§ 5.62]

Sections 5.63–.71, *infra*, set forth the procedures under section 766.56 that govern relationships between creditors and married persons, when a married person applies for credit based on marital property and the credit results in a family-purpose obligation.

B. Inquiry as to Marital Status and Marital Property Agreements [§ 5.63]

A creditor may inquire as to the marital status of the applicant. Wis. Stat. § 766.56(2)(d). The ECOA also permits such an inquiry as long as it is intended to ascertain rights and remedies and not to discriminate in granting credit. 15 U.S.C. § 1691(b)(1). Further, in Wisconsin Consumer Act credit transactions, the creditor must give written notice to the nonapplicant spouse of the extension of credit. Wis. Stat. § 766.56(3)(b); *see infra* § 5.70. Accordingly, asking for the nonapplicant spouse's name and address would be necessary if information concerning marital status is not volunteered.

If the applicant is married, the creditor also may ask whether a marital property agreement exists, since such an inquiry is relevant to a determination of the extent of marital property available to satisfy the obligation and since there is no provision prohibiting such an inquiry. However, creditors are no longer *required* to inquire about the existence of a marital property agreement, as they were under the Act as originally adopted. *See* Wis. Stat. § 766.56(2)(b) (1983–84) (repealed and recreated by 1985 Trailer Bill). As noted in section 5.36, *supra*, the creditor is bound by the provisions of a marital property agreement if a copy is furnished by the applicant before the credit is granted. Wis. Stat. § 766.56(2)(c).

C. Effect of Marital Property Agreements, Unilateral Statements, and Court Decrees [§ 5.64]

In Wisconsin Consumer Act transactions involving spouses, section 766.56(2)(b) requires the creditor to include a notice to the applicant in every written credit application. The notice must state that no provision of a marital property agreement, a unilateral statement electing to treat income on nonmarital property as individual property, or a court decree under the remedy provisions of the Act adversely affects the interest of the creditor unless the creditor, before granting the credit, is furnished a copy of the agreement, statement, or decree or has actual knowledge of the adverse provision when the obligation to the creditor is incurred. Wis. Stat. § 766.56(2)(b). Accordingly, in Consumer Act transactions, the applicant is alerted to the fact that provisions of such documents will not be binding on the creditor unless a copy of the relevant document is

given to the creditor (or the debtor can establish that the creditor had actual knowledge of the adverse provision) before the credit is granted. In credit transactions not governed by the Consumer Act, the creditor is not required to include a notice as to the effect of such agreements or decrees.

With respect to credit generally (i.e., not limited to Consumer Act transactions or credit transactions with a creditor who regularly extends credit), the Act provides that if the applicant discloses the existence of a marital property agreement or decree and provides a copy to the creditor before credit is granted (or, in the case of an open-end plan, before the plan is entered into), the creditor is bound by any property classification, characterization of an obligation, or management and control right contained in the document. Wis. Stat. § 766.56(2)(c); *see supra* §§ 5.45–.50 (definitions of credit and creditor).

If the disclosure of the marital property agreement, unilateral statement, or decree is made after the credit is granted (or after an open-end plan is entered into), the creditor is not bound by the provisions of the document with respect to that obligation (or plan), including any renewals, extensions, or modifications of the obligation or use of the plan. Wis. Stat. § 766.56(2)(c). Also, in credit transactions with spouses, the recording of a marital property agreement or a unilateral statement (or its revocation) with respect to income on nonmarital property does not constitute actual or constructive notice to third parties, except with respect to the application of chapter 706 regarding conveyancing. Wis. Stat. § 766.56(2)(a); *see supra* § 5.36.

➢ ***Note.*** With respect to the right of the nonapplicant spouse to terminate a Consumer Act open-end credit plan that may result in a family-purpose obligation, see sections 5.72–.75, *infra*. This right may be a significant remedy for the nonapplicant spouse if the applicant spouse fails to timely disclose to the creditor a marital property agreement, statement, or decree and the failure adversely affects the interests of the nonapplicant spouse.

➢ ***Practice Tip.*** The above provisions relating to the effects of undisclosed marital property agreements, unilateral statements, or court decrees are for the protection of the creditor. Accordingly, although there is no specific statutory provision, the creditor should be able to waive these provisions by agreeing to be bound by the

particular document after disclosure. The effect of such a waiver would be analogous to the binding effect of a written consent under section 766.55(4), signed by a creditor, that diminishes the creditor's rights provided in section 766.55 (obligations of spouses).

D. Predetermination Date Open-end Plans [§ 5.65]

1. In General [§ 5.66]

The Act contains a special section, section 766.555, relating to open-end plans that were established by one spouse before the spouses' determination date. Such plans are sometimes called *straddle accounts*. The purpose of section 766.555 is to clarify what property is available for satisfaction of family-purpose obligations incurred after the determination date by a spouse under such a plan. *See* Wis. Stat. Ann. § 766.555 Legis. Council Notes—1985 Act 37, § 99 (West 2009). Section 766.555(1)(a) defines an *open-end plan* as credit extended on an account pursuant to a plan that permits a spouse to make purchases or obtain loans directly from the creditor, or indirectly from the creditor by use of a credit card, check, or other device. Section 766.555 applies only to those plans for which only one of the spouses is a party to the account. Wis. Stat. § 766.555(1)(b).

Section 766.555 provides one set of provisions for spouses whose determination date is 12:01 a.m. on January 1, 1986, and another set for persons whose determination date is after 12:01 a.m. on January 1, 1986, discussed in sections 5.67 and 5.68, *infra*, respectively.

2. Spouses' Determination Date Is January 1, 1986 [§ 5.67]

With respect to pre-Act open-end plans (i.e., when the spouses' determination date is January 1, 1986), an obligation incurred on or after January 1, 1986, under the plan by the spouse who entered into the plan—whether or not the obligation is a family-purpose obligation—may be satisfied only from

1. Nonmarital property of that spouse; and

2. That part of marital property that would have been the property of that spouse except for the enactment of the Marital Property Act.

Wis. Stat. § 766.555(2)(b). That is, obligations under pre-Act plans are treated in the same way as pre-Act obligations. *See* Wis. Stat. § 766.55(2)(c)2. However, before the date that such a family-purpose obligation is incurred, the creditor may give written notice to both spouses describing the nature of the plan and stating that a family-purpose obligation incurred under the plan may be satisfied from *all* marital property of the spouses, including the income of both, and from the property of the incurring spouse that is not marital property. *See* Wis. Stat. § 766.555(2)(c)1., 2. Then, the obligation may be satisfied from all marital property of the spouses, in addition to the above-described property of the spouse who entered into the plan. *Id.*

The written notice described above is considered given on the date that the creditor mails it. Wis. Stat. § 766.555(2)(c)3. It may be enclosed in an envelope addressed to the incurring spouse at his or her last-known address, if a statement appears on the face of the envelope that alerts both spouses that the envelope contains important information for both of them. Wis. Stat. § 766.555(2)(c)4.

3. Spouses' Determination Date Is After January 1, 1986 [§ 5.68]

As noted in section 5.67, *supra*, pre-Act open-end plans are subject to a special notice provision enabling a creditor who complies with the provision to reach all marital property of the spouses, in addition to the incurring spouse's nonmarital property and that part of marital property that would have been the incurring spouse's property but for the enactment of the Act. *See* Wis. Stat. § 766.555(2)(c)1., 2. There is no corresponding notice provision for predetermination date open-end plans of persons who marry after January 1, 1986, or of spouses who become domiciled in Wisconsin after January 1, 1986 (i.e., when the spouses' determination date is *after* January 1, 1986). A notice requirement was not included because "there is no practical way for a creditor to routinely give such a notice under the circumstances addressed by [these statutory provisions]." Wis. Stat. Ann. § 766.555 Legis. Council Notes—1985 Act 37, § 99 (West 2009). However, notwithstanding the lack of a notice provision, a family-purpose obligation incurred after the determination date under such a predetermination date open-end plan may be satisfied

from all marital property and all other property of the incurring spouse. Wis. Stat. § 766.555(3)(c). This is consistent with the general rule governing family-purpose obligations. *See* Wis. Stat. § 766.55(2)(b). On the other hand, a *non*family-purpose obligation incurred after the determination date under such a predetermination date open-end plan may be satisfied only from nonmarital property of that spouse and from that part of marital property that would have been the property of that spouse but for the enactment of the Act. *See* Wis. Stat. § 766.555(3)(b). This is consistent with the general rule governing pre-Act obligations incurred by a spouse. *See* Wis. Stat. § 766.55(2)(c)2.

4. Conclusion [§ 5.69]

The difference between predetermination date open-end plans for spouses whose determination date is January 1, 1986, and predetermination date plans for spouses whose determination date is after January 1, 1986, is that in the former case, family-purpose obligations cannot be satisfied from all marital property unless the notice described in section 766.555(2)(c)2. is given to both spouses. *See* Wis. Stat. § 766.555(2)(c)1.

E. Notice to Nonapplicant Spouse of Extension of Credit to Applicant Spouse [§ 5.70]

When a creditor extends credit to a spouse in a Consumer Act transaction and the extension of credit may result in a family-purpose obligation, section 766.56(3)(b) requires the creditor to give notice to the nonapplicant spouse (sometimes referred to as the tattletale notice) before any payment is due. This notice requirement applies to an extension of credit under a postdetermination date open-end credit plan, as defined in the Wisconsin Consumer Act, *see* Wis. Stat. § 421.301(27); it also applies to Consumer Act credit other than open-end credit extended after the determination date. Wis. Stat. § 766.56(3)(a). But the notice requirement does not extend to renewals, extensions, modifications, or the use of an open-end plan. *Id.* Predetermination date open-end credit plans are governed by section 766.555. *See supra* §§ 5.65–.69.

A creditor may satisfy the notice requirement by providing a copy of the document evidencing the obligation or any required credit disclosure

that is given to the applicant spouse or by providing a separate written description of the nature of the credit extended. Wis. Stat. § 766.56(3)(b). The notice is considered given on the date it is mailed to the address of the nonapplicant spouse provided by the applicant spouse. If the applicant informs the creditor that the spouses reside at the same address, the notice may be enclosed in an envelope addressed to the nonapplicant spouse or both spouses. *Id.* Notice is also deemed given if the nonapplicant spouse has actual knowledge of the credit extension or waives the notice requirement in writing. Wis. Stat. § 766.56(3)(c).

➢ ***Comment.*** The notice requirement under section 766.56(3)(b) refers to an extension of credit that "may result in" a family-purpose obligation. Thus, the requirement covers a line of credit, such as the creation of a charge account or issuance of a credit card, that may or may not be used for a family-purpose obligation. It is arguable that, for example, on issuance of a credit card that may be used for a family purpose, the creditor may reach all marital property assets under section 766.55(2)(b) even if a particular charge—or, indeed, all charges—made on the card were not incurred in the interest of the marriage or the family. *See infra* ch. 6; *see also supra* § 5.42, *infra* § 5.71 (effect of separate written statement relating to family purpose under section 766.55(1)).

The Marital Property Act added section 427.104(2) to the Consumer Act to provide that if notice is given under section 766.56(3)(b), sending a billing statement or other notice of account to the spouse of the debtor or collecting the amount due on the account from the spouse of the debtor does not in itself constitute a prohibited practice under section 427.104. *See infra* § 6.69 (general relationship between Marital Property Act and Wisconsin Consumer Act); *see also infra* §§ 5.72–.75.

Other than the $25 liability provided under section 766.56(4)(b) for failure to give the notice to the nonapplicant, *see supra* § 5.57, section 766.56 does not specifically state any consequences of providing or failing to provide the notice. In *Park Bank-West v. Mueller*, 151 Wis. 2d 476, 444 N.W.2d 754 (Ct. App. 1989), the court held that a creditor's rights were not affected by the creditor's failure to give the "tattletale notice" to the nonincurring spouse under section 766.56(3)(b). In pointing out that the only penalty was a $25 liability provided in section 766.56(4)(b), the court concluded that the notice was informational only and that the legislature had not intended that a creditor's right to reach marital property assets be limited by its failure to give notice. *Id.* at 484.

The court criticized this result because of its adverse effect on the spouse who does not receive the notice and suggested that the legislature reevaluate the effect of section 766.56(4)(b). *Id.* at 484–85.

➢ ***Practice Tip.*** As a practical matter, particularly when significant Consumer Act credit is involved and marital property is relied on because the applicant spouse's nonmarital property is insufficient to support the credit, it may be in the creditor's interest to mail full information under section 766.56(3)(b) to the nonapplicant spouse, including copies of the application, all other credit documents, a listing of all property relied on, and the asserted classification of that property. However, a creditor who gives the above notice probably will not estop the nonapplicant spouse from contending that the property asserted by the applicant spouse to be marital property was in fact the nonapplicant's individual or predetermination date property.

F. Conclusiveness of Family-purpose Statement [§ 5.71]

Under section 766.55(1), if an obligated or incurring spouse signs a statement at or before the time an obligation is incurred, stating that the obligation is or will be incurred in the interest of the marriage or the family, the obligation will be considered a family-purpose obligation. The statement is "conclusive evidence that the obligation to which the statement refers is an obligation in the interest of the marriage or family" with respect to the rights of the creditor, regardless of the actual use of the credit. Wis. Stat. § 766.55(1). The statement does not, however, affect any interspousal right or remedy. *Id.*

It should be noted that the family-purpose statement under section 766.55(1) applies to any "obligation." It is not limited to Consumer Act credit or credit transactions with a creditor who regularly extends credit. Such a separate statement signed by the spouse who is obtaining credit or incurring an obligation will be sufficient to protect the creditor or obligee from any later assertion by either spouse that the obligation was not for a family purpose. Accordingly, the creditor is assured of being able to reach all marital property to satisfy the obligation, provided the statement is signed at or before the time the obligation is incurred.

➢ ***Historical Note.*** The Marital Property Act as originally adopted lacked any provision for a family-purpose statement. Thus, a creditor relying on marital property in extending credit took the risk that the obligation being incurred would not be found to be a family-purpose obligation. Either or both spouses appeared to be free to contest a creditor's assertion that the obligation was incurred for a family purpose and hence might contend that the creditor could not reach all marital property. To remedy this, the 1985 Trailer Bill amended section 766.55(1) to provide for the family-purpose statement.

VI. Relationship of Marital Property Act to Consumer Act and Other Laws [§ 5.72]

A. Consumer Act [§ 5.73]

Section 766.565 attempts to harmonize a number of the provisions of the Consumer Act with the Marital Property Act. These harmonizing provisions include the following:

1. Section 766.565(3) provides that the spouse of a person who incurs a family-purpose obligation that is governed by the Consumer Act may exercise the rights and remedies that are available to the incurring spouse under the Consumer Act.

2. Section 766.565(5) provides that the spouse of a person who establishes an open-end credit plan governed by the Consumer Act that may result in a family-purpose obligation may terminate the plan (with consequences provided in the statute) by giving written notice of termination to the creditor. *See infra* § 5.74 (relationship between unilateral termination provision of section 766.565(5) and ECOA and Regulation B). An open-end plan may include a provision authorizing the creditor to declare the account balance due and payable on receipt of notice of termination. Wis. Stat. § 766.565(5).

3. Section 766.565(6) provides that written notice to a spouse under the Consumer Act concerning an increase in the finance-charge rate is not effective with respect to the interest of the nonincurring spouse in marital property unless notice of the increase is given to both spouses.

B. Equal Credit Opportunity Act [§ 5.74]

In 1986, the Federal Reserve Board (FRB) issued a notice of intent to make a preemption determination regarding certain provisions of the Marital Property Act, including section 766.565(5), discussed in section 5.73, *supra*. *See* Equal Credit Opportunity; Intent to Preempt Wisconsin Law, 51 Fed. Reg. 35,521 (1986). In the notice, the FRB published for comment a proposed determination that the unilateral-termination provision of section 766.565(5) is inconsistent with, and therefore preempted by, the ECOA and Regulation B. The FRB viewed the practical effect of section 766.565(5) as nullifying a married applicant's right to obtain individual credit, contrary to section 202.7(a) of Regulation B, which prohibits creditors from refusing to grant an individual account to a creditworthy applicant on the basis of marital status. *See* 12 C.F.R. § 202.7(a).

In its decision, effective November 1, 1987, the FRB ultimately determined not to preempt the specified provisions of the Wisconsin Marital Property Act. 52 Fed. Reg. 35,537 (1987), *reprinted* in 73 Fed. Reserve Bull. 869 (Nov. 1987). The FRB further concluded that Wisconsin is a community property state for Regulation B purposes and that specified sections of the Wisconsin Statutes are not preempted by Regulation B.

The FRB stated that although a clear inconsistency exists between section 766.565(5) and the Regulation B provision prohibiting discrimination based on marital status, *see* 12 C.F.R. § 202.7(a), section 766.565(5) is entitled to deference under the ECOA provision stating that consideration or application of state laws directly or indirectly affecting creditworthiness does not constitute discrimination, 15 U.S.C. § 1691d(b). The FRB thus decided not to preempt section 766.565(5), based on the ECOA and Regulation B provisions allowing a creditor to take into account state property law affecting creditworthiness. *See* 15 U.S.C. § 1691d(b); 12 C.F.R. § 202.6(c).

The FRB also examined section 766.56(2)(d) and concluded that the statutory language allowing a creditor to ask whether a credit applicant is "married, unmarried or separated, [or] under a decree of legal separation" is not mandatory and only clarifies the nature of the inquiry permissible by a creditor when a person applies for credit. The FRB decided that inquiries involving the applicant's marital status under subsections 766.56(2)(d) and (3)(b), as well as the required name and address of the

applicant's spouse under section 766.56(3)(b), do not conflict with the ECOA or Regulation B. *See also supra* §§ 5.63 (inquiry as to marital status), 5.70 (notice to nonapplicant spouse), *infra* §§ 5.80, .91–.96 (applicability of ECOA and conclusion that Wisconsin is community property state for purposes of ECOA).

C. Truth in Lending Act [§ 5.75]

Questions have been raised about whether the application of section 766.565(5), discussed in section 5.73, *supra*, violates the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1667f, or Regulation Z (Truth in Lending), 12 C.F.R. pt. 226. Specifically, the question arises whether an open-end plan that includes a provision under section 766.565(5) permitting the creditor to declare the balance due on receipt of notice of termination by the nonincurring spouse violates either the TILA or Regulation Z.

Under Regulation Z, a creditor must make certain written disclosures to the consumer regarding the terms and conditions of open-end credit and home-equity plans. *See* 12 C.F.R. § 226.5. For example, for home-equity plans, the statement to the consumer must include the conditions under which the creditor may terminate credit and demand full payment. 12 C.F.R. § 226.5b(d)(4). No such creditor under a home-equity plan, by contract or otherwise, may so terminate and demand full payment except for the consumer's fraud or misrepresentation, failure to meet repayment terms, or action or inaction that has adversely affected the creditor's security or the creditor's rights in the security. 12 C.F.R. § 226.5b(f)(2)(i)-(iii). These regulations were adopted by the FRB effective June 7, 1989, and compliance became mandatory as of November 7, 1989. Truth in Lending; Home Equity Disclosure and Substantive Rules, 54 Fed. Reg. 24,670 (1989). Federal law dealing with credit extended by a depository institution to its executive officers specifically requires that as a condition of the plan the credit becomes due and payable on demand, provided that the creditor includes such a provision in the initial agreement. 12 C.F.R. § 226.5b(f)(2)(iv).

Note that the exceptions listed above, which permit the creditor under a home-equity plan to accelerate payment, do not include third-party actions such as the consumer's spouse's termination of the plan under section 766.565(5). The question arises whether a creditor under a home-equity plan (and possibly in other situations governed by

Regulation Z) may include a provision authorizing the creditor to accelerate the balance of an open-end plan after receiving notice of termination by the nonincurring spouse. The FRB considered this issue and published notice of its intent to make a preemptive determination that such a provision in a home-equity plan conflicts with the TILA and the applicable provisions of Regulation Z, *see* 12 C.F.R. § 226.5b(f)(2). Truth in Lending; Intent to Make Determination of Effect on State Law; Wisconsin, 55 Fed. Reg. 13,282 (1990).

In another decision, effective October 1, 1991, the FRB determined that the portion of section 766.565(5) that permits a creditor to include in an open-end home equity plan agreement a provision authorizing the creditor to accelerate the balance due after receiving notice of termination from the nonobligated spouse is inconsistent with the purposes of federal law, *see* 12 C.F.R. § 226.5b(f)(2), and therefore is preempted by federal law. Truth in Lending; Determination of Effect on State Law (Wisconsin), 55 Fed. Reg. 31,815 (1990). But in the same decision, the FRB ruled that valid reasons exist for *not* preempting the portion of section 766.565(5) that permits the nonobligated spouse to terminate the plan. These include an interest in protecting the nonobligated spouse's marital property rights (by deeming the spouse a "consumer" for purposes of terminating the plan) and the precedent for considering a nonobligated person (who has an ownership interest in an asset that secures the plan) a "consumer" who can terminate the plan. The FRB found no similar basis for permitting a creditor to accelerate the balance, since that would "interfere with the operation of the federal scheme" that restricts creditors' actions. *Id.* at 31,816. These federal provisions were designed to protect the borrower from such an adverse result except in limited circumstances provided in Regulation Z. *See* 12 C.F.R. § 226.5b(f)(2).

The above preemptive determination is now reflected in the official staff commentary on Regulation Z. *See* 12 C.F.R. pt. 226, Supp. I cmt. 28(a)-15. One result of the determination may be illustrated by the following example.

- ***Example.*** Assume that a husband established a line of credit under an open-end plan covered by the TILA, secured by the spouses' dwelling, but that the husband was the only spouse obligated under the plan. Assume also that the plan permitted the creditor to accelerate the balance due after receiving notice from the nonobligated spouse terminating the plan under section 766.565(5).

If the wife gives such notice, it would appear that the plan has been terminated as to the husband's right to obtain future advances under the plan, but that the creditor may not accelerate payment of the debt then outstanding under the plan. It would appear that the outstanding balance would continue to be payable in installments as if the plan had not been terminated.

➢ ***Note.*** As issued, the above determination applies only to open-end plans secured by a consumer's dwelling, covered by the TILA. Previously, the FRB had determined that no part of section 766.565(5) was preempted by the ECOA and Regulation B. Equal Credit Opportunity; Determination of Effect of State Laws (Wisconsin). 52 Fed. Reg. 35,537 (1987); *see supra* § 5.74. However, as discussed above, the portion of section 766.565(5) permitting acceleration under a home-equity plan after receipt of a termination notice covered by the TILA has been determined to be preempted by that Act and Regulation Z.

Regulation Z applies if credit is primarily for family, personal, or household purposes. 12 C.F.R. § 226.1(c)(1)(iv). Credit for a business, commercial, agricultural, or organizational purpose is exempt. 12 C.F.R. § 226.3(a)(1). However, obligations incurred for a "business purpose" and those incurred "in the interest of the marriage or the family" are not necessarily mutually exclusive. A spouse who guarantees an obligation of a corporation in which he or she works has a business purpose in signing the guarantee; yet the obligation under the guarantee is in the interest of the guarantor's marriage or family. The guarantee may enable the corporation to obtain a loan that will enable its business to continue, thereby supporting the guarantor and his or her family. A business-purpose credit includes a loan to expand a business, even if it is secured by the borrower's residence or personal property. 12 C.F.R. pt. 226, Supp. I cmt. 3(a)-2.

As noted in section 5.71, *supra*, a family-purpose statement under section 766.55(1) is considered "conclusive evidence" that the obligation in question is an obligation in the interest of the marriage or family. However, a family-purpose statement is intended only to expand the property available to creditors, not to eliminate the business-purpose exception of Regulation Z. The primary purpose of an underlying loan must be examined to determine whether a transaction is subject to Regulation Z and the federal Truth in Lending Act. In *Poe v. First National Bank*, 597 F.2d 895 (5th Cir. 1979), for example, a

corporation's principal shareholder and his wife signed guarantees and pledged the family home as security for various notes evidencing loans to the corporation. The court stated that

> The Truth-in-Lending Act specifically exempts from its scope extensions of credit for business or commercial purposes. As to consumer credit transactions, the Act provides that the adjective "consumer" is specifically intended to characterize the transaction as one in which the party to whom credit is extended is a natural person and the money is primarily for personal, family, household, or agricultural purposes . . . . The courts will look to the purpose of the loan to determine whether it is covered by the Act. In the instant case, there is no question that the purpose of each transaction was to finance the corporation. The transactions, therefore, were exempted from the Act.

Id. at 896 (citations omitted); *see also Toy Nat'l Bank v. McGarr*, 286 N.W.2d 376, 378 (Iowa 1979) (holding that "not every loan transaction which results in a security interest in the debtor's residence is subject to this statutory right of rescission [found in the TILA]. The transaction must be otherwise subject to the Act, i.e., it must be a consumer loan rather than a business or commercial one.").

VII. Effect of Equal Credit Opportunity Act on Credit Transactions Under Wisconsin Marital Property Act [§ 5.76]

A. ECOA in General [§ 5.77]

In the early 1970s, the National Commission on Consumer Finance reported evidence of widespread discrimination against women in the credit industry. For example, women were at times required to answer questions on credit application forms that addressed age, sex, race, religion, birth-control practices, and childbearing intentions. Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 Wis. L. Rev. 655, 656. Seeking to protect married women from discriminatory credit practices that prohibited them from establishing individual credit, Congress passed the ECOA in 1974 and expanded it in 1976. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified at 15 U.S.C. §§ 1691–1691f), *amended by* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251. The ECOA is Title VII of the Consumer Credit Protection

Act. The Consumer Credit Protection Act originally consisted of five titles and was adopted in 1968 (and mainly imposed standard disclosure requirements on transactions covered by that act). *See* Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified at 15 U.S.C. §§ 1601–1693r). The Fair Credit Reporting Act (FCRA) was added as Title VI of the Consumer Credit Protection Act in 1970. *See* Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified at 15 U.S.C. §§ 1681–1681u); *see also infra* § 5.82.

The ECOA prohibits discrimination at all stages of a credit transaction, including any extensions of credit to individuals, small businesses, partnerships, trusts, or corporations; credit investigations, creditworthiness standards, signature requirements, and credit reporting; and collection of debts. The prohibitions against discrimination are not limited to banks and financial institutions under the ECOA. The ECOA differs from other areas of the Consumer Credit Protection Act in that it applies to business and commercial transactions and to any individual who regularly extends credit. *See infra* § 5.79 (definitions of creditor and person under ECOA).

The burden of proof in an ECOA case is similar to that in any other type of discrimination case. *See Cragin v. First Fed. Savs. & Loan Ass'n*, 498 F. Supp. 379, 384 (D. Nev. 1980). If a claimant makes out a prima facie case by showing that the party is a member of a class protected by the law preventing discrimination, the burden shifts to the creditor to establish a nondiscriminatory basis for its actions. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

B. General Applicability of ECOA [§ 5.78]

1. Introduction [§ 5.79]

In a community property state, as in a common-law property state, a number of questions about the granting of credit by commercial lenders to married persons are governed by the ECOA. (Wisconsin is a community property state for purposes of the ECOA. *See infra* §§ 5.87–.90.) The ECOA, which became effective on October 28, 1975, applies to creditors who regularly extend, renew, or continue consumer credit. The ECOA defines the term *creditor* as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of

an original creditor who participates in the decision to extend, renew, or continue credit." 15 U.S.C. § 1691a(e). The term *person* as used in the ECOA is also broadly defined. *See* 15 U.S.C. § 1691a(f) (defining person as "a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association").

The purpose of the ECOA is "to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status." Pub. L. No. 93-495, tit. V, § 502, 88 Stat. 1521 (1974) (codified at 15 U.S.C. § 1691 note). This purpose is carried out by prohibiting discrimination by any creditor with regard to any aspect of a credit transaction on the basis of prohibited factors, including sex and marital status. The ECOA provides as follows:

> (a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
> (1) on the basis of … sex or marital status … ;
> (b) It shall not constitute discrimination for purposes of this subchapter for a creditor—
> (2) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness.…

15 U.S.C. § 1691(a), (b). To *discriminate* against a credit applicant is defined in Regulation B as meaning "to treat an applicant less favorably than other applicants." 12 C.F.R. § 202.2(n). This means to treat an applicant less favorably than others similarly situated, on the basis of an impermissible factor.

The FRB is broadly directed to prescribe regulations "to carry out the purposes" of the ECOA. 15 U.S.C. § 1691b(a)(1). The FRB is also authorized to exempt transactions that are not "primarily for personal, family, or household purposes." 15 U.S.C. § 1691b(a)(2). However, administrative enforcement of the ECOA with respect to various categories of creditors is diffused among various agencies, such as the Comptroller of the Currency, the FRB, and the Securities and Exchange Commission. *See* 15 U.S.C. § 1691c(a). When the ECOA does not specifically commit enforcement to a particular federal agency (as is the case with consumer-finance companies), the Federal Trade Commission (FTC) is charged with enforcing the ECOA's requirements; the FTC is

empowered to enforce any board regulation under the ECOA as if the violation had been a violation of an FTC trade-regulation rule. 15 U.S.C. § 1691c(c).

Penalties imposed on creditors who violate the ECOA include recovery in federal court of actual damages (including recovery by class action) and punitive damages (including class-action punitive damages). Costs of the action and reasonable attorney fees are to be added to damages awarded. 15 U.S.C. § 1691e(d); *see also Anderson v. United Fin. Co.*, 666 F.2d 1274 (9th Cir. 1982) (discussing actual and punitive damages and attorney fees recoverable under ECOA).

There is a two-year statute of limitation on actions for relief under the ECOA seeking damages, attorney fees, and costs. 15 U.S.C. § 1691e(f). No such statute of limitation exists for defensive assertions of the ECOA to block a lender's attempt to enforce a credit instrument. *See, e.g.*, *Silverman v. Eastrich Multiple Inv. Fund, L.P.*, 51 F.3d 28, 32 (3d Cir. 1995) (holding that "[c]laims by way of recoupment are 'never barred by the statute of limitations … '") (quoting *Bull v. United States*, 295 U.S. 247, 262 (1935)).

Section 425.307(1) sets forth the statute of limitation for actions brought under the Wisconsin Consumer Act. A customer must generally bring an action to enforce rights under chapters 421–427 within (1) one year after the date of the last violation, (2) two years after the consummation of the agreement, or (3) one year after the last payment is made, whichever is later. Wis. Stat. § 425.307(1). Actions with respect to transactions under open-end credit plans must be commenced within two years after the date of the last violation. No action under the Wisconsin Consumer Act may be commenced more than six years after the date of the last violation. *Id.*

2. General Relationship Between State Law and ECOA [§ 5.80]

To ensure the availability of community property or income to satisfy credit obligations, many creditors in community property states have taken the position that before granting the applicant spouse's request for credit, the credit grantor is justified in requesting the signature of the nonapplicant spouse on the credit application and the credit instruments involved. *See* Loeb, *supra* § 5.42; Brown, *supra* § 5.42. The effect of

the nonapplicant spouse's signature, of course, is to create personal liability on the part of that spouse; hence, the creditor can also reach that spouse's noncommunity property assets (i.e., separate property of that spouse).

➢ ***Note.*** When considering ECOA enforcement and cases from other states, one should be aware that the laws of the other community property states vary and may not include the broad provisions contained in the Wisconsin Marital Property Act regarding management and control, property classification, family-purpose obligations, and assets available to satisfy obligations.

Provisions of the ECOA itself bear directly on the effect of state law on the ECOA. First, a request for signatures of both spouses for the purpose of creating a valid lien, passing clear title, or assigning earnings does not constitute discrimination under the ECOA as long as sex or marital status is not taken into account in evaluating creditworthiness. 15 U.S.C.§ 1691d(a). Second, considering or applying state property laws affecting creditworthiness does not constitute discrimination under the ECOA. 15 U.S.C. § 1691d(b).

3. Information Requested on Credit Applications [§ 5.81]

Under Regulation B, a creditor may request information concerning an applicant's spouse if (1) the spouse will be permitted to use the account, (2) the spouse will be contractually liable on the account, (3) the applicant is relying on the spouse's income as a basis for repayment of the requested credit, (4) the applicant resides in a community property state, or (5) property relied on as a basis for repayment is located in a community property state. 12 C.F.R. § 202.5(c)(2). If an applicant applies for an individual unsecured account and resides in a community property state (or if property relied on as a basis for repayment is located in such a state), a creditor may request information concerning the applicant's marital status. 12 C.F.R. § 202.5(d)(1).

4. Credit Reports Concerning Nonapplicant Spouse [§ 5.82]

Implicit in Regulation B is an assumption that, in a community property state, in addition to requesting information from the applicant spouse concerning the nonapplicant spouse, the creditor may consider the nonapplicant spouse's credit history and obtain credit information from other sources. This follows, since the creditor has a legitimate business need for the information, and thus meets the requirements of the FCRA. *See* 15 U.S.C. § 1681b(a)(3)(F) ("any consumer reporting agency may furnish a consumer report … [t]o a person which it has reason to believe … has a legitimate business need for the information … in connection with a business transaction that is initiated by the consumer").

In general, the FCRA regulates organizations that are in the business of supplying credit information. The general purposes of the FCRA are to protect the credit reputation of a consumer and to prevent the dissemination of inaccurate credit information concerning consumers. The FTC has issued unofficial staff interpretations of the provisions of the FCRA, consistent with its responsibility when applying both the ECOA and the FCRA to review and regulate commercial activity it concludes is unfair or deceptive.

An FTC unofficial staff interpretation dated May 29, 1976, concerning the FCRA took the position that a credit grantor has a "legitimate need" for the credit report of a nonapplicant spouse when the applicant relies on community property to qualify for credit. *See* L. Goldfarb, Div. of Special Statutes, FTC Unofficial Staff Interpretation (Mar. 29, 1976). The rationale of the opinion is that the credit extension "involves" the nonapplicant spouse because the extension entails pledging (or relying on) the resources of both spouses (i.e., the community property). *Id.*

There is a question whether a spouse in a community property state where each spouse has an equal right to manage and control community assets has a right to obtain a credit report concerning his or her spouse. Under the FCRA, the spouse arguably has a legitimate business need for the information, to the extent that the information requested concerns assets that constitute community property. *See Fernandez v. Retail Credit Co.*, 349 F. Supp. 652, 654–55 (E.D. La. 1972) (interpreting 15 U.S.C. § 1681b(3)(F) and holding that "legitimate business need[s] … in

connection with a business transaction" related to needs and objectives of person to whom report is furnished, rather than to business needs of subject of report). This interpretation, if correct, places a practical burden on the credit agency to determine what assets constitute community property, because there would be no "legitimate need" to know information concerning the nonapplicant spouse's separate property. However, in Wisconsin, this burden should be eased by the presumption that all assets of spouses are marital property. *See* Wis. Stat. § 766.31(2). Further, in Wisconsin, it appears that credit information concerning the other spouse "involves" the applicant spouse, since credit actions of the other spouse affect the spouses' marital property on which the applicant spouse may be relying.

In addition to the above considerations, Regulation B states that it does not limit or abridge any federal or state law regarding privacy or privileged information. *See* 12 C.F.R. § 202.5 n.1.

The issuance of an erroneous credit report regarding one spouse may form the basis of a claim by the other spouse under the FCRA if the other spouse's ability to obtain credit is adversely affected. *See Williams v. Equifax Credit Info. Servs.*, 892 F. Supp. 951 (E.D. Mich. 1995) (holding that wife had standing to sue under FCRA because erroneous credit information about husband impaired wife's own ability to secure credit on jointly owned property).

5. Evaluation of Applicant's Credit [§ 5.83]

Under Regulation B's general rule on evaluating creditworthiness, a creditor may consider any information that the creditor obtains, except as otherwise provided in the ECOA or Regulation B, as long as the information is not used to discriminate against the applicant on a prohibited basis. 12 C.F.R. § 202.6(a). Regulation B states that, except as provided in the ECOA and Regulation B, a creditor "shall not take a prohibited basis into account in any system of evaluating the creditworthiness of applicants." 12 C.F.R. § 202.6(b)(1). A creditor may, however, consider an applicant's marital status "for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit." 12 C.F.R. pt. 202, Supp. I cmt. 6(b)(8)-1. In addition, a creditor must not discount or exclude from consideration income of the applicant or the applicant's spouse because of a prohibited basis; a creditor may consider "the amount and probable continuance of

any income in evaluating an applicant's creditworthiness." 12 C.F.R. § 202.6(b)(5). Finally, a creditor's consideration or application of state property laws affecting creditworthiness does not constitute unlawful discrimination for the purposes of the ECOA or Regulation B. 12 C.F.R. § 202.6(c); 15 U.S.C. § 1691d(b).

In evaluating credit, to the extent that a creditor considers credit history, the creditor is specifically authorized by Regulation B to consider the credit history of accounts that either spouse is permitted to use or for which both are liable. 12 C.F.R. § 202.6(b)(6)(i). In addition, to the extent that the creditor considers credit history, on the applicant's request the creditor must consider the credit history of any account in the name of the nonapplicant spouse "that the applicant can demonstrate accurately reflects the applicant's creditworthiness." 12 C.F.R. § 202.6(b)(6)(iii).

6. Spousal Signature Requirements [§ 5.84]

a. Unsecured Credit [§ 5.85]

Except as otherwise provided in section 202.7(d) of Regulation B, a creditor may not require the signature of an applicant's spouse (unless it is a joint application) on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the credit requested. 12 C.F.R. § 202.7(d)(1). This regulation was judicially recognized and enforced in *Anderson v. United Finance Co.*, 666 F.2d 1274 (9th Cir. 1982) (common-law-state transaction). Although the applicant in *Anderson* who requested credit in her sole name was found creditworthy by the creditor, the creditor required the applicant's spouse to sign the promissory note (in addition to the necessary security instrument to perfect a valid lien against property offered as security). In holding for the applicant, the court stated that this was not simply a technical violation, but rather it was "just the type of discrimination which the [Equal Credit Protection] Act was created to prohibit." *Id.* at 1276.

If the credit is unsecured and the applicant relies in part on property to establish creditworthiness, the creditor may consider state law; the form of ownership of the property; the property's susceptibility to attachment, execution, severance, or partition; and other factors that may affect the value to the creditor of the applicant's interest in the property. *See* 12

C.F.R. pt. 202, Supp. I cmt. 7(d)(2)-1, -2. However, if an applicant for unsecured credit resides in a community property state, the creditor may require the nonapplicant spouse's signature on an instrument necessary to make the community property available to satisfy the debt only if state law *denies* the applicant spouse power to manage or control sufficient community property to qualify for the credit requested and if the applicant's separate property is insufficient. 12 C.F.R. § 202.7(d)(3); *see also infra* §§ 5.87–.90.

With respect to a cosigner of credit applications and credit instruments, Regulation B is specific. A cosigner or guarantor may be requested only "[i]f, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the extension of the credit requested." 12 C.F.R. § 202.7(d)(5). A creditor is not permitted to require that the spouse be the additional party. *Id.* However, if an applicant in a community property state relies on the spouse's future earnings that, as a matter of state law, cannot be characterized as community property until earned, the creditor may require the spouse's signature. 12 C.F.R. pt. 202, Supp. I cmt. 7(d)(5)-2.

b. Secured Credit [§ 5.86]

As discussed in section 5.85, *supra*, the basic rule of Regulation B is that a creditor may not require the signature of the applicant's spouse (or the signature of another person) on a credit instrument, unless it is a joint application, "if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1). This rule applies to secured as well as unsecured credit. In the case of secured credit, however, a creditor may require the signature of the applicant's spouse on any instrument necessary or reasonably believed to be necessary under state law "to make the property being offered as security available to satisfy the debt in the event of default." 12 C.F.R. § 202.7(d)(4). This includes any instrument needed to create a lien, pass clear title, or assign earnings. *Id.*; *see also McKenzie v. U.S. Home Corp.*, 704 F.2d 778 (5th Cir. 1983) (holding that creditor's requirement, involving Texas law, that applicant's husband execute deed of trust to ensure valid lien was not impermissible discrimination).

In granting secured credit under the Wisconsin Marital Property Act, a credit grantor is not prohibited by Regulation B from requiring the

other spouse to join in a security instrument if the applicant needs to use marital property held by the nonapplicant spouse as security to establish creditworthiness, or if the applicant does not have sole management and control rights over the property and lacks the power to encumber the assets. *See* Wis. Stat. § 766.51(1m); *see also supra* §§ 5.12–.26, *infra* § 5.126.

As a practical matter, to obtain priority with respect to third parties (such as bona fide purchasers and creditors), a lien against property must be perfected and notice provided. Accordingly, the ECOA provides that if perfection is required to meet a creditor's standards for creditworthiness, the nonapplicant spouse's signature may be required on the document creating the lien or secured interest if the signature is necessary to perfect the lien or create the secured interest and to provide effective notice to third parties. (This provision assumes, of course, that the creditor's requirements do not discriminate on an impermissible basis.) However, the creditor may not require the nonapplicant spouse's signature on any document obligating that spouse (for example, as a co-signer or guarantor), since the signature rules remain applicable to both secured and unsecured credit.

With respect to the effect of the Wisconsin Marital Property Act on secured credit documentation, as well as the provisions of the Uniform Commercial Code, see sections 5.129–.135, *infra*.

Lenders should be careful in requiring a spouse to sign a *note* when the other spouse qualifies independently as creditworthy. In granting secured credit under the Marital Property Act, a credit grantor is not prohibited by Regulation B from requiring both spouses to join in a *security instrument* if the applicant does not have sole management and control rights over the property because the applicant spouse lacks the power to encumber the assets. *See* Wis. Stat. § 766.51(1m).

Although there are no cases with respect to the effect of the Wisconsin Marital Property Act on secured credit documentation, other courts have addressed this issue. The Eighth Circuit, in an unpublished decision, affirmed a decision in which the Bankruptcy Court found there was no ECOA violation by the mortgagee. *National Bank of Commerce v. McMullan (In re McMullan)*, 196 B.R. 818 (Bankr. W.D. Ark. 1996), *aff'd*, No. 97-1086 1998 WL 382576 (June 9, 1998) (unpublished decision). Under Louisiana law, the oil and gas leases and equipment that the debtors acquired during their marriage were community

property. Thus, the ECOA was not violated when the mortgagee required the wife's signature on the notes and mortgages. Because the wife owned a co-interest in all the collateral, the lender was justified in requiring her to execute both the notes and mortgages to create a valid lien. *Id.* at 833. The court cited *In re DiPietro*, 135 B.R. 773, 777 (Bankr. E.D. Pa. 1992) (holding that bank logically required wife's signature on term note in addition to husband's signature when bank could obtain security in husband's property only by having wife be co-obligor) and *Resolution Trust Corp. v. Townsend Associates Ltd. Partnership*, 840 F. Supp. 1127, 1142 (E.D. Mich. 1993) (ruling that creditor's requiring wife's personal guarantee in addition to husband's, after his default on original loan, was not pretext for discrimination when husband and wife jointly owned assets listed on financial statements and husband did not separately own sufficient assets to be creditworthy). *McMullan*, 196 B.R. at 832.

However, in *McMullan*, the wife's signature was required on the *notes and security instruments*. The distinction between requiring signatures on notes and requiring signatures on security instruments was made clear in *Farris v. Jefferson Bank (In re Farris)*, 194 B.R. 931 (Bankr. E.D. Pa. 1996). In *Farris*, the lender was found to have violated the ECOA in requiring a spouse's signature on a note secured by a mortgage. Although the spouse's signature on the mortgage was necessary to encumber the real estate, the lender did not have a "reasonable belief" that the spouse's signature was necessary on the note to acquire the right to proceed against the real estate.

➢ ***Note.*** Regarding "reasonable belief," the official staff interpretation of Regulation B reads as follows:

> *Need for signature-reasonable belief.* Generally, a signature to make the secured property available will only be needed on a security agreement. *A creditor's reasonable belief* that, to assure access to the property, the spouse's signature is needed on an instrument that imposes personal liability *should be supported by a thorough review of pertinent statutory and decisional law or an opinion of the state attorney general*.

12 C.F.R. pt. 202, Supp. I cmt. 7(d)(4)–2 (emphasis added).

The lender was unable to demonstrate that the spouse's signature was necessary on the note because the other spouse qualified independently as creditworthy. *Farris*, 194 B.R. at 941. In comparison, in *In re*

DiPietro, the spouse apparently did not qualify as independently creditworthy.

➢ ***Query.*** What if a note and security agreement are combined in one document? The FRB official staff commentary on section 202.7(d)(4) of Regulation B states that when a creditor uses an integrated instrument (combining the note and security agreement), the spouse may not be required to sign the integrated instrument if the signature is only needed to grant a security interest. 12 C.F.R. pt. 202, Supp. I cmt. 7(d)(4)–3. The spouse may be asked to sign an integrated instrument if the instrument makes clear that the spouse's signature is only to grant a security interest and that signing the instrument does not impose personal liability. This disclaimer may be placed next to the spouse's signature. *Id.*

C. Specific Applicability of ECOA in Wisconsin [§ 5.87]

1. In General [§ 5.88]

In determining qualifications for credit under the ECOA, reference is to be made to state law, including provisions governing rights of management and control over property and factors that may affect the value to the creditor of the applicant's interest in the property. *See supra* §§ 5.78–.86. As discussed in section 5.42, *supra*, the Wisconsin Marital Property Act relies in part on management and control rights with respect to credit transactions with married persons by adding to UMPA an expanded concept of management and control in connection with family-purpose credit. *See* Wis. Stat. § 766.51(1m). The Act also incorporates the UMPA approach that relies on the family-purpose doctrine to determine the extent to which marital property may be reached to satisfy credit obligations. *See supra* § 5.19.

Because of the nature of marital property in Wisconsin, the scope of management and control rights over marital property, and the fact that the basic principles of Wisconsin marital property are the same as those in community property states, Wisconsin is a "community property state" for purposes of the ECOA. *See supra* § 5.74 (FRB conclusion that Wisconsin is community property state). This conclusion is buttressed by the addition of section 766.001(2) to the Act by the 1985 Trailer Bill. That section states that "[i]t is the intent of the legislature that marital

property is a form of community property." *See* Wis. Stat. Ann. § 766.001(2) Legis. Council Notes—1985 Act 37, § 68 (West 2009).

2. Applicability Based on Management and Control [§ 5.89]

Section 766.51(1m) specifically provides that, in obtaining credit for a family-purpose obligation, "a spouse acting alone may manage and control all of the marital property." This expanded application of management and control rights does not, however, extend to the excepted items of business property in section 766.70(3)(a)–(d) or to the right to encumber marital property unless, in both cases, the applicant spouse acting alone may otherwise manage and control the marital property. Wis. Stat. § 766.51(1m)(b); *see infra* § 5.25 (purchase money secured transactions). As discussed in section 5.42, *supra*, the primary purpose of section 766.51(1m) is to trigger the application of the signature or joinder rules of the ECOA to unsecured credit. *See* Wis. Stat. Ann. § 766.51(1m) Legis. Council Notes—1985 Act 37, §§ 84 to 87 (West 2009); *see also supra* §§ 5.84–.86 (ECOA signature rules). If the applicant qualifies for credit under section 766.51(1m), then the signature or joinder of the applicant's spouse may not be requested or required under the ECOA. This analysis is similar to that for credit grantors outlined in Johnson, *supra* § 5.31, at 341.

This rule is reinforced by Regulation B, under which a creditor may not require the nonapplicant spouse's signature, since Wisconsin law does not deny the applicant the power to manage or control marital property that the creditor must consider under the ECOA in evaluating an applicant's creditworthiness. *See* 12 C.F.R. § 202.7(d)(3); *see also supra* § 5.85.

3. Applicability Based on Family-purpose Doctrine [§ 5.90]

Applicability of the ECOA, although tied primarily to management and control, *see supra* §§ 5.42, .89, may also be invoked in Wisconsin under the family-purpose doctrine. Pursuant to the very broad family-purpose doctrine under the Marital Property Act, the actions of one spouse will have the effect of "obligating" marital property beyond

property that can be obligated pursuant to the rights of management and control. Viewed from the perspective of the marital property assets that can be reached to satisfy family-purpose obligations, *see supra* §§ 5.30, .31, if an obligation is within the family-purpose doctrine, all marital property assets are available. Under the ECOA, considering or applying state property laws affecting creditworthiness does not constitute discrimination. 15 U.S.C. § 1691d(b). Thus, in Wisconsin, it is permissible under the ECOA for a creditor, in evaluating creditworthiness, to consider the availability of all marital property assets to satisfy family-purpose obligations. To the extent that a creditor relies in extending credit on assets it can reach under the family-purpose doctrine, it appears that the ECOA mandates nondiscrimination in the extension of credit under that doctrine in the same way that it mandates nondiscrimination in the extension of credit under the rights of management and control.

D. Joinder of Nonapplicant Spouse When Relying on That Spouse's Future Income [§ 5.91]

1. Application to Marital Property Act of ECOA Joinder Rules When Relying on Earned Income [§ 5.92]

a. Analysis Under Marital Property Act [§ 5.93]

As discussed in section 5.85, *supra*, if an applicant for credit resides in a community property state, Regulation B permits the creditor to require the nonapplicant spouse's signature only if state law denies the applicant spouse power to manage or control sufficient community property to qualify for the credit requested and if the applicant's separate property is insufficient. 12 C.F.R. § 202.7(d)(3). When an applicant spouse is relying on future wages of the nonapplicant spouse to establish creditworthiness, is a credit grantor prohibited by Regulation B and the Wisconsin Marital Property Act from requiring joinder of the other spouse? Stated another way, in view of the provisions under the Act (such as its attribution-of-creditworthiness and special management and control provisions for credit purposes), does it constitute discrimination against the nonwage-earning spouse under the ECOA if, when he or she applies for credit, the creditor requires the signature of the nonapplicant,

wage-earning spouse before granting credit on the basis of future wage income? *See* Cairns, *supra* § 5.77, at 165 (similar analysis); *see supra* § 5.22.

The answer to the above question turns on the question of whether future wage income is property subject to management and control for extension-of-credit purposes under the Act. As discussed in section 5.22, *supra*, for general property law purposes, future wage income does not constitute property under the Act. However, the Act's definition of property may in fact be sufficiently broad to encompass future wages for credit-extension purposes, particularly since the Act is to be liberally construed to effectuate its purposes. *See supra* § 5.60. Further, as discussed in section 5.23–.24, *supra*, the property law definition is too limited in the context of management and control for extension-of-credit purposes. Similarly, it is too limited in the context of evaluation of creditworthiness based on the family-purpose doctrine (under which all marital property is to be considered as if it were the property of—i.e., owned by—the applicant spouse) under the Act.

According to at least one member of the UMPA drafting committee, future income is marital property that can be relied on for credit purposes under UMPA, even without Wisconsin's additional provisions: "Each spouse's wages are marital property, and because marital property is fully subject to process by postmarriage creditors of either spouse, arguably a homemaker spouse without wage income is as good a credit risk as his or her wage-earning mate." Wellman, *supra* § 5.5, at 743. Under this view, apparently the only significant risk to the creditor is if the applicant is not in fact married to the wage-earner. *Id.*

What is the effect if future wage income is not property for credit purposes under the Act? In that case, neither spouse has a property interest in the income until it is accrued or earned. Therefore, neither spouse has management and control rights over such future income, and neither spouse can use such future income in obtaining credit. *See* Wis. Stat. §§ 766.31, .51; *see also supra* § 5.22. Under this analysis, when granting credit to a wage-earning spouse, a credit grantor is not relying on "property." Nor is the credit grantor relying on present management and control rights over future receipts or "ownership" rights in the wage-earning spouse, whether an applicant or a nonapplicant.

Under the Act, for the purposes of obtaining and granting credit, future wage income when earned will be the property of both spouses;

the wages will not be the property of the wage-earning spouse alone. When the wages become property, both spouses will have equal ownership and equal management and control rights for the purpose of obtaining an extension of family-purpose credit under section 766.51(1m). In addition, both spouses will have equal ownership rights for credit purposes under the credit-evaluation requirements of section 766.56(1).

Regardless of whether future wage income is property subject to management and control for extension-of-credit purposes under the Act, by application of the ECOA to the Act, reliance on future wage income as a basis for determining creditworthiness must be nondiscriminatory. Under section 766.56(1), if the credit grantor places any reliance on future income—whether wage income or otherwise—the creditor must give equal weight to such income in determining creditworthiness, regardless of whether the wage-earning or nonwage-earning spouse is applying for credit. This concept operates independently of management and control, and regardless of whether future income is characterized as property, particularly since, to the extent of ownership, both parties own or will own such income since it is or will be marital property.

The credit grantor may still evaluate future wage income on objective criteria, but Regulation B requires the credit grantor to place each spouse on the same footing in the evaluation process. *See supra* § 5.83.

b. Analogy to Other Community Property States [§ 5.94]

When considering whether the ECOA prohibits a credit grantor in Wisconsin from requiring the joinder of the nonapplicant spouse when the applicant spouse relies on the nonapplicant spouse's future wages, it may be helpful to consider how the ECOA is applied in other community property states. In many instances, the joinder issue in other community property states also has involved the question, discussed in section 5.93, *supra*, of whether future wage income of the nonapplicant spouse constitutes community property subject to management and control of the applicant spouse.

For example, one Washington commentator has implied that future wage income is, in effect, subject to management and control:

> Income of either spouse is an accretion to the wealth of the community and therefore community property. Either spouse can manage and, therefore, obligate that property upon a debt. If the debt is incurred for a community purpose, the creditor can look thereafter to the community income flow of either spouse for satisfaction of the debt.

Johnson, *supra* § 5.31, at 345. This commentator further states as follows:

> It is not uncommon for an applicant to seek unsecured credit in reliance on [the nonapplicant] spouse's income flow. . . . A nonapplicant spouse's income, like the applicant's income, is community property and is available to satisfy community debts. Therefore, a creditor should ordinarily treat an offer of a nonapplicant spouse's income to establish creditworthiness like any other offer of community property.

Id. at 346–47.

Finally, regarding joinder, this commentator concludes as follows: "In summary, the income flow of either spouse is a community asset. If either spouse's income is offered as evidence of creditworthiness for a community debt, the ECOA regulations prohibit the creditor from requiring the signature of the nonapplicant spouse." *Id.* at 349.

A number of lawsuits in community property states involve this issue. For example, *Akulian v. American Express* (San Francisco, Cal. Sup. Ct., apparently filed Aug. 19, 1982), *noted in* Marcus A. Brown, *Update on ECOA*, 36 Pers. Fin. L. Q. Rep. 67, 68 (1982), involved a class action suit based on American Express's alleged failure to consider a husband's income that was (or would become) community property and the company's subsequent denial of issuance of a credit card to his wife. The case subsequently was dismissed by stipulation.

The same issue arose in *Clark v. Avco Financial Services*, No. 80-272 (D. Ariz., filed Apr. 10, 1980). There, an applicant spouse requested individual unsecured credit relying on community assets, including her spouse's future income, but the creditor required her husband to join to "obligate the community." On the applicant spouse's motion for summary judgment, the court held that the creditor's policy of requiring the signature of both spouses in such an instance violated the ECOA and Regulation B, since either spouse in Arizona can bind the community (and the creditor in *Clark* had concluded that the community property

was sufficient to qualify the applicant for the loan). The court awarded punitive damages and attorney fees to the applicant spouse.

The issue of whether a nonapplicant spouse's future wage income constitutes community property subject to the applicant spouse's management and control was addressed in *United States v. ITT Consumer Financial Corp.*, 816 F.2d 487 (9th Cir. 1987), *aff'g* No. C-83-3924 JPV (N.D. Cal. 1985). In that case, filed in 1983 in the United States District Court for the Northern District of California, the United States, upon Federal Trade Commission authority, alleged that in extending credit to spouses in community property states with equal management and control (asserted, as of 1983, to be the community property states other than Texas), the defendants discriminated against married women applicants by denying individual credit when the women relied on their husbands' future income to substantiate their creditworthiness. The government further alleged that, in those states, the defendants required the husband's signature even when the applicant alone qualified for credit (because of management and control over community assets) under the defendants' standards for creditworthiness.

The district court's order, which granted the defendants' summary judgment motion, was affirmed by the Ninth Circuit Court of Appeals, which held that the defendants' practice of requiring the nonapplicant spouse to co-sign a promissory note when the applicant relied on his or her spouse's future earnings to qualify for the credit was not discriminatory under the ECOA. The court stated that the issue was a question of state law and held that, under the laws of the seven community property states involved, future earnings may not be characterized as community property until *earned*, because a circumstance such as death or divorce could cause future earnings to become separate property. *See supra* §§ 5.21–.25. Hence, a married applicant's equal management power over community property in those states does not extend to the future earnings of the applicant's spouse. Therefore, a lender is justified in requiring the nonapplicant spouse's signature when reliance is placed on that spouse's future earnings to substantiate creditworthiness. *ITT*, 816 F.2d at 491.

The court also held that the defendants' co-signature requirement did not violate the ECOA or Regulation B, specifically 12 C.F.R. § 202.7(d)(l), (3), (5), because the defendants required a co-signer *only if* an applicant did not qualify individually under the defendants' standards of creditworthiness. No co-signer was required for a married applicant

unless a co-signer was also required for a similarly situated unmarried applicant. *Id.* at 493.

Because of the decision in *ITT*, the FRB amended its official staff commentary to section 202.7(d) of Regulation B with respect to signature requirements in credit transactions. *See* Equal Credit Opportunity; Update to Official Staff Commentary, 53 Fed. Reg. 11,044 (1988). The commentary was amended to read as follows:

> *Reliance on income of another person—individual credit*. An applicant who requests individual credit relying on the income of another person (including a spouse in a noncommunity property state) may be required to provide the signature of the other person to make the income available to pay the debt. In community property states, the signature of a spouse may be required if the applicant relies on the spouse's separate income. If the applicant relies on the spouse's future earnings that as a matter of state law cannot be characterized as community property until earned, the creditor may require the spouse's signature, but need not do so—even if it is the creditor's practice to require the signature when an applicant relies on the future earnings of a person other than a spouse. (See § 202.6(c) on consideration of state property laws.)

c. Conclusion [§ 5.95]

Under the FRB interpretation of Regulation B discussed in section 5.94, *supra*, if a spouse applies for unsecured credit based on the future earnings of the nonapplicant spouse (and the Marital Property Act applies to the spouses), the credit grantor might not be violating the ECOA by requiring the signature of the nonapplicant spouse. This rule may apply despite the fact that section 766.56(1) provides for attribution of creditworthiness between spouses. *See supra* §§ 5.52–.55. The issue under the FRB interpretation is whether the nonapplicant spouse's future earnings may be characterized under Wisconsin law as a marital property asset. *See supra* §§ 5.21–.26.

Although the *ITT* holding (that future earnings are not community property until earned, *see supra* § 5.94) was not based on Wisconsin law, the authors of this book consider it likely that the holding would be followed in Wisconsin because of the similarities in the underlying community property law principles of both the states involved and Wisconsin. Thus, in Wisconsin, under this analysis, the ECOA would

not be violated if a credit grantor required the nonapplicant spouse's signature in circumstances similar to those in *ITT*.

➢ ***Note.*** For a further comment on the *ITT* decision, see June M. Weisberger and H. Arleen Wolek, *WMPA and Credit: Key Changes for Creditors*, Wis. Law., Apr. 1989, at 18. The authors of that article, contrary to the position taken by the authors of this book, argue that there is reason to believe that the rationale of the *ITT* holding would *not* be followed in Wisconsin because of the Act's provisions relating to creditworthiness and those relating to a creditor's reaching assets after divorce, change of domicile, or death. *See supra* § 5.30, *infra* §§ 5.97–.104. Based on these provisions, Weisberger and Wolek conclude that, for purposes of obtaining credit, a court might decide that the future income of the nonobligated spouse is a marital property asset. Basically the same position (i.e., contrary to this book's analysis) is taken in Howard S. Erlanger and June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 Wis. L. Rev. 769, 788 n.74, 789. Erlanger and Weisberger base their view on the Act's special credit provisions—particularly section 766.51(1), which by its terms requires the creditor to consider future income of both spouses—and the Act's expanded collection provisions.

For a discussion of the *ITT* case and the FRB's revised official staff commentary to Regulation B, see Dan L. Nicewander, *Spousal Cosignature Rules in the Aftermath of United States v. ITT Consumer Financial Services*, 42 Consumer Fin. L.Q. Rep. 145 (1988); *see also* Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 Mem. St. U. L. Rev. 37, 92–94 (1994).

2. Application to Marital Property Act of ECOA Joinder Rules When Relying on Unearned Income [§ 5.96]

An applicant spouse may attempt to establish creditworthiness by relying on future unearned income of the spouses, particularly income on marital property held by the nonapplicant spouse or income on nonmarital property of the nonapplicant spouse. In such an instance, the

issue—that is, whether a credit grantor is prohibited by Regulation B and the Wisconsin Marital Property Act from requiring joinder of the other spouse—is the same as when the applicant spouse is relying on future earned income of the nonapplicant spouse. The analysis discussed in sections 5.92–.95, *supra*, applies to such circumstances.

VIII. Practical Problems When Extending Unsecured Credit to Only One Spouse [§ 5.97]

A. In General [§ 5.98]

A major purpose of the Wisconsin Marital Property Act and Regulation B as applied to marital property is to require credit grantors to extend credit to one spouse on the basis of marital property assets or future income of the spouses. However, a number of practical problems face credit grantors in Wisconsin when both spouses are not applicants for credit. In such instances, creditors may face a diminished availability of the future income or marital property assets on which they relied in granting credit. Although family-purpose creditors subject to the Act are legally required to take all marital property income and assets into account when considering creditworthiness of married persons, creditors' access to such income and assets may be compromised or lost in some circumstances. Some of the issues of concern to creditors are described in sections 5.99–.101 and 5.104, *infra*.

B. Marriage Dissolution [§ 5.99]

The existence of marital property depends on the status of the parties as married persons, and the expanded application of management and control by a nontitled spouse in family-purpose credit transactions depends on his or her status as a spouse. *See supra* § 5.37. In some community property states, spouses' separation may terminate the community or management and control rights, and hence separation is a relevant contingency for credit grantors in those states. For example, section 26.16.140 of the Washington Code provides that a spouse's wages earned while living separate and apart are separate property. Wash. Rev. Code Ann. § 26.16.140 (West, WESTLAW current with amendments received through Jan. 15, 2010). California's law has the same effect. *See* Cal. Fam. Code § 771 (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. 17 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot).

The UMPA section 1 comment explains the situation under UMPA:

> [UMPA] 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. . . . The period when certain property will be marital is during marriage and [UMPA's] provisions addressed to "spouses" will apply then as well.

Thus, to the extent a creditor has relied on the income stream of a nonobligated spouse, that income stream may be "lost" after dissolution if the creditor cannot reach it.

However, under section 766.55(2m), which governs spousal obligations, the former marital property assigned to each spouse at dissolution remains available for satisfying a family-purpose obligation to the extent of its value at the date of the decree. In addition, if the decree assigns responsibility for satisfaction of the obligation to the nonincurring spouse, "the obligation may be satisfied as if both spouses had incurred the obligation." Wis. Stat. § 766.55(2m). In the event of such an assignment, the creditor may proceed on the basis of the personal liability of each spouse. Without the personal liability of the nonapplicant spouse, which would not exist without an assignment of responsibility by the decree, the creditor's practical rights to reach assets that were formerly marital property clearly would be diminished after dissolution in the case of a family-purpose obligation. This is not the result in the case of a support obligation under section 766.55(2)(a), as to which both spouses remain obligated. *See St. Mary's Hosp. Med. Ctr. v. Brody*, 186 Wis. 2d 100, 519 N.W.2d 706 (Ct. App. 1994) (discussed at sections 5.106, 5.110, 6.5, 6.6, 6.8, and 6.46, *infra*).

➢ ***Comment.*** Creditors are well advised to monitor the marital status of borrowers who have relied on marital property to establish creditworthiness. This is similar to watching for the death of borrowers. It can be argued that creditors should be able to consider the likelihood of dissolution as a factor in evaluating creditworthiness, provided the evaluation is done on a

> nondiscriminatory basis. It is questionable, however, whether in evaluating creditworthiness of the nonwage-earning or nontitled applicant spouse, the creditor may take into account the effect of a possible dissolution of the marriage unless an action is pending. *See supra* §§ 5.34, .36.

At least one writer has concluded that the potential for a particular couple's divorce, if divorce is imminent, merits special attention because of the divorce's effect on the availability of the nonapplicant spouse's income:

> The danger of … divorce may sufficiently diminish the value of a nonapplicant spouse's income flow as a source of creditworthiness to permit the creditor to require the nonapplicant spouse's signature on the debt instrument.… In most other situations [that is, where there is no divorce] the ECOA will probably be interpreted to prohibit the creditor's requiring the nonapplicant spouse's signature unless the … divorce is sufficiently certain so as to support a reasonable belief in the necessity of requiring the spouse's signature to ensure the availability of the nonapplicant spouse's income flow in the event of default.

Johnson, *supra* § 5.31, at 348.

Regulation B may allow a creditor to require a reapplication in the event of a divorce, at which time creditworthiness can be reevaluated. *See* 12 C.F.R. § 202.7(c)(2).

C. Change of Domicile [§ 5.100]

Section 766.55(7) states that property available to creditors under chapter 766 remains available regardless of whether it is located in Wisconsin and regardless of whether chapter 766 no longer applies because of a change of domicile by one or both spouses. This provision was adopted to "aid creditors attempting to satisfy obligations covered by [chapter] 766 in other jurisdictions," but with an acknowledgment that "recognition of the provision may be subject to the laws of other jurisdictions." Wis. Stat. Ann. § 766.55(7) Legis. Council Notes—1985 Act 37, §§ 90 to 98 (West 2009); *see supra* § 5.38 (Act's applicability to spouses "during marriage," i.e., while both spouses are domiciled in Wisconsin); *see also infra* §§ 13.17, .22 (application of choice-of-law principles to changes in domicile).

➢ ***Note.*** If one or both spouses move to a common-law state, the nonapplicant spouse's future income, including future wage income, will not be classified as a marital property asset; such income may therefore be lost to the creditor as a source for repayment of the debt. As with the divorce contingency discussed in section 5.99, *supra*, it can be argued that creditors should be permitted to evaluate the change-of-domicile possibility when determining creditworthiness, provided the evaluation is done on a nondiscriminatory basis.

D. Death [§ 5.101]

At death, as at dissolution of a marriage, marital property loses its classification as marital property. Under section 861.01, on the death of either spouse, the personal representative of the estate or other successor in interest of a deceased spouse owns the deceased spouse's undivided one-half interest in each item of former marital property as a tenant in common with the surviving spouse, who retains his or her undivided one-half interest.

Section 859.18(2), regarding satisfaction of obligations at the death of a spouse, contains the general rule that property that would have been available under section 766.55(2) to satisfy the obligation, except for the death, continues to be available, subject to a number of exceptions. The following discussion regarding the application of these exceptions is limited to those creditors who regularly extend credit and to family-purpose obligations. For a more detailed discussion of the satisfaction of obligations at the death of a spouse, see sections 12.80–.131, *infra*.

If an obligation is within the family-purpose doctrine, then on the death of the *nonobligated* spouse, that deceased spouse's marital property that is probate property remains available. *See* Wis. Stat. § 859.18(2). However, if no claim is filed in the estate of the nonobligated spouse within the time established for filing claims under section 859.01, the claim is barred against the decedent's estate. Wis. Stat. § 859.02(1). Hence, the deceased spouse's one-half interest in the former marital property that is probate property is freed from the obligation.

➢ ***Caveat.*** The claims of creditors who are not given notice by the personal representative of the final date for filing claims may not be barred if (1) the personal representative knew (or with reasonable

diligence should have known) of the existence of the potential claim (and the identity and mailing address of the potential claimant) and (2) the claimant did not have actual knowledge of the estate proceeding at least 30 days before the final day for filing claims. Wis. Stat. § 859.02(2)(b).

It appears that if the freed property is later distributed to the surviving spouse, it becomes available to the creditor by reason of that spouse's personal liability. *See* Wis. Stat. § 859.02(3); *see also infra* § 12.121. Regardless of whether a claim was timely filed in the estate, the former marital property and nonmarital property of the surviving obligated spouse (including any assets received from the probate estate of the deceased spouse) are available to the creditor, based on the personal liability of the surviving spouse.

Similarly, if an obligation is within the family-purpose doctrine, then on the death of the *obligated* spouse, the former marital property and the nonmarital property of the deceased obligated spouse remain obligated. Wis. Stat. § 859.18(2). This result is based on the personal liability of the obligated spouse. However, if a claim is not filed in the estate of the obligated spouse within the time established for filing claims under section 859.01, the claim is barred against the decedent's estate, with the exceptions noted in the caveat above. Wis. Stat. § 859.02(1), (3). Hence, the deceased spouse's nonmarital probate property is freed from the obligation, and his or her one-half interest in the former marital property that is probate property is freed from the obligation. *See* Wis. Stat. § 859.02(1). Under section 859.02(3), regardless of whether a claim was timely filed, the former marital property of the surviving, nonobligated, spouse remains available to the creditor subject to the exceptions in section 859.18.

The effect of section 859.18 is to enable creditors who regularly extend credit to reach the property that would have been marital property but for the spouse's death. *See* Wis. Stat. § 859.18(2). This property includes future income, even that of the surviving spouse, regardless of whether the surviving spouse is obligated. This legislative scheme recognizes the fact that creditors are required under section 766.56(1) to rely on marital property, including such future income, in extending credit. *See* Wis. Stat. Ann. § 859.18 Legis. Council Notes—1985 Act 37, § 169 (West 2002). The general exception of section 859.18(3), that the income of the nonobligated surviving spouse is not available, does not apply to an obligation resulting from an extension of credit by a

creditor who regularly extends credit. *See* Wis. Stat. § 859.18(1), (3). Similarly, the general exception, that former marital property is available only to the extent of its value at the death of the deceased obligated spouse, does not apply to an obligation resulting from an extension of credit by a creditor who regularly extends credit. *Id*.

However, in such a case—when the deceased spouse was the only obligated spouse—the following property is *not* available for satisfaction of the obligation:

1. Survivorship marital property (except as provided in subsections 766.60(5)(b) and (c), which relate to certain liens and judgment liens if execution had issued before death);

2. Joint tenancy (unless execution had issued before death on a judgment);

3. Deferred employment benefits; and

4. Life insurance (unless paid to the estate or assigned to or paid to the creditor as security).

Wis. Stat. § 859.18(4)(a).

It should be noted that simply changing marital property to survivorship marital property completely removes it from the category of property that otherwise would be available in full to satisfy the obligation. *See* Wis. Stat. § 859.18(4)(a)1. By contrast, marital property that passes to the surviving spouse by reason of a marital property agreement that operates as a will substitute under section 766.58(3)(f) remains obligated (as does marital property in other specified forms of nonprobate transfers). Wis. Stat. § 859.18(6); *see* Wis. Stat. § 859.18(5); *see also infra* § 12.82. This different treatment is based on a view of survivorship marital property as analogous to joint tenancy with right of survivorship and of property passing by a will-substitute marital property agreement as analogous to property passing under a will. *See* Wis. Stat. Ann. § 859.18 Legis. Council Notes—1985 Act 37, § 169 (West 2002).

➢ ***Note.*** As mentioned above, the disposition of property by a will-substitute marital property agreement on the death of a spouse does not affect the property available to a creditor to satisfy an obligation. Wis. Stat. § 859.18(6). An exception to this general rule exists,

however, if under the agreement the property was unavailable to the creditor while both spouses were alive. *Id.*; *see* Wis. Stat. Ann. § 859.18(6) Legis. Council Notes—1991 Act 301, § 35 (West 2002); *see also infra* § 7.12.

If the surviving spouse is the only obligated spouse, the following property, unless transferred to the obligated surviving spouse, is *not* available for satisfaction of the obligation:

1. Joint tenancy (unless execution on a judgment had issued before death);

2. Deferred employment benefits; and

3. Life insurance (unless paid to the estate or assigned to or paid to the creditor as security).

Wis. Stat. § 859.18(4)(b).

In sum, significant protection is provided under the probate claims procedures to creditors who regularly extend credit and who rely on the income of, and marital property assets held by, the nonobligated spouse. It appears that with respect to the contingency of death, the assets and income available to such a creditor are approximately the same as those that would have been available had the credit been extended to an unmarried person who owned all the assets (which is the standard for attribution of creditworthiness under section 766.56(1)). *See supra* §§ 5.52–.55. The primary exception is survivorship marital property, which is given traditional joint-tenancy treatment. Nonetheless, for the creditor, the contingency of the death of a married person, as compared with that of an unmarried person, requires additional monitoring, presents more complications, and may result in higher collection and other costs.

E. Ability to Reach Assets [§ 5.102]

Many creditors argue that, when extending secured or unsecured credit in community property states on the basis of a spouse's management and control rights or on the basis of the family-purpose doctrine, they should not be required to consider the assets or income stream of the nonobligated spouse for repayment of the debt because as a

practical matter it may be impossible to reach such assets or income. *See* Loeb, *supra* § 5.42; Brown, *supra* § 5.42; Winnie F. Taylor, *Regulation B's Spousal Signature Rules and Community Property States: A Creditor Collection Dilemma*, ABA [Am. Bankers Ass'n] Bank Compliance, Summer 1984, at 12, 13.

In Wisconsin, however, all marital property, including the nonobligated spouse's interest in marital property, can be reached by a judgment creditor of the obligated spouse, provided that the judgment was rendered on an obligation incurred in the interest of the marriage or the family. Wis. Stat. § 766.55(2)(b). The means available may include attachment under chapter 811, garnishment under chapter 812, and levy under chapter 815. *See supra* §§ 5.30, .31; *see also infra* ch. 6.

➢ ***Practice Tip.*** Often, a creditor does not have (or did not seek) information about a judgment debtor's assets before granting credit. After obtaining a judgment, a creditor may serve an order to show cause on a judgment debtor pursuant to section 816.03, requiring a debtor to appear before a court commissioner. The hearing before a court commissioner is called a *supplementary examination*. In a supplementary examination, a creditor may question the debtor about all assets, including marital property assets.

F. Marital Property Agreements [§ 5.103]

In general, for a marital property agreement that was executed before credit has been granted to be binding on a creditor, the creditor must have actual knowledge of it (or have been furnished a copy under certain circumstances) when the obligation was incurred. Wis. Stat. §§ 766.55(4m), .56(2)(c). Accordingly, marital property agreements executed after credit has been granted should not cause practical difficulties for creditors under the Wisconsin Marital Property Act. *See supra* §§ 5.36, .63. This is in contrast to the community property law in many other states. In those states, wage income and other assets can be reclassified (i.e., transmuted) by agreement after the debt has been incurred. Such postdebt reclassification is binding on the creditor despite the fact that it adversely affects the creditor's interest. Joan H. Henderson, *Marital Agreements and the Rights of Creditors*, 19 Idaho L. Rev. 177 (1983). This type of reclassification appears to be one of the most difficult practical problems facing creditors in other community

property states. *See* Loeb, *supra* § 5.42; Brown, *supra* § 5.42; *see also supra* § 5.81, *infra* § 7.10.

G. Conclusion [§ 5.104]

Creditors' groups have argued that the Wisconsin Marital Property Act presents creditors with many practical problems. Proponents of equal access to credit argue that these considerations are a matter of "credit risk" to be considered as a part of the cost of extending credit. See Johnson, *supra* § 5.31, at 345–56 for a brief reference to these and related problems. Johnson states that when an unsecured creditor lends in reliance on existing community property, the creditor "impliedly accepts the risk that there will be insufficient community property to satisfy the debt upon default," and this risk does not enable the creditor to require the other spouse's signature to the debt instrument under the ECOA. *Id*. at 346. Equal access proponents also point out that these considerations are similar to those involving divorce, change of domicile, or death in common-law states. They assert that the most important consideration is the debtor's continued willingness to repay and the continued employment (and, hence, income stream) of the spouse or spouses whose wages were considered in granting the credit. It is their position that the likelihood of this income stream being interrupted or otherwise unavailable to the creditor is, as a practical matter, the same regardless of what property law applies to the spouses. Of course, it is not identical in the event of a divorce or a change in domicile, *see supra* §§ 5.99, .100, but under the policy of the Marital Property Act and the ECOA, these contingencies are not to be taken into account in extending credit to a spouse.

IX. Other Possible Bases for Obtaining and Granting Credit [§ 5.105]

A. Duty of Support [§ 5.106]

In Wisconsin, the duty of each spouse to support the other and to support his or her minor children is based on statutorily created personal liability. *See* Wis. Stat. § 49.90(1); *St. Mary's Hosp. Med. Ctr. v. Brody*, 186 Wis. 2d 100, 109, 519 N.W.2d 706 (Ct. App. 1993) (noting that Act modified Wisconsin's doctrine of necessaries "so that it now imposes

personal liability on each spouse for the other's necessaries"); *see also infra* § 5.110 (discussing *Brody*). (As explained in section 5.109, *infra*, the doctrine of necessaries is based on, and coextensive with, the duty of support.) The duty of each spouse to support the other spouse is a duty owed between the spouses. Although the statutory duty of support is owed by the spouses to one another, the fulfillment of that duty through a third party's provision of necessaries to one of the spouses (e.g., the provision of necessary medical treatment by a hospital) may give rise to personal liability on the part of the other spouse to the third party under the doctrine of necessaries. *See Brody*, 186 Wis. 2d at 109; *see also infra* § 5.110. The duty to support a minor child is a duty of the parent owed to his or her minor children.

Section 49.90, entitled "Liability of relatives; enforcement," creates a statutory duty of support, the violation of which is a criminal act. Section 49.90(1)(a) provides that, if a dependent person is unable to maintain himself or herself, the dependent person's spouse or parent must maintain the dependent person so far as the spouse or parent is able.

Section 49.90(1m) provides that "[e]ach spouse has an equal obligation to support the other spouse" and that "[e]ach parent has an equal obligation to support his or her minor children" as provided in chapters 48 and 938. Chapter 49 provides a procedure for the district attorney to apply to the circuit court for an order to compel maintenance for a dependent person if that person's relatives fail to do so. *See* Wis. Stat. § 49.90(2). In addition, section 49.90(10) provides that, if an action under section 49.90 relates to the support or maintenance of a child, the court is to determine maintenance or support in the same manner as support is determined under section 767.511. These provisions are consistent with the intent of the Act, expressed in section 765.001(2), that marriage is a legal relationship between two equal persons "who owe to each other mutual responsibility and support."

Further, and very significantly, section 765.001(2) states as follows:

> 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 section.

The measure of the duty of support and the extent of the spouses' respective responsibilities are contained in the Family Code (chapters 765–768). Section 767.501 ("Actions to compel support") provides spouses, spouses' minor children, persons with legal custody of spouses' minor children, and relatives without legal responsibility for the spouses' children a remedy to compel a spouse to provide support and maintenance to his or her spouse or minor children. The amount of the support and its apportionment between the spouses are determined by the court by reference to the factors listed in sections 767.511 and 767.56, which govern child support and maintenance payments. The factors include the comparative health of the spouses, the comparative earning capacity of the spouses, custodial responsibilities for the children, and such other factors as the court may determine are relevant.

Although a spouse who contracts for goods or services is personally liable to the creditor by contract, generally the noncontracting spouse is not personally liable to the creditor. However, when such goods or services are necessaries, personal liability on the part of the noncontracting spouse may arise under the doctrine of necessaries. *See Brody*, 186 Wis. 2d at 109; *see also infra* § 5.110. When an obligation to a creditor falls within the duty of support, section 766.55(2)(a) specifies the assets available to the creditor to satisfy the obligation. *See Brody*, 186 Wis. 2d at 109; *see also supra* § 5.31, *infra* §§ 6.5, .6. When an obligation to a creditor does not fall within the duty of support but constitutes a family-purpose obligation, section 766.55(2)(b) specifies the assets available to the creditor to satisfy the obligation. *See supra* § 5.31, *infra* § 6.8.

B. Doctrine of Necessaries [§ 5.107]

1. In General [§ 5.108]

The Wisconsin common-law doctrine of necessaries, which is narrower than the family-purpose doctrine, *see supra* § 5.31, imposes personal liability on spouses for necessaries furnished to the family. *See supra* § 5.106. The Act has a significant impact on the necessaries doctrine. As explained in section 5.109, *infra*, the doctrine of necessaries is based on and coextensive with the duty of support discussed in section 5.106, *supra*.

2. Status Before Act [§ 5.109]

During the period of legislative debate on predecessor bills to the Act, the Wisconsin Supreme Court redefined and reaffirmed the Wisconsin common-law doctrine of necessaries in *Marshfield Clinic v. Discher*, 105 Wis. 2d 506, 314 N.W.2d 326 (1982), *Sharpe Furniture, Inc. v. Buckstaff*, 99 Wis. 2d 114, 299 N.W.2d 219 (1980), and *Stromsted v. St. Michael Hospital of Franciscan Sisters (In re Estate of Stromsted*), 99 Wis. 2d 136, 299 N.W.2d 226 (1980). The doctrine as enunciated in those cases imposes, as a matter of public policy, a personal liability on each spouse to third parties who have provided necessaries for the support of the family. This liability for payment for necessaries is based on each spouse's duty of support owed to the other spouse and their minor children. The cases state that necessaries include food, clothing, medicine, medical assistance, means of transportation, housing, furniture, and the like that are necessary and appropriate (based on the spouse's ability and economic and social circumstances) for the other spouse's or the children's sustenance, health, and comfort.

The Wisconsin Supreme Court held in these cases that the doctrine of necessaries serves legitimate and proper purposes in today's society, including fostering and facilitating support of the family, aiding enforcement of the spousal duty of support, encouraging extension of credit to spouses (in harmony with the purposes behind the support statutes), and benefiting providers of necessaries by enhancing certainty of payment. The court also held as follows:

> In light of the proper function of the necessaries rule in relation to the support of the family, in the absence of an express contract to the contrary, we hold that a husband incurs the primary obligation, implied as a matter of law, to assume liability for the necessaries which have been procured for the sustenance of his family.

Sharpe Furniture, 99 Wis. 2d at 120.

The stated justifications for imposing primary liability on husbands and secondary liability on wives included the following: the fact that wives seeking credit might not have had the economic ability to make the necessary purchases, *id*. at 119; the general income-producing patterns of the contemporary family, especially the fact that wives generally had "remained behind" their husbands in the area of income production, *Stromsted*, 99 Wis. 2d at 144–45; the fact that many wives did not work

outside the home (and many others only worked outside the home on a part-time basis); and the overall fact that "wives are still far from equal with their husbands in economic resources," *Marshfield Clinic*, 105 Wis. 2d at 515. Accordingly, the court held in *Marshfield Clinic* that the primary/secondary liability rule was the most equitable method of dividing the liability. *Id.* at 516.

Dissenting and concurring opinions in each of the three decisions vigorously challenged the concept of primary/secondary liability. These opinions emphasized that the duty of support that "underpins" the doctrine of necessaries is not a hard-and-fast rule; rather, the duty is allocated between the spouses not on the basis of sex but on the basis of a number of statutory factors. *See supra* § 5.106. Accordingly, a determination would be required in each case of the apportionment of the liability between the spouses.

The Wisconsin Supreme Court's decision that husbands are primarily liable for necessaries reflects the vitality of the necessaries doctrine and illustrates why the doctrine probably will continue to operate in some form, despite the adoption of the Act:

> [T]he necessaries rule . . . serves several important governmental objectives. The rule benefits families by making it more likely that they will obtain necessary and appropriate goods and services. It enables wives to obtain credit more easily, rather than having to depend on their husbands to make necessary purchases. It also protects wives from economic hardship by placing primary liability on husbands. This is significant because [although] wives have made substantial economic gains in the past decade . . . substantial economic disparities still persist between husbands and wives. The rule also benefits the providers of goods and services by assuring them greater certainty of payment when they extend credit to families.

Marshfield Clinic, 105 Wis. 2d at 510.

3. Status After Act [§ 5.110]

In view of increased spousal access to credit resulting from the Act, the basis for the primary/secondary liability rule under the necessaries doctrine has been greatly diminished, if not eliminated. In fact, the Act may have reduced the basis for this rule to the point that the rule could not withstand objections on constitutional or statutory grounds. *See* Wis. Stat. § 765.001(2); *Brody*, 186 Wis. 2d at 109 (concluding that section

765.001(2) has modified doctrine of necessaries in Wisconsin) (discussed below); *see also Marshfield Clinic*, 105 Wis. 2d 506, 314 N.W.2d 326 (1982), and cases cited therein. *See generally* Henry J. Sommer & Margaret Dee McGarity, *Collier Family Law and the Bankruptcy Code* ¶ 3.02[2] (1991 & Supp. 2003).

The continued vitality of the doctrine of necessaries and its modification by section 765.001(2) were confirmed by the Wisconsin Court of Appeals in *St. Mary's Hospital Medical Center v. Brody*, 186 Wis. 2d 100, 519 N.W.2d 706 (Ct. App. 1994). In *Brody*, the hospital sued the former spouses for medical services rendered to the husband during the marriage. Although the divorce judgment assigned the hospital debt to the husband, the circuit court concluded, and the court of appeals agreed, that the wife also was liable to the hospital for the debt under the doctrine of necessaries. The hospital appealed from the circuit court judgment, however, because that court, relying on section 766.55(2m), provided in the judgment that the hospital could satisfy the amount owed by the former wife only from marital property assets assigned to her "to the extent of the value of the marital property at the date of [the] divorce." *Id*. at 102. Under section 766.55(2m), marital property assets assigned to each spouse under a divorce decree are available to satisfy a family-purpose obligation under section 766.55(2)(b) only to the extent of the value of the marital property assets on the date of the decree.

On appeal (in which the former wife did not participate), the court of appeals concluded that the circuit court had erred in applying the limitation on satisfaction of the judgment and that all of the former wife's assets were available to satisfy the hospital debt. Under the court's analysis, the former wife's obligation to the hospital under the doctrine of necessaries fell within section 766.55(2)(a) as an "obligation to satisfy a duty of support owed to the other spouse." *Id*. at 110. Under section 766.55(2)(a), a spouse's obligation to satisfy a duty of support owed to the other spouse may be satisfied "only from all marital property and all other property of the obligated spouse." Because the former wife was an "obligated spouse" because of her obligation to provide support under section 765.001(2), the hospital could reach all her assets under section 766.55(2)(a). *Id*. at 111–12.

Although the court acknowledged that a support obligation will almost always involve the interests of the marriage or family, it reasoned that such an obligation must be considered as falling under section

766.55(2)(a) and not under section 766.55(2)(b) (as a family-purpose obligation) to avoid reading section 766.55(2)(a) out of the statute. By adopting this approach, the court rendered section 766.55(2m), on which the circuit court had relied in applying the limitation on collection, inapplicable to the former wife's obligation to the hospital since that subsection applies only in the case of family-purpose obligations under section 766.55(2)(b). *Id*. at 112.

With regard to the doctrine of necessaries, the court stated that section 765.001(2) has modified the doctrine in Wisconsin "so that it now imposes personal liability on each spouse for the other's necessaries." *Id*. at 109. The court concluded that because the spouses were married at the time the former husband incurred necessary medical expenses, the former wife was equally responsible to the hospital for the debt under section 765.001(2). *Id*.

➢ ***Comment.*** The court in *Brody* arguably could have reached its ultimate conclusion (i.e., that all of the former wife's assets were available to satisfy the debt to the hospital) without engaging in an analysis under section 766.55. By focusing on the fact that the former wife was *personally* liable for the debt by reason of the doctrine of necessaries, analysis under section 766.55 would have been unnecessary. However, the court viewed subsection 766.55(2m) as an obstacle to the hospital's collection of the debt from the former wife, since she was the nonincurring spouse with respect to the debt and the debt arguably was a family-purpose obligation under section 766.55(2)(b). The response to this is simply that subsection (2m) is not applicable when both spouses are personally liable under the necessaries doctrine, thus making further analysis under section 766.55 unnecessary.

For additional discussion of the *Brody* decision, see section 5.106, *supra*, and sections 6.5, 6.6, 6.8, and 6.44, *infra*. For additional decisions applying the doctrine of necessaries following the adoption of the Marital Property Act, see *ITT Financial Services v. Graf*, No. 88-CV-574 (Wis. Cir. Ct. La Crosse County Feb. 24, 1989), and *United States v. Conn*, 645 F. Supp. 44 (E.D. Wis. 1986).

➢ ***Note.*** Although under the necessaries doctrine a spouse is obligated to pay for the other spouse's medical expenses, it has been held that this does not permit a creditor to reach worker's

compensation benefits paid to the other spouse because of the first spouse's death or injury. Those benefits remain exempt in the other spouse's hands under section 102.27, which prohibits worker's compensation benefits from being "taken for the debts of the party entitled thereto." *See also In re Brien*, 128 B.R. 220 (Bankr. E.D. Wis. 1991).

X. Practical Considerations [§ 5.111]

A. In General [§ 5.112]

Many sections of this chapter refer to or discuss practical considerations and problems in connection with the system of obtaining and granting credit under the Wisconsin Marital Property Act. Those sections should be consulted first for details regarding these practical considerations. Sections 5.113–.135, *infra*, highlight some of these considerations from the viewpoint of various types of credit and offer some general conclusions.

B. Effect of Act on Categories of Credit [§ 5.113]

1. Commercial Credit Granted to Business Entities [§ 5.114]

a. Sole Proprietorship [§ 5.115]

The Wisconsin Marital Property Act has significant impact on the relationship between creditors and a married sole proprietor. The considerations are basically the same as those regarding the creditworthiness of any married person. The Act affects the relationship to the extent that the sole proprietor's spouse may have incurred or will incur obligations in the interest of the marriage or the family and the creditor is relying on marital property in evaluating the sole proprietor's creditworthiness.

Accordingly, the evaluation of creditworthiness under these circumstances should include a consideration of credit obligations undertaken by the sole proprietor's spouse. For example, if the other spouse is a spendthrift or has recently filed for bankruptcy, such facts

would affect the creditworthiness of the sole proprietor. Conversely, the income of the sole proprietor's spouse becomes a consideration that may enhance the creditworthiness of the sole proprietor.

With respect to unsecured and secured credit, the assets of the sole proprietorship that are solely held by the proprietor are under the management and control of the proprietor. *See supra* §§ 5.16, .42. However, those assets, to the extent they are marital property, may be reached to satisfy an obligation incurred by the other spouse if the obligation is within the family-purpose doctrine. *See supra* § 5.31. Further, if marital property assets of the sole proprietorship are not held by either spouse (i.e., if they are untitled assets), presumably either spouse may manage and control them under the general rule of section 766.51(1)(am). *See supra* § 4.76.

b. Partnership [§ 5.116]

The Marital Property Act should have no significant effect on the relationship between a partnership and creditors relying on the assets of the partnership. However, to the extent that a creditor relies on the credit of a general partner who is married, many of the considerations that apply to a sole proprietor will apply to the general partner as well. *See supra* § 5.115.

In general, it appears that the partnership's underlying assets may not be reached to satisfy a judgment based on a family-purpose obligation. However, if the partnership interest is marital property of the spouses, a family-purpose judgment creditor may be able to levy execution on the partnership interest.

c. Corporations and Other Entities [§ 5.117]

The Marital Property Act should not directly affect the relationship between a corporation (or other entity, such as a trust, estate, or charitable foundation) and its creditors. The Act is relevant to credit granted to spouses, not to credit granted to separate legal entities. The marital status of a corporation's stockholders, officers, directors, or employees should be irrelevant to the creditors of the corporation. Regarding guarantees, however, see section 5.118, *infra*.

d. Guarantees [§ 5.118]

As noted in section 5.117, *supra*, marital status should be irrelevant to the creditors of a corporation. However, marital status becomes relevant when a creditor is obtaining the guarantee of a married person. The same types of considerations discussed in connection with credit extended to a sole proprietor apply. *See supra* § 5.115.

A married person's guarantee of a debt of a corporation or other entity may be within the family-purpose doctrine. The conclusive effect of a separate statement under section 766.55(1), signed by the guaranteeing spouse and stating that the obligation is being incurred in the interests of the marriage or the family, should remove the risk of a later finding of nonfamily purpose. If the guarantee is within the family-purpose doctrine, all marital property as well as the nonmarital property of the guarantor will be available to satisfy the obligation. *See supra* § 5.31. It appears that the creditor will not be justified in insisting on joinder or consent of the guarantor's spouse in connection with a loan to a business in which the spouse is an employee or an investor. *See supra* § 4.59, *infra* § 6.22.

2. Consumer Credit Generally [§ 5.119]

a. In General [§ 5.120]

The approaches of financial institutions to unsecured consumer credit under the Marital Property Act are discussed in June M. Weisberger and H. Arleen Wolek, *WMPA and Credit: An Empirical Study of Financial Institutions*, Wis. Law., May 1989, at 20. The authors of that article assert that, in determining creditworthiness under the Act, some financial institutions are unduly cautious in dealing with a spouse applying for unsecured credit, while other institutions do not obtain sufficient information relating to obligations of the nonapplicant spouse. Further, the authors conclude that the practices of many financial institutions are contrary both to the legislative purposes of the credit provisions of the Act and to the provisions of the ECOA (as interpreted by the FRB in Regulation B).

b. Applicability of Normal Considerations of Creditworthiness [§ 5.121]

The Marital Property Act has a profound effect on consumer credit involving married persons. This is particularly true of credit based on marital property, since both spouses can obligate marital property when family-purpose obligations are involved (in the sense of rendering such property available to the creditor for satisfaction of the obligation), and the income stream of the spouses arguably is fully available to each of them for the purpose of obtaining credit for family-purpose obligations. *See supra* §§ 5.12–.104.

c. Procedure for Credit Applicant [§ 5.122]

If spouses apply for joint credit when each of them will be personally obligated, the Marital Property Act has little impact. The situation is different, however, when only one spouse applies for credit (and the other spouse will not be guaranteeing the obligation). If the nonmarital property and income stream of the applicant spouse are insufficient to justify the credit requested, the applicant spouse will rely on marital property to establish sufficient income and assets to obtain the credit requested. When an obligation within the family-purpose doctrine is being incurred, the creditor must consider all marital property. Wis. Stat. § 766.56(1). Further, when secured credit is involved, the applicant spouse will rely on marital property, based on that spouse's rights of management and control of marital property.

Depending on the type of credit being requested, the applicant spouse may be asked to supply the credit grantor with the following information, by documentation, representation, or other verification:

1. Proof of the fact of the marriage relationship;

2. A copy of any marital property agreement (if the applicant spouse intends the creditor to be bound by its terms);

3. A copy of any divorce decree, court order, or other documents (such as a unilateral statement under section 766.59 classifying income from nonmarital property as individual property) that may affect the applicant spouse's management and control rights, the classification

of property, or the obligations of the spouses (if the applicant spouse intends that the creditor be bound by them);

4. Information regarding each spouse's assets and liabilities and classification of the spouses' property;

5. Information regarding each spouse's income stream; and

6. Other credit information appropriate to the credit requested.

d. Procedure for Credit Grantor [§ 5.123]

(1) Evaluation of Creditworthiness [§ 5.124]

The credit grantor's system of evaluating creditworthiness under the Marital Property Act is similar to the system used before the Act if (1) the spouses apply jointly, (2) one spouse alone applies for credit and has sufficient individual (or other nonmarital) assets and income to support the credit, or (3) the creditor consents in writing under section 766.55(4) to look only to the assets and income of the applicant spouse. However, when one spouse alone applies for credit and must rely on marital property to establish creditworthiness, the creditor is required to follow the attribution-of-creditworthiness requirements and the procedures of the Marital Property Act. *See, e.g.*, *supra* §§ 5.52–.55, .61–.96.

(2) Verification [§ 5.125]

The credit grantor is entitled to verify information submitted by a credit applicant and may request reasonable proof as long as it is done on a nondiscriminatory basis.

It is not clear what the credit grantor may demand to establish the marital property status of assets or the marital component of mixed property. It appears that the credit grantor may not safely rely merely on the presumption of the marital property classification under section 766.31(2), nor may the credit grantor safely rely on an affidavit of the applicant. Further, the creditor probably will not be able to obtain

information on classification of property through the normal credit-bureau reporting services.

When one spouse alone applies for credit and is relying on marital property to establish creditworthiness, it appears that the credit grantor may not insist directly on verification by the other spouse concerning information received relating to marital property, even if this requirement is applied in all cases. This follows because the other spouse has no personal relationship to the credit transaction. However, if the other spouse refuses to cooperate, the applicant spouse may have remedies available to him or her under section 766.70—for example, a claim for breach of the good-faith duty, or an order for an accounting or access, which may enable the applicant spouse to obtain necessary verification such as proof of earnings. *See infra* § 8.20. Further, it may be possible to rely on the expanded application of management and control rights in section 766.51(1m), when that section is applicable, in the spouse's attempt to obtain verification.

➢ ***Query.*** If the creditor is unable to obtain verification, may the credit grantor eliminate unverified assets from consideration in granting credit? If such assets are not eliminated, the credit grantor takes the risk that an asset not held by the applicant but represented as marital property may in fact be the other spouse's individual or predetermination date property. Thus, the credit grantor should be able to consider lack of verification in the evaluation process, or possibly eliminate unverified assets in the evaluation process, as long as it is done on a nondiscriminatory basis.

A credit grantor that comes within the reach of 18 U.S.C. § 1014 may choose to accept the assertions made by the applicant spouse on a credit application, relying on the deterrent against supplying false information provided by 18 U.S.C. § 1014. Under that section, it is a federal crime to knowingly make a false statement or report for purposes of influencing a wide range of federal agencies and financial institutions, including any institution whose accounts are insured by the FDIC. In addition, under section 943.39(3), anyone who, with intent to injure or defraud, "[m]akes a false written statement with knowledge that it is false and with intent that it shall ultimately appear to have been signed under oath" is guilty of a felony under Wisconsin criminal law. Therefore, a credit grantor (whether within 18 U.S.C. § 1014 or not) may choose to rely on the deterrents against providing false information by requiring that the loan application be signed under oath.

➢ ***Comment.*** A credit grantor may conclude that these deterrents are sufficient to prevent a credit-applicant spouse from providing inaccurate information concerning marital property. However, these deterrents may not be effective in many cases, particularly when the applicant spouse may reasonably believe that the information provided is accurate but in fact it is not.

(3) Either Spouse's Management and Control [§ 5.126]

Since the exercise of management and control rights by either spouse may affect the marital property available to repay a debt, the possibility that management and control rights may have been exercised by the nonapplicant spouse is a factor creditors may consider in evaluating creditworthiness. However, a creditor may not arbitrarily reduce the creditworthiness of an applicant on this basis, since objective information can be obtained to verify the status of the other spouse's liabilities as well as the other spouse's use of marital property to obtain credit. Once obtained, this information must be used on a nondiscriminatory basis. *See supra* § 5.82.

The Marital Property Act effectively creates a system under which all marital property is available to either spouse for purposes of obtaining family-purpose credit. Under the Act, the burden is placed on the credit grantor to establish the extent to which either spouse has effectively "consumed" the creditworthiness of both spouses. The result is that an applicant spouse can obtain credit only to the extent that the total marital credit is not already committed. The Act creates what may be characterized as a "first-come, first-served" system. This system may create practical problems for applicants and for creditors as well. For example, when one spouse has an open, unused line of credit or a margin account holding securities that are marital property, that spouse may have substantially "consumed" the creditworthiness of the spouses.

➢ ***Note.*** If the nonapplicant spouse has not acted in good faith with respect to use of the credit resources of both spouses, the applicant spouse has remedies available under the provisions relating to breach of the good-faith duty under section 766.15 or has a right to an accounting under section 766.70(2). *See infra* §§ 8.18, .20.

(4) Reliance on Family Purpose [§ 5.127]

If the credit extended was incurred for the benefit of the marriage or the family, the obligation may be satisfied from all marital property and all other property of the incurring spouse. Wis. Stat. § 766.55(2)(b). If not, then only nonmarital property of the incurring spouse and that spouse's interest in marital property can be reached, and in that order. Wis. Stat. § 766.55(2)(d).

Unless the creditor receives a written statement of family purpose under section 766.55(1), the creditor takes a risk that unsecured credit granted to the applicant was not incurred for the benefit of the marriage or the family. However, if the written statement of family purpose is obtained at or before the time the obligation is incurred, it is conclusive evidence of that fact for the creditor. Wis. Stat. § 766.55(1). In addition, even if the statement is not obtained, the strong presumption in favor of the family-purpose doctrine, the apparent safeguards to a credit grantor following the Act's credit-granting procedures, and the policy behind the bona fide purchaser rule may protect a creditor who relied in good faith on an applicant spouse's representation of family purpose. *See infra* § 6.12.

3. Consumer Credit: Merchandise and Credit Cards [§ 5.128]

The considerations, procedures, and conclusions outlined in sections 5.119–.127, *supra*, appear to apply similarly to consumer credit granted for purchases of merchandise and for consumer credit cards. However, the terms of underlying contracts relating to charge accounts, credit cards, and the like vary greatly. For example, the terms of a charge account may provide that a security interest is retained in the merchandise. This element may give the creditor some added protection and a greater likelihood of repayment by one spouse or the other. Some credit agreements also may provide that if the card is used by the nonapplicant spouse, that use constitutes an agreement to be personally liable for repayment (including, in some instances, for subsequent purchases) as if the application had originally been executed by the nonapplicant spouse. These provisions may give the creditors added protection and may serve to substantially reduce creditor concerns.

C. Effect of Act on Creation of Security Interest [§ 5.129]

1. In General [§ 5.130]

The considerations outlined in sections 5.113–.128, *supra*, in connection with commercial and consumer credit generally apply to secured credit as well. The reason is that, in nearly all cases involving secured credit, evaluation of creditworthiness is the primary consideration, and reliance on the security is secondary. This is because realization on the security is expensive, time consuming, and risky (because of depreciation or fluctuation in value of the collateral). Secured credit does, however, present some additional issues under the Marital Property Act, as discussed in sections 5.131–.135, *infra*.

2. A Spouse May Not Create a Security Interest in Marital Property Held by Nonapplicant Spouse [§ 5.131]

If marital property is held by a spouse, either alone or in the alternative, or is not held by either spouse, the Marital Property Act provides that the spouse may create a security interest in the property, *see* Wis. Stat. § 766.51(1)(am), (b); *see also* Wis. Stat. § 766.01(11) (defining management and control), and the creditor may safely rely on the security instrument executed by that spouse alone. However, as explained in section 5.25, *supra*, if the spouse seeking secured credit on the basis of marital property does not hold the property (either alone or in the alternative) or if the marital property involved is not in that spouse's possession and is not held by either spouse, that spouse does not have the power to grant a security interest in the property. *See* Wis. Stat. § 766.51(1m). Accordingly, that spouse may not create a security interest in the marital property, and the creditor may not safely rely on the security instrument executed by that spouse alone. An exception exists for purchase money security interests. *See* Wis. Stat. § 766.51(1)(am); *see also supra* § 5.25.

➢ ***Note.*** There may be mortgages and other security instruments that purport to grant a security interest in any property "owned" by the spouse who is purporting to grant the security interest. However,

as noted above, the power to grant a security interest in marital property is based on the rules of management and control, not on ownership. The grant of a security interest in all property "owned" by the borrower is ambiguous, at best, because the borrower may grant a security interest only on the basis of management and control rights. These considerations would be particularly applicable to predetermination date documents intended for revolving collateral. *See supra* § 4.64, *infra* § 6.36.

3. Marital Property Subject to Management and Control by Applicant Spouse [§ 5.132]

a. Marital Property Act and Uniform Commercial Code [§ 5.133]

The Marital Property Act, by its terms, grants an applicant spouse the legal power to pledge marital property or otherwise create a security interest in it if the property (1) is held in the applicant spouse's name alone, (2) is not held by either spouse (but is in the applicant spouse's possession), or (3) is held in the names of the spouses in the alternative (the "or") form. *See* Wis. Stat. § 766.51(1)(am), (b); *see also supra* § 5.42. With respect to property governed by Wisconsin's Uniform Commercial Code (UCC) (codified at chapters 401–409), the Marital Property Act controls over UCC provisions relating to the creation of a security interest.

The UCC previously explicitly required the signature of the debtor on a security agreement or financing statement. *See* Wis. Stat. §§ 409.203(1)(a), .402(1)(a) (1999–2000). The term *debtor* was defined to mean "the person who owes the payment or other performance of the obligation secured." Wis. Stat. § 409.105(1)(d) (1999–2000). However, when the debtor and the owner(s) of the collateral are different, the term *debtor* means the owner(s) of the collateral. Wis. Stat. § 409.102(1)(gs). Courts have construed these requirements to mean that the signatures of all owners are required on the relevant documents to create a security interest in the collateral. *See Motz v. Central Nat'l Bank*, 456 N.E.2d 958 (Ill. 1983) (joint interests); *Casco Bank & Trust Co. v. Cloutier*, 398 A.2d 1224 (Me. 1979) (spousal co-ownership of business).

Under the Marital Property Act, marital property is "owned" by both spouses. *See* Wis. Stat. § 766.31(3). However, for purposes of the UCC, a security agreement or financing statement signed by one spouse is deemed signed by the debtor if that spouse acting alone has the right under section 766.51 to manage and control the collateral, unless a marital property agreement or court decree that is binding on the secured party under the Marital Property Act (section 766.55(4m) or 766.56(2)(c)) provides otherwise. Wis. Stat. § 409.203(4)(b). Thus, if one spouse acting alone has the right to manage and control the property, the signature of the nonincurring spouse is not required under the UCC. *See also In re Biane (Biane v. United California Bank)*, 20 B.R. 659 (9th Cir. 1982) (concluding that community property rules take precedence over UCC requirements, with result that one spouse may create security interest in community property).

With respect to creating security interests in titled marital property assets when the method for obtaining a security interest in the assets is not governed by the UCC (such as for motor vehicles), the normal management and control rules apply, regardless of the underlying marital property ownership in the nontitled spouse.

b. Real Estate [§ 5.134]

In the context of a purchase money mortgage, either spouse acting alone may create the mortgage lien. *See* Wis. Stat. § 706.02(1)(f); *see also supra* § 5.25. As to existing marital real property, except for the requirement that both spouses execute conveyances of their homestead, *see* Wis. Stat. § 706.02(1)(f), if the property is held in a spouse's name alone, it may be mortgaged by that spouse. Either spouse may mortgage such nonhomestead marital real property if it is held in the alternative (the "or") form, although they must act together if the property is held in conjunctive (the "and") form. *See* Wis. Stat. § 766.51; *see also supra* §§ 5.16, .17. Accordingly, problems do not appear to exist with respect to the perfection of a mortgage lien based on a mortgage of nonhomestead marital property real estate given by the record title–holding spouse (alone, or in the alternative form if the marital property classification can be established).

The expanded application of management and control rights for credit purposes does not affect these conclusions regarding real estate, since the expanded application excludes the right to create a security interest

(unless the spouse otherwise may manage and control the property), other than a purchase money security interest. *See supra* § 5.25.

4. Nonmarital Property [§ 5.135]

A spouse may solely manage and control his or her property that is not marital property. Wis. Stat. § 766.51(1)(a). Accordingly, if the asset is held or titled solely in the applicant spouse's name, the creditor receiving a security interest need not be concerned about whether the asset constitutes marital property or nonmarital property, since in either event, the applicant spouse has full rights of management and control. *See* Wis. Stat. § 766.51(1)(a), (am). However, to the extent that real estate is involved and the real estate might be or become marital property, the secured creditor (mortgage lender) needs to consider judgments against the spouse of the applicant that may constitute a lien against the real estate under section 806.15(4). Judgments against the applicant's spouse that are docketed before the recording of the mortgage may need to be considered if the real estate may constitute marital property or mixed property with a marital property component. Section 806.15(5) provides a procedure for lifting a judgment lien that has attached to real estate of the nonobligated spouse (or former spouse) of the judgment debtor when the property is exempt from execution on the lien because the real estate is not available to satisfy the underlying obligation (pursuant to section 766.55). *See also* Wis. Stat. § 815.205 (regarding certain property of spouse exempt from execution).

Since such security interests granted are effective with respect to the real or personal property involved, any later actions of the nonapplicant spouse or his or her creditors will be subject to the security interest, except, with respect to real estate, the possible lien of a judgment against the spouse of the applicant under the circumstances described in section 806.15(4). *See infra* §§ 6.51–.58 (especially 6.58), .64.

XI. Predetermination Date Obligations [§ 5.136]

A. In General [§ 5.137]

With respect to creditor-debtor relationships existing before the determination date, the Wisconsin Marital Property Act by its terms does not alter the relationships between a married person (or a married couple)

and his or her (or their) creditors, if the property or obligation involved existed on the determination date. Wis. Stat. § 766.55(3). An obligation of a guarantor, surety, or indemnitor arising after the determination date under a contract executed before the determination date is classified as an obligation in existence on or before the determination date. *Id.*; *see supra* § 2.8 (determination date defined); *see also infra* §§ 6.23 (remedies of creditors with respect to predetermination date obligations), .30 (obligations not provided for under Act).

Although the creditor under a premarriage or a pre-Act obligation can reach some of the assets of the obligated spouse, Wis. Stat. § 766.55(2)(c), the Act may have a significant practical effect on the assets available to satisfy the obligation. This is because the income and marital property of the obligated spouse received or accumulated after the determination date are subject to any family-purpose obligations of the nonobligated spouse arising after the spouses' determination date. In other words, the base of assets on which the creditor originally relied may become eroded. *See infra* ch. 6.

➢ ***Note.*** Section 766.55(3) relates to predetermination date obligations in general—that is, to obligations in existence (1) before marriage, (2) before establishment of both spouses' domicile in Wisconsin (after the effective date of the Act), or (3) before the effective date of the Act (for spouses who are both domiciled in Wisconsin on the effective date of the Act). *See* Wis. Stat. § 766.01(5) (definition of determination date). However, the specific section dealing with creditors' recovery for such obligations—section 766.55(2)(c)1., 2.—relates only to obligations in existence before marriage or before the effective date of the Act. *See infra* § 5.138.

In contrast, there is no specific section dealing with recovery by a creditor of an obligation in existence before the establishment of the spouses' domicile in Wisconsin after the effective date of the Act. Arguably, such obligations should be treated no differently than obligations arising before marriage or before the effective date of the Act for spouses who are both domiciled in Wisconsin on the effective date of the Act. However, in the absence of a specific statutory section comparable to section 766.55(2)(c)1. and 2., a creditor's recovery for an obligation in existence before the establishment of the spouses' domicile in Wisconsin after the effective date of the Act is available without reference to categories of obligation under the Act. *See infra* § 6.30.

B. Obligations Existing Before Marriage or Before Act's Effective Date [§ 5.138]

With respect to a spouse's obligation attributable to an obligation that arose before marriage or before January l, 1986, for spouses whose determination date is the effective date of the Act, neither the creditor's interest nor the debtor's interest appears to be adversely affected in any significant way by the marriage or the Act. The Act attempts to leave the parties where they would have been absent the marriage or absent the Act. This is accomplished by providing that the obligation may be satisfied from nonmarital property of the obligated spouse and from that part of the marital property that would have been the property of that spouse but for the marriage or the enactment of the Act. *See* Wis. Stat. § 766.55(2)(c)1., 2.; *see also infra* § 6.23.

However, as noted in section 5.137, *supra*, the base of assets upon which the creditor has relied may become eroded by reason of the application of section 766.55(2) to obligations incurred after the determination date.